Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING MARCH 4, 2022
Issue 9-22

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First Offenders; Motions for Discharge

Giles v. State, A21A1352 (1/7/22)

In 2007, appellant entered a negotiated guilty plea to one count of statutory rape for having sex with a thirteen-year-old girl while he was seventeen. He was sentenced to ten years of probation under the First Offender Act. In 2012, the trial court revoked his probation for failing to register as a sex offender and ordered him to serve 150-180 days in a probation detention center. In 2013, he again failed to register and after a hearing, the trial court revoked the balance of his sentence. In both sentences, however, the trial court did not enter an adjudication of guilty on appellant's statutory rape offense.

In November 2020, appellant filed a "Motion to Terminate First Offender Probation," stating that he was still being required to report to probation despite the termination of his sentence in January 2019. At a hearing on the motion, the State agreed that, given the passage of time, the sentence had been served in full, and the court posed the question whether appellant was entitled to discharge following his first-offender sentence with no adjudication of guilt. The trial court found that appellant was not entitled to discharge because his first offender probation was revoked twice, and he was charged with other crimes (twice failing to register as a sex offender) during his first offender probationary period.

Appellant contended that he was entitled to discharge under the First Offender Act because his probation period for the offense had expired, and he had not been adjudicated guilty of the first-offender statutory rape offense. The Court agreed.

In reviewing the language of OCGA § 42-8-62 (a) (2007), the Court found that there are three conditions under which a defendant "shall" be discharged, any one of which is sufficient: fulfillment of the terms of probation, release prior to the probation period, or release from confinement. In this context, the word "shall" is "a word of command," and discharge is essentially an automatic result by operation of the statute. And here, it was undisputed that appellant's 10-year term of probation for the 2007 statutory rape offense had expired by 2020 (when he moved for a discharge), so he was no longer subject to probation or confinement based on the sentence for that offense. It was also undisputed that the record contained no adjudication of guilt as to the statutory rape offense. Accordingly, pretermitting whether appellant successfully "fulfilled … the terms of probation," he had been (or should have been) released from confinement for the statutory rape offense, and he had not been adjudicated guilty of that offense; thus, he "shall be discharged" as to that offense

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Therefore, the Court concluded, the trial court revoked appellant's probation, as it was authorized to do under OCGA § 42-8-38 based on the probation violation. But the record showed that the trial court did not enter (nor did the State seek) an adjudication of guilt as to the underlying first-offender statutory rape offense. OCGA § 42-8-60 (b) (2007) states that an adjudication of guilt *can* result from a violation, but it does not *automatically* result by operation of law. Absent an order making an adjudication of guilt as to the first-offender statutory rape offense, appellant was never adjudicated guilty of that offense at the time that the probation/confinement period ended for that offense. In effect, his sentence was over, and he had not been adjudicated guilty for the first offender offense. Under this scenario, appellant was subject to discharge automatically under OCGA § 42-8-62 (a) (2007).

Void Sentences; Motions to Withdraw Guilty Pleas

Baker v. State, A21A1442 (1/12/22)

In 2015, appellant pled guilty to two counts of armed robbery. He was sentenced on the first count of robbery to 30 years with 15 years to serve and 15 years on probation, and on the second count, 15 years to serve concurrently with the first count. Thereafter, appellant filed a pro se "Motion to Correct Void and Illegal 30 Year Sentence." The trial court agreed that appellant's sentence was not within statutory limits, and on January 13, 2021, the court resentenced appellant on the first count of armed robbery to 20 years to serve 15 years with the remaining 5 years on probation, and on the second count, 15 years to serve concurrently with the first count. At the resentencing hearing, appellant appeared pro se via video from prison.

Within the same term of court, appellant then filed a motion to withdraw his guilty plea. The trial court denied the motion, concluding that the motion to withdraw was untimely because "[t]he plea had been accepted over five and a half years prior."

