Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING FEBRUARY 25, 2022
Issue 8-22

THIS WEEK:

- Possession of a Firearm by Convicted Felon; Sentencing
- Motions to Sever; Ineffective Assistance of Counsel
- Right to be Present; Ineffective Assistance of Counsel
- Armed Robbery; Consciousness of Taking

Possession of a Firearm by Convicted Felon; Sentencing

Langley v. State, S21G0783 (2/1/22)

Langley pled guilty to one count of possession of a firearm by a convicted felon in violation of OCGA § 16-11-131 (b). The trial court sentenced him to a term of imprisonment with the first six months to be served in confinement and the remainder to be served on probation. The State appealed. Relying on *State v. Jones*, 265 Ga. App. 493, 495 (2) (2004), the Court of Appeals acknowledged "the trial court's general discretion under OCGA § 17-10-1 (a) (1) (A) to impose a probated sentence" but concluded that the specific and mandatory phrase "shall be imprisoned" in OCGA § 16-11-131 (b) prevailed over the general grant of authority to "probate all or any part" of a determinate sentence contained in OCGA § 17-10-1 (a) (1) (A). See *State v. Langley*, 358 Ga. App. 343, 345 (2021). The Court of Appeals vacated Langley's sentence and remanded the case to the trial court for resentencing. See *Id.*, at 345. The Court then granted Langley's petition for certiorari.

Langley contended that the Court of Appeals erred in construing the phrase "shall be imprisoned" in OCGA § 16-11-131 (b) to deprive the trial court of discretion to impose a probated sentence pursuant to OCGA § 17-10-1 (a) (1) (A). The Court agreed.

The Court stated that the question is how a statute containing the phrase "shall be imprisoned" interacts with OCGA § 17-10-1 (a) (1) (A), which says that upon conviction, the trial court shall impose a "determinate sentence for a specific number of months or years" that is within the sentencing range "prescribed by law as the punishment for the crime" but then adds that "[t]he judge imposing the sentence is granted power and authority to suspend or probate all or any part of the entire sentence." In looking at Georgia's penal statutes in general, the Court found that virtually all penal statutes in Georgia introduce the sentencing range for a violation with one of two phrases: either "shall be imprisoned," or, more commonly, "shall be punished by imprisonment." Despite the slight difference in wording, both phrases mean the same thing. In ordinary English, "imprisonment" means "the state of being imprisoned" or "confinement." Webster's Third New International Dictionary 1137 (1966). And a person who is "imprisoned" for violating a penal statute is undoubtedly being punished.

The State argued that if the penal statute uses the phrase "shall be imprisoned," probation is never allowed, because the sentence must be served in confinement. But, the Court stated, the problem with the State's argument is that it would

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essentially nullify the availability of probation in Georgia, making the part of OCGA § 17-10-1 (a) (1) (A) that authorizes trial courts to probate sentences a virtual dead letter. Instead, the Court concluded, both phrases - "shall be imprisoned" and "shall be punished by imprisonment" - function as terms of art in Georgia sentencing law, and both serve to introduce the sentencing range of time in prison that a penal statute prescribes as punishment for a violation. Pursuant to OCGA § 17-10-1 (a) (1) (A), upon conviction, the trial court must impose a sentence for a specific number of years, months, or days in prison within that sentencing range, and the judge imposing the sentence is then authorized to probate all or any part of the sentence, unless such probation is expressly forbidden. In effect, probation is superimposed on the system of prison sentences prescribed in individual criminal statutes.

In so holding, the Court found that the trial court in *Jones* lacked authority to probate *any* part of Jones' sentence, but not because OCGA § 16-13-30 (d) introduced the sentencing range for a second or subsequent conviction with the phrase "shall be imprisoned." Instead, it was the final sentence of OCGA § 16-13-30 (d), which provides that "[t]he provisions of subsection (a) of Code Section 17-10-7 shall not apply to a sentence imposed for a second such offense; provided, however, that the remaining provisions of Code Section 17-10-7 shall apply for any subsequent offense." Thus, while OCGA § 17-10-7 (a) generally preserves the authority of trial courts under OCGA § 17-10-1 (a) (1) (A) to probate all or any part of a sentence for a second or subsequent felony conviction, OCGA § 16-13-30 (d) provided otherwise for Jones' second conviction for possession of cocaine with intent to distribute by specifying that "[t]he provisions of subsection (a) of Code Section 17-10-7 shall not apply to a sentence imposed for a second such offense." Therefore, the Court held, to the extent that Division 2 of *Jones* can be read as holding that the introduction of a sentencing range with the phrase "shall be imprisoned," standing alone, deprives trial courts of discretion to impose a probated sentence under OCGA § 17-10-1 (a) (1) (A), it is disapproved.

