

THIS WEEK:

- Discovery; Witnesses
- Plea Offers; Knowing and Voluntary Pleas of Not Guilty
- Jury Charges; Deliberate Ignorance
- Ineffective Assistance of Counsel; PTSD
- Motions to Recuse Judge; Constitutional Right to Speedy Trial

Discovery; Witnesses

Hines v. State, S21A1079 (12/14/21)

Appellant was convicted of the malice murder of his girlfriend with whom he had been living. The record showed that one of the State's witnesses brought her niece, Johnson, to court on the first day of trial. The niece had relevant information concerning the disappearance of the victim from her home and overheard statements made by appellant to the victim.

Appellant contended that the State violated OCGA § 17-16-8 (a) by failing to disclose Johnson as a witness at least ten days before trial, and that the trial court abused its discretion when it failed to exclude her testimony pursuant to the remedial provisions contained in OCGA § 17-16-6. Specifically, appellant argued that Johnson was a "surprise witness" and that he received insufficient time to investigate her and prepare for her testimony. The Court disagreed.

First, the Court found no violation of OCGA § 17-16-8 (a) with respect to Johnson. The "witness list rule" set forth in the statute is designed to prevent a defendant from being surprised at trial by a witness that the defendant has not had an opportunity to interview. Moreover, the trial court may allow an exception to the rule where good cause is shown, and counsel is afforded an opportunity to interview the witness.

And here, the Court found, the trial court determined that the State established good cause for not disclosing Johnson at least ten days before trial. The prosecutor told the court that the State previously was not aware of Johnson's name or contact information and did not know that she had relevant information about the murder; the State only learned that Johnson was a potential witness when she came forward on the day of trial. Defense counsel did not dispute the prosecutor's explanation, which the trial court accepted, finding that Johnson was "newly discovered." Moreover, the transcript showed that the trial court complied with OCGA § 17-16-8 (a) by affording appellant "an opportunity to interview" Johnson before she was called to testify. Under these circumstances, the Court concluded that the trial court did not abuse its discretion in allowing an exception to the ten-day requirement under OCGA § 17-16-8 (a). And, because the requirements of OCGA § 17-16-8 (a) were satisfied with respect to Johnson, the Court stated that it did not need to decide whether the trial court also abused its discretion when it declined to exclude Johnson's testimony under OCGA § 17-16-6, which provides certain remedies when the State "has failed to comply with the requirements of this article."

Plea Offers; Knowing and Voluntary Pleas of Not Guilty

Myers v. State, S21A1119 (12/14/21)

Appellant was convicted of felony murder and other offenses. He contended that his decision to plead not guilty was not knowing and voluntary because, contrary to the State's representation before trial, he was not actually facing a potential mandatory life without parole sentence if he went to trial. The Court disagreed.

Appellant argued that, at the time of making the decision whether to go to trial or to accept the State's plea offer, he did not understand that, because he had only two prior felony convictions, not three as the State asserted, the recidivist statute, OCGA § 17-10-7, did not require the trial court to sentence him to life in prison without the possibility of parole if he were to be convicted of murder. He contended that the State's misrepresentation of the potential recidivist sentence "deprived him of a knowing and willful decision on the matter" of whether to accept the State's plea offer.

The Court noted that a defendant who enters a guilty plea simultaneously waives several constitutional rights, including the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers. For this waiver to be valid, it must be an intentional relinquishment or abandonment of a known right or privilege. Consequently, if a defendant's guilty plea is not equally voluntary and knowing, it has been obtained in violation of due process and is therefore void. Moreover, because a guilty plea is an admission of all the elements of a formal criminal charge, it cannot be truly voluntary unless the defendant possesses an understanding of the law in relation to the facts.

However, the Court stated, it is not aware of any authority that a trial court is required as a matter of course to ensure that a defendant's decision to exercise his right to a jury trial by pleading not guilty is knowing, intelligent, and voluntary under the same standard as applies to the acceptance of a guilty plea, and the Court noted, appellant cited no such authority. A defendant's not guilty plea, in contrast to a guilty plea, does not waive constitutionally protected rights; rather, it invokes the right to a jury trial and the right of confrontation. Accordingly, the Court concluded, appellant failed to show any error in the trial court's acceptance of his not guilty plea.

Jury Charges; Deliberate Ignorance

Grullon v. State, S21G0445 (12/14/21)

Appellant was convicted of trafficking heroin. The Court of Appeals affirmed his conviction, concluding that appellant did not show "reversible error because he affirmatively stated to the trial court that he had no objection after the jury was charged." *Grullon v. State*, 357 Ga. App. 695, 695 (2020). The Court granted certiorari to decide whether the Court of Appeals correctly held that appellant affirmatively waived his claim that the trial court gave an erroneous jury instruction on deliberate ignorance.