Appellant contended and the State conceded that the trial court erred in denying the motion to withdraw appellant's guilty plea. The Court stated that it is well settled that a motion to withdraw a guilty plea must be filed within the same term of court as the sentence entered on the guilty plea. Here, appellant's initial sentence was declared void, and he was resentenced on January 13, 2021. Thus, appellant's motion to withdraw his guilty plea was made within the same term of court as the January 13 sentence. The trial court therefore had jurisdiction to consider appellant's motion to withdraw his plea, and it erred in concluding otherwise.

Appellant next argued, and the State again conceded that his new sentence is void because he was deprived of his Sixth Amendment right to counsel at resentencing. The Court stated that the well-established rule is that a defendant has a right to appointed counsel at any critical stage of proceedings brought against him and that sentencing, or resentencing, is such a critical stage at which a defendant is generally entitled to be present at the sentencing hearing and to be represented by counsel. Further, in instances where a defendant's entire sentencing package has been vacated and, at resentencing, the trial court has full discretion to reconstruct the sentence and impose a more lenient punishment, the defendant retains a right to appointed counsel. On the other hand, where the defendant's sentence is mandatory or fixed in such a way that, at resentencing, the trial court is without discretion, the resulting resentencing proceeding is purely ministerial, and it is unnecessary for the defendant to be present at the sentencing hearing or be represented by counsel.

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Here, the Court found, the trial court had full discretion to reconstruct the sentence and impose a more lenient punishment. Thus, appellant had the right to counsel. As counsel was not present for his resentencing and there was no apparent waiver of his right to counsel, the Court vacated appellant's sentence and remanded the case for resentencing. However, the Court added, before resentencing, the trial court must address appellant's motion to withdraw his plea.

Harmless Error; Procedural Default

Betterson v. State, A21A1406 (1/12/22)

Appellant was convicted of kidnapping with bodily injury, hijacking a motor vehicle, aggravated battery, and three counts of possession of a firearm by a convicted felon during the commission of a crime. The evidence showed that the victim was appellant's girlfriend. Appellant contended that the trial court erred in admitting evidence of ammunition found when the police searched his parents' residence. Inside a closet in the house, officers found a 9-millimeter handgun that the victim identified as the weapon appellant had with him on the date of the incident. They also recovered "a random [7.62-millimeter] round, which is a round … most commonly see[n] in larger [AK-47] rifles, mostly used by police and the military … [o]r gun enthusiasts." The trial court admitted this 7.62-millimeter round into evidence over appellant's objection.

The Court found that although the State offered evidence that the lone 7.62-millimeter round was found at the home of appellant's parents, it made no effort to link that ammunition to appellant or the incident at issue here. On the contrary, the evidence showed that appellant possessed a 9-millimeter handgun during the crimes for which he was indicted and that the "random [7.62-millimeter] round" fit a larger type of rifle. Moreover, appellant did not live in the house where the ammunition was found. However, the Court found, given the lack of evidence connecting appellant to this ammunition, as well as the victim's testimony identifying appellant as her attacker and describing the handgun in his possession, it was highly unlikely that admission of the 7.62- millimeter round influenced the jury's verdict. Accordingly, the Court concluded, the admission was harmless error.

Appellant next contended that the Court should remand the case to the trial court for a hearing on his ineffective assistance of counsel claim. The record showed that new counsel represented appellant during the motion for new trial proceedings, and the new attorney raised an ineffective assistance of counsel claim through an amendment to appellant's motion for new trial. Prior to the new trial hearing, however, the attorney withdrew the amended motion and the ineffective assistance claim. Counsel explained at the new trial hearing that she had investigated appellant's ineffective assistance allegations and determined that the claim was not viable. She noted that appellant disagreed with her decision and wanted to pursue the claim, and the trial court allowed him to describe his allegations, which related to specific evidence that he asserted trial counsel should have presented at trial. The trial court informed appellant that his attorney had withdrawn the ineffective assistance claim and that he could probably raise the issue "down the road." It then denied the motion for new trial without addressing ineffective assistance.