Motions to Sever; Ineffective Assistance of Counsel

Terrell v. State, S21A0942 (2/1/22)

Appellant was convicted of felony murder, aggravated assault, and other crimes related to the shooting death of Matthews. The evidence, very briefly stated, showed that appellant lived in an apartment with his "aunt" and co-defendant Stinchcomb. Stinchcomb got into an argument at the apartment and hit a woman. Later, a group of people who lived in a house just down the street, came to the apartment to confront Stinchcomb about the incident. He retreated inside the apartment and the group followed him inside and beat on Stinchcomb. Shortly thereafter, when the group was back at their house, appellant and his three co-defendants, drove up and appellant started shooting at the house. The car with appellant then left and returned to the apartment. Matthews, who was in the house at the time, walked down the street to talk with appellant and she brought her boyfriend, Stallings, with her. Neither was armed. As they approached the apartment, appellant began shooting and fatally shot Matthews. Appellant and his co-defendants Parks, Gilliam, and Stinchcomb then fled the scene.

Prior to trial, appellant filed a motion to sever, which he renewed just before opening statements at trial. The trial court denied both motions. Appellant argued that the trial court abused its discretion. Specifically, he argued that his co-defendants' defenses were antagonistic to his assertion that he shot in self-defense because his co-defendants' strategy was to assert that he "went crazy," so there was no reason for them to know ahead of time that the shooting might occur.

However, the Court stated, antagonistic defenses are insufficient to require severance in a non-death penalty case absent a showing of prejudice. Although the co-defendants claimed that appellant "went crazy" and that they had no notice that he would start shooting, the evidence was strong that appellant went to the house with the intent of retaliating against those who had "trashed" the apartment. Parks testified that appellant told the co-defendants that he was going to shoot Stallings before going to the house and that there was a rifle in the passenger seat of the car where appellant was sitting on the way to the house. Upon approaching the house, Stinchcomb pointed out people while appellant shot at them. Moreover, the failure to sever did not impede appellant from presenting his claim of self-defense. Consequently, the Court concluded, because appellant did not show that the result of the trial would have been different if he had been tried separately, the trial court did not abuse its discretion in denying the motions to sever.

Appellant next contended that his trial counsel was ineffective for failing to again renew his motion to sever after his co-defendants' opening statements and sometime during trial. The record showed that at the motion for new trial hearing, trial counsel testified that he may have agreed to file the initial motion to sever at appellant's request because he generally likes to have co-defendants to blame at trial. He explained that after filing an unsuccessful motion to sever, he would usually renew the motion only if something occurred during trial that merited a mistrial: "[S]omething really dramatic has to happen for me to go back and renew [a] severance motion. … It has to be tantamount to a mistrial. I'm not going to keep asking for severances." In denying appellant's motion for new trial on this ground, the trial court concluded that counsel was not deficient for failing to renew the motion to sever mid-trial, "as that was a course of action a reasonable attorney was entitled to choose."

The Court stated that generally, the failure to file a motion to sever does not require a finding of ineffective assistance since the decision whether to seek severance is a matter of trial tactics or strategy, and a decision amounting to reasonable trial strategy does not constitute deficient performance. Furthermore, the Court found, appellant cited to nothing that occurred during trial that would have supported a third motion to sever on grounds not already denied. Moreover, the trial court did not abuse its discretion in denying the first two motions to sever and would have acted entirely within its discretion to deny a third motion to sever during trial on the same grounds. Accordingly, the Court held, the trial court did not err in denying appellant's claim of ineffective assistance of counsel.

Right to be Present; Ineffective Assistance of Counsel

Brennan v. State, S21A1183 (2/1/22)

In 2010, appellant was convicted of felony murder and other offenses in connection with the scalding death of her 8-year-old stepdaughter. Prior to trial, the State and appellant reached a tentative plea agreement whereby the State would withdraw its notice of intention to seek the death penalty and appellant would plead guilty to voluntary manslaughter for a total sentence of 20 years with fewer than 20 years to serve in prison. Counsel for the parties then approached the trial court pursuant to USCR 33.5 (B) to see if it would accept the tentative plea agreement. The following persons were present in the room for the USCR 33.5 conference: the trial judge, the district attorney, and appellant's lead and second-chair counsel. Appellant was not present. Appellant contended that the trial court erred by conducting a pre-trial conference under USCR 33.5 (B) outside her presence in violation of her federal and state constitutional rights. The Court disagreed.