The record showed that during the charge conference, the State requested that the trial court give a jury instruction on deliberate ignorance, citing *Perez-Castillo v. State*, 257 Ga. App. 633, 635 (2002). Appellant objected, asserting that this charge should not be given in circumstances where the evidence "points to either actual knowledge or no knowledge on the part of the defendant," and the State had argued that appellant had a basis for actual knowledge in this case. The trial court overruled appellant's objection and gave the State's requested charge on deliberate ignorance. When the trial court

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completed the final instructions to the jury, the trial court asked the parties whether there were any exceptions, and trial counsel replied, "No, sir, Judge."

First, the Court agreed with the Court of Appeals that appellant failed to preserve his claim of error for regular appellate review. In accordance with OCGA § 17-8-58 (a), a party who objects to any of the charges given to the jury is obligated to raise that objection before the jury retires to deliberate. Here, appellant did not reiterate his objection to the deliberate ignorance charge after the trial court gave the final instructions to the jury in accordance with OCGA § 17-8-58 (a); additionally, the ground for his objection at trial was different than the ground he asserted on appeal. However, the alleged error is still reviewed for plain error on appeal. In other words, when an error in the jury instruction is enumerated and argued on appeal, the appellate court is required to conduct a plain error analysis.

For purposes of undertaking the plain error analysis, the Court noted that it established the following test for determining whether there is plain error in jury instructions under OCGA § 17-8-58 (b): First, there must be an error or defect — some sort of deviation from a legal rule — that has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings. Fourth and finally, if the above three prongs are satisfied, the appellate court has the discretion to remedy the error — discretion which ought to be exercised only if the error seriously affects the fairness, integrity, or public reputation of judicial proceedings.

The Court of Appeals concluded that the first requirement was not met: Appellant had "waived any claim that the charge was improper" by "affirmatively stating that he had no objection to the charge" after it was given to the jury. *Grullon*, 357 Ga. App. at 700 (2). Appellant contended and the State conceded that the Court of Appeals erred in making this ruling. The Court agreed.

The Court found that appellant objected to the deliberate ignorance charge at two points during trial before the trial court charged the jury. And, while he did not object again after the final instructions were given, that did not show that appellant intentionally relinquished his known rights with regard to the deliberate ignorance instruction. Generally, counsel's silence at a juncture when a request for — or objection to — a jury instruction might have been made will be considered merely a forfeiture for which plain error review remains available. While appellant's counsel did not remain silent, there was also no specific waiver of any objections to the deliberate ignorance instruction.

Moreover, the Court found no tactical reason for appellant's trial counsel not to object to the deliberate ignorance charge after it was given in the final instructions to the jury, particularly because he had previously objected to the instruction during trial and been informed by the trial court that the charge would be given. Additionally, appellant never affirmatively stated that he had no objection to the specific deliberate ignorance charge he now challenged, and in fact, he raised an objection to that charge earlier at trial.

Thus, the Court concluded, because appellant's claim of error was not affirmatively waived and survives the first step of plain error review, the Court of Appeals must now consider the other parts of the plain error analysis and particularly, whether the error that the State conceded probably affected the outcome of the proceedings. Accordingly, the Court

reversed the portion of the judgment of the Court of Appeals concluding that there was affirmative waiver and remanded the case for the court to consider the other elements of plain error review.

Ineffective Assistance of Counsel; PTSD

Bates v. State, S21A1188 (12/14/21)

Appellant was convicted of malice murder in connection with the shooting death of his neighbor and the neighbor's dog. Appellant was angered by the neighbor walking his dog on appellant's lawn.

Appellant contended that his trial counsel rendered constitutionally ineffective assistance by relying on appellant's PTSD diagnosis to argue defenses that are prohibited by law, i.e., to negate intent for malice murder, to mitigate intent for voluntary manslaughter, and to support self-defense. Citing *Benham v. State*, 277 Ga. 516 (2004), appellant argued that trial counsel was constitutionally deficient when counsel argued a theory that is not recognized as a lawful defense. However, the Court found, contrary to appellant's argument, *Benham* is not a case where trial counsel failed to adequately research and understand the defenses available to the client. Here, trial counsel explicitly acknowledged in the pre-trial stipulation that evidence of PTSD was inadmissible to negate intent; but argued that evidence of PTSD was admissible to explain appellant's conduct. The State agreed this was a permissible purpose. At the motion for new trial hearing, one of appellant's trial attorneys acknowledged introducing "as much [mental health evidence] as we could get in not calling it PTSD . . . hoping to seek from the jury some — some — not nullification, but reduction of punishment." And the Court stated, it could not say that trial counsel's strategy was objectively unreasonable given that trial counsel sought and received jury instructions on voluntary manslaughter and self-defense. Further, it cannot be said that no competent attorneys in trial counsel's position would not have employed the same strategy in this case. Thus, the Court concluded, appellant failed to show deficient performance under *Strickland*, and therefore, this ineffective assistance claim failed.

Next, appellant argued that his trial counsel rendered constitutionally ineffective assistance by failing to file a pre-trial notice under Uniform Superior Court Rule 31.5, which he contended prevented him from introducing evidence of mental illness. The Court disagreed.