Appellant argued through new appellate counsel that trial counsel and his motion-for-new-trial counsel provided ineffective assistance by (1) not presenting certain evidence at trial, and (2) failing to raise the ineffective assistance claim in his motion for new trial. But, the Court stated, it is axiomatic that a claim of ineffectiveness of trial counsel must be asserted at the

earliest practicable moment. Although appellant had the opportunity to challenge the effectiveness of trial counsel at the new trial stage, he failed to do so. His claim with respect to trial counsel, therefore, was waived.

Moreover, the Court stated, any claim that the attorney who represented appellant at the motion for new trial performed deficiently by not raising an ineffective assistance claim is also procedurally barred. A defendant is not allowed to resuscitate a specific claim of ineffective assistance of trial counsel that was not raised at the motion for new trial stage by recasting the claim on appeal as one of ineffective assistance of motion-for-new-trial counsel for failing to raise the specific claim of trial counsel's ineffectiveness. The Court concluded that if appellant wishes to pursue a claim that his motion-for-new-trial counsel was ineffective in this regard, he must do so through a petition for a writ of habeas corpus.

CAD Reports; Merger

Kamusoko v. State, A21A1597 (1/14/22)

Appellant was convicted of hijacking a motor vehicle, armed robbery, attempted armed robbery, and obstruction of an officer. The evidence showed that appellant used a weapon in an attempted robbery of Ellison and shortly thereafter, hijacked the vehicle of Myke. Appellant contended that the trial court erred in admitting three police dispatch reports (known as CAD reports). Specifically, he argued, the CAD reports included "who said what to who[m], and … [what] was said to the 911 operators," and the State failed to establish that the CAD reports were admissible under any exception to the hearsay rule. The Court disagreed.

Here, the Court found, the CAD reports detailed facts provided to dispatch personnel by the witnesses, victims, and officers attempting to apprehend the suspect responsible for several offenses in the same vicinity around the same time. The statements made during the 911 calls or by officers reporting to dispatch personnel — and detailed in the CAD reports — were related to a startling event or condition — the offenses committed by the assailant — and the statements were made moments after, or in close proximity to the time of the offenses — indicating a sufficient assurance that the statements were trustworthy. Thus, the Court concluded, given that the statements in the CAD reports were admissible as excited utterances, appellant failed to show that the trial court erred in admitting the reports over his hearsay objection.

Nevertheless, appellant argued, the CAD reports should not have been admitted into evidence because they were not relevant. The Court noted that the trial court found that the reports were relevant to show the timeline of how long it took to locate the suspect insofar as it rebutted defense counsel's opening statement regarding the amount of time that passed between the robbery and appellant being spotted. And the Court found, although appellant argued that the CAD reports were not admissible to explain the officers' conduct, the reports in this case were relevant in demonstrating the circumstances of the offenses — specifically, the existence, nature, and location of appellant's crime spree, his flight from officers, and his eventual apprehension. Accordingly, the Court held, the trial court did not abuse its discretion in finding the CAD reports relevant and allowing them to be introduced into evidence.

Appellant contended that his conviction for armed robbery against Myke (Count 2) should have been vacated because it was the identical crime to his conviction for hijacking a motor vehicle against Myke (Count 1). Specifically, he argued that "this is not a merger situation - this is the same legal situation as occurs when a criminal defendant is convicted of both

malice murder and felony murder: since a person cannot be punished twice for the same crime, the felony murder conviction is vacated as a matter of law."

The record showed that Count 1 of appellant's indictment charged him with the offense of hijacking a motor vehicle in violation of OCGA § 16-5-44.1 in that he "did unlawfully obtain a Kia Sorento, a motor vehicle, from the person and presence of Antonio Myke by intimidation while in possession of a handgun, a firearm[.]" Count 2 charged him with armed robbery in violation of OCGA § 16-8-41 in that he, "with the intent to commit a theft, did unlawfully take a Kia Sorento, a motor vehicle, property of Antonio Myke, from the person and immediate presence of Antonio Myke, by the use of a handgun, an offensive weapon[.]" Appellant argued that these two counts, while nominally specifying separate offenses, alleged the exact same crime — the same taking of the same vehicle by use of the same firearm — and he should not have been convicted of both offenses because the armed robbery charge merely prohibits a designated kind of conduct generally, while the hijacking charge prohibits a specific instance of such conduct.