The Court noted that whether a conference under USCR 33.5 qualifies as a critical stage of a criminal proceeding is a matter of first impression. The Court determined that disclosure of a tentative plea agreement at a conference under USCR 33.5 is not a critical stage for the following reasons: (1) a defendant's rights cannot be lost because a defendant has no right to enter a guilty plea; (2) a defendant's defenses or privileges cannot be waived because there is no impact on a defendant's opportunity to defend against the charges; and (3) the outcome of the case cannot be substantially affected in some other way because (a) a defendant still retains the option to formally tender a guilty plea, and (b) a defendant can still proceed to trial and raise any and all permissible defenses and privileges during trial. Therefore, the Court concluded, a disclosure of a tentative plea agreement by counsel for the parties under USCR 33.5 is a not a critical stage for which a defendant has the right to be present under the United States Constitution or the Georgia Constitution.

Next, appellant contended that her second-chair counsel rendered constitutionally ineffective assistance by being mentally and physically incapable of assisting in her trial. The record showed that at trial, appellant was represented by three attorneys. Nestor was the second chair and conducted the direct examination of the defense engineering expert, although lead counsel conducted the re-direct examination of him. At the motion for new trial hearing, appellant's other two attorneys and the defense investigator testified that Nester would fall asleep during trial. Lead counsel also testified that they "were having issues with [Nester] prior to trial with just some cognitive issues that were difficult to define at the time," and "[t]here were complaints that started originating prior to trial." Ultimately, Nester was fired from the Capital Defender's Office sometime after appellant's trial. Nester's wife testified at the motion for new trial hearing that Nester's cognitive decline began "around 2011, maybe somewhere around there."

The Court found that assuming without deciding that Nester's performance was deficient, appellant did not demonstrate that she was prejudiced by Nestor's performance. Appellant argued that "but for [Nester's] impairment and his disjointed examination of a key witness, there was a reasonable probability that the outcome of her trial would have been different." However, the Court found, appellant failed to point to any specific testimony that Nester failed to elicit from the defense engineering expert or to any problematic testimony that Nester elicited from him. Mere speculation on appellant's part is insufficient to establish *Strickland* prejudice. And, to the extent Nester's direct examination of the defense engineering expert was "disjointed," this was remedied by appellant's lead counsel conducting a re-direct examination of the defense engineering expert. Thus, her ineffective assistance claim failed.

Armed Robbery; Consciousness of Taking

Stokes v. State, A21A1658 (1/6/22)

Appellant was convicted of armed robbery, aggravated assault, false imprisonment, and possession of a firearm during the commission of a felony. The evidence showed that appellant was staying in a hotel room with the victim, with whom she was romantically involved. While the victim was sleeping in the room, the sound of the door opening woke him up. The victim saw appellant's sister, Armauni, and a man who was later identified as Williams. Armauni and Williams pulled out handguns, hit the victim in the forehead with one of the weapons, and pointed another at his face. Around that time, the victim observed that appellant was dressed and standing in the bathroom and that she was grabbing some items and placing them in a bag. The victim fled the room and ran unclothed to the front desk to seek help. Seconds after the victim ran from the room, Williams, Armauni, and appellant ran after him, with either appellant or her sister carrying a bag and a

bundle of clothing. Williams, Armauni and appellant ran from the stairwell and into the parking lot, and they all left in the same vehicle.

Appellant contended that the evidence was insufficient to support her conviction for armed robbery. Specifically, she argued that the victim was not conscious that the property was being taken from him. The Court disagreed.

The Court noted that appellant relied on *Grant v. State*, 226 Ga. App. 506 (1997), which involves the offense of *robbery by sudden snatching*. But, the Court stated, that offense is committed when the victim becomes conscious that something is being taken from him and for some reason is unable to prevent it. Here, however, appellant was charged with armed robbery, and she identified no precedent which mandates that a victim of armed robbery must be conscious of the theft at the time of the taking, and, the Court stated, its research uncovered none. Therefore, the Court declined to hold that a victim's "consciousness of the taking" is an essential element of armed robbery. Accordingly, the victim need not have been conscious of the taking for the jury to have found that his property was stolen from his immediate presence, and the trial court properly denied appellant's motion for directed verdict on the armed robbery charge.