Rule 31.5 requires written, pre-trial notice to the State where an accused intends to "raise the issue that [he] was insane, mentally ill, or intellectually disabled at the time of the act or acts charged against the accused." Appellant contended that a Rule 31.5 notice should have been filed in this case to "facilitate the presentation of needed evidence of appellant's mental illness at the time of the shooting."

However, the Court found, there is no dispute that appellant actually presented extensive evidence of his mental illness (i.e., PTSD) and treatment. In addition, at the motion for new trial hearing, another one of appellant's trial attorneys testified that he did not file a Rule 31.5 notice because there was no evidence of insanity. In fact, three psychologists found appellant was not insane at the time of the shooting.

Furthermore, the Court found that appellant's citation of *McKelvin v. State*, 305 Ga. 39, 41 (2) (a) (2019), for the argument that a Rule 31.5 notice is required under circumstances such as his is unavailing. In *McKelvin*, the Court

specifically held that the defense of involuntary intoxication is a subset of an insanity defense and thus encompassed by Rule 31.5. By contrast, appellant cited no authority for the proposition that PTSD is a subset of insanity.

Therefore, the Court concluded, trial counsel's decision to forgo a Rule 31.5 notice was not objectively unreasonable. And, the fact that appellate counsel would have pursued a different strategy does not render trial counsel's strategy unreasonable. Accordingly, the Court held, appellant failed to show deficient performance under *Strickland*, and therefore, this ineffective assistance claim also failed.

Motions to Recuse Judge; Constitutional Right to Speedy Trial

Hall v. State, A21A0840 (10/25/21)

Appellant was convicted of burglary. Briefly stated, the evidence showed that appellant dropped off his co-defendant at the vacant house appellant selected to be burglarized. His codefendant was caught in the act and rolled on appellant.

Appellant argued that the trial court judge should have recused himself because he previously represented appellant regarding burglary and criminal trespass charges from 2001. The Court disagreed.

The Court stated that when considering the issue of recusal, both OCGA § 15-1-8 and the Code of Judicial Conduct should be applied. The Code of Judicial Conduct provides a broader rule of disqualification than does OCGA § 15-1-8. The Court found that although none of the provisions of OCGA § 15-1-8 apply to the facts of this case, under Rule 2.11 (a) of the Code of Judicial Conduct, "[j]udges shall disqualify themselves in any proceeding in which their impartiality might reasonably be questioned[.]" The alleged bias of the judge must be of such a nature and intensity to prevent the defendant from obtaining a trial uninfluenced by the court's prejudgment. A judge's prior representation of a witness or a party in an unrelated matter does not automatically require disqualification. And here, the Court found that appellant did not point to any actions by the trial judge showing bias or impartiality. Thus, the trial judge's prior representation of appellant, without more, did not require recusal.

Appellant also argued that the court erred in denying his constitutional speedy trial claim. The Court stated that a constitutional speedy trial claim is evaluated under a two-part framework. First, the trial court must consider whether the length of time between the defendant's arrest and trial is sufficiently long to be considered presumptively prejudicial. If not, the speedy trial claim fails at the threshold. A delay of one year or more is typically presumed to be prejudicial.

If the presumptive-prejudice threshold is crossed, as it was in this case, the trial court proceeds to the second part of the framework, applying a context-focused, four-factor balancing test to determine whether the defendant was denied the right to a speedy trial. These four factors are (1) the length of the delay; (2) the reasons for it; (3) the defendant's assertion of his right to a speedy trial; and (4) prejudice to the defendant.

Here, the Court found, the record showed that appellant was indicted in August 2014 and tried in August 2018. The trial court found that this delay was presumptively prejudicial, and proceeded to analyze appellant's speedy trial claim under the four-factor balancing test. In considering the second factor, the reason for the delay, the trial court found that appellant made repeated demands for new counsel, and that this delayed his trial. The court noted that appellant had been

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represented by no less than five lawyers. Additionally, the State announced that it was ready for trial as early as 2016, but that appellant had requested a continuance so that he could obtain new counsel. With respect to the third factor, the court found that appellant had made both pro se and counseled demands for a speedy trial, and thus this factor weighed in his favor. Finally, in considering the fourth factor, the court found that appellant failed to show oppressive pretrial incarceration, since he admitted at trial that he was incarcerated for a parole violation, and that he failed to proffer witnesses or evidence that he would have presented at trial but for the delay. In balancing these four factors, the trial court found that appellant's speedy trial rights were not violated.

The Court noted that appellant primarily took issue with the trial court's analysis of the fourth factor. He contended that the delay prejudiced him in preserving an "alibi defense" in the form of a video recording that would have shown him picking up a woman from a jail at the time the burglary occurred. However, the Court found, appellant did not present an alibi defense at trial — he instead admitted to dropping off his co-defendant and driving back to the burglarized house, and it was undisputed at trial that appellant was not at the house when the police caught the co-defendant burglarizing the house. Accordingly, the Court concluded, even if such a video recording existed and was lost by the delay, it would not have bolstered appellant's defense. Therefore, the trial court did not abuse its discretion in denying his constitutional speedy trial claim.