The Court noted that it is true that under OCGA § 16-1-7 (a) (2), an accused may not be convicted of more than one crime if "[t]he crimes differ only in that one is defined to prohibit a designated kind of conduct generally and the other to prohibit a specific instance of such conduct." However, the Court found, in *Mathis v. State*, 273 Ga. 508, 509-510 (1) (2001), the Supreme Court of Georgia specifically concluded that the prior version of OCGA § 16-5-44.1 (d) (1994) — which expressly provided that "[t]he offense of hijacking a motor vehicle shall be considered a separate offense and shall not merge with any other offense" — mandated that a defendant could be sentenced both for armed robbery and for hijacking a motor vehicle based on the same conduct. According to the Court in *Mathis*, the proscription of merging hijacking a motor vehicle with other criminal statutes does not violate constitutional or statutory double jeopardy provisions. *Id.* at 509 (1). Therefore, the Court held, the trial court did not err in refusing to vacate appellant's conviction for armed robbery and sentencing him for both armed robbery and hijacking a motor vehicle.

Jury Charges; Differing Standards of Appellate Review

Miles v. State, A21A1378 (1/18/22)

Appellant was convicted of cruelty to children in the first degree and battery (family violence) for striking his girlfriend and two-year-old daughter during a domestic dispute. He contended that the trial court committed plain error by failing to charge the jury on the lesser-included offenses of cruelty to children in the second degree and reckless conduct as lesser-included offenses of cruelty to children in the first degree. The Court disagreed.

The Court first noted that appellant did not request charges on these two lesser included offenses in his written requests and did not object to the trial court's failure to give the charges. Thus, the Court stated, while appellant contended that a plain error applies to the analysis of whether a *trial court errs in failing to sua sponte give a charge on a lesser included offense*, the law is less clear. Indeed, there appeared to be three parallel lines of authority that have been established in this area. First, there is *State v. Stonaker*, 236 Ga. 1, 2 (2) (1976), which holds that a trial judge never errs in failing to instruct the jury on a lesser included offense where there is no written request to so charge. Second, there is another line of cases — developed before the enactment of OCGA § 17-8-58 in 2007 — our appellate courts apply a standard originating with Code Ann. § 70-207, the predecessor statute to OCGA § 5-5-24 (c) ("[n]otwithstanding any other provision of this Code section, the appellate courts shall consider and review erroneous charges where there has been a substantial error in the

charge which was harmful as a matter of law, regardless of whether objection was made hereunder or not"). And in the third line of cases — and following the enactment of OCGA § 17-8-58 — numerous cases have analyzed the issue under the plain error standard of review. Thus, the Court stated, Georgia has cases after the enactment of OCGA § 17-8-58 and following *State v. Kelly*, 290 Ga. 29 (2011) analyzing the issue in each of the three ways.

But, the Court determined, pretermitting the confusion created by these parallel lines of cases, the rules governing judicial precedent mandate that it analyze the issue under the plain error standard of review of *Kelly* rather than the simplified no error approach of *Stonaker*. Nevertheless, the Court stated, this does not mean that it cannot look to *Stonaker* to determine whether there was a clear or obvious error that substantially affected the outcome of the proceedings.

And, the Court concluded, since a trial court never errs in failing to instruct the jury on a lesser-included offense where there is no written request to so charge, there was no reversible error. Also, where there was no reversible error, it follows that there could be no plain error either (since plain error does not exist in the absence of reversible error). Further, the Court held, to the extent an analysis under OCGA § 5-5-24 (c) is also required, the jury was provided proper guidelines for determining guilt or innocence and that no harm occurred as a matter of law as a result of the trial court's failure to charge on the lesser-included offenses of cruelty to children in the second degree and reckless conduct.

Admissions through Agent; Attorney-Client Privileged Communications

Parrish v. State, A21A1315 (1/18/22)

Appellant was convicted of voluntary manslaughter (as a lesser-included offense for one count of murder) aggravated assault, possession of a firearm during the commission of a felony, possession of a firearm by a convicted felon, and other offenses. The evidence showed that appellant left the scene after the crimes occurred but less than a week later, turned himself into the police. Around the same time that appellant turned himself in to police, his trial counsel provided law enforcement with a statement recounting appellant's version of the shooting, which he claimed was in self-defense. At trial, the prosecutor used this statement to impeach appellant's testimony.

Appellant contended that the trial court erred in admitting the prepared statement for impeachment purposes. Specifically, he argued that the statement was not his but rather, was drafted by his trial counsel without his input and thus, was essentially inadmissible hearsay. The Court disagreed.

The Court noted that OCGA § 24-8-801 (d) (2) (C) and (D), provides as follows: "Admissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is … [a] statement by a person authorized by the party to make a statement concerning the subject [or] [a] statement by the party's agent or employee, but not including any agent of the state in a criminal proceeding, concerning a matter within the scope of the agency or employment, made during the existence of the relationship[.]" The Court found that federal case law has held that the federal counterpart to this statute (Federal Rule of Evidence 801 (d) (2) (D)) allows statements by an attorney to be admissible against a defendant in criminal cases in certain situations. Additionally, OCGA § 24-6-621 provides that "[a] witness may be impeached by disproving the facts testified to by the witness." And a trial court may admit evidence relevant to the issue of impeachment even if "the evidence would not qualify for admission on other grounds." Furthermore, the State has a right to a thorough and sifting cross-examination of appellant's direct testimony.

Therefore, the Court held, the statements were not inadmissible hearsay. But, the Court concluded, even if the trial court erred in admitting trial counsel's statement about the shooting, any alleged error in this regard was harmless because the evidence against appellant was overwhelming.

Next, appellant contended that his trial counsel rendered ineffective assistance by drafting the statement regarding the shooting without his input. Specifically, he argued that in doing so, his counsel violated the attorney-client privilege and then helped to undermine his credibility when the State was able to use the statement for impeachment purposes on cross-examination. The Court again disagreed.

It is well established that the attorney-client privilege protects communications between the client and the attorney that are intended to be confidential; the protection does not extend to communications which are not of a confidential nature. In fact, it does not extend to client communications to an attorney for the purpose of being conveyed by the attorney to a third party. Here, the Court found, during the hearing on appellant's motion for new trial, his trial counsel testified that while appellant never signed or read the statement, he provided counsel with the information necessary to draft it, was aware that counsel intended to inform the police that appellant acted in self-defense, and explicitly agreed with that course of action. Thus, the evidence showed that the statement was intended to be conveyed to third parties and therefore, was not privileged. As a result, the trial court did not err in denying appellant's claim of ineffective assistance in this regard.

As to appellant's claim that his attorney performed deficiently by offering the police this statement, the Court noted that appellant's counsel testified that he drafted the statement and provided it to the police for the tactical purpose of informing them that this was an incident of self-defense and possibly getting the charges dropped without his client having to testify. In fact, trial counsel further testified that he had successfully employed this same tactic in previous self-defense cases and that appellant gave him permission to do so in this case. This kind of strategic decision generally cannot and will not serve as the basis for an ineffective assistance claim. And, the Court further found, counsel's reasoned explanation for his strategy was not so unsound that no reasonable lawyer would have pursued it. Thus, trial counsel's decision to provide the statement to the police did not constitute deficient performance. Furthermore, the evidence supporting appellant's convictions was overwhelming and therefore, appellant failed to show that his trial counsel's actions prejudiced him. Accordingly, the Court concluded, the trial court did not err in denying appellant's ineffective assistance claim in this regard either.