Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JUNE 10, 2022
Issue 23-22

THIS WEEK:

- Opening Statements; *Bruton*
- *Miranda*; Ineffective Assistance of Counsel
- Fingerprinting; OCGA § 40-5-20
- Sufficiency of the Evidence; Conspiracies
- Out-of-state Witnesses; Certification of Materiality

Opening Statements; *Bruton*

Wilson v. State, A22A0348 (4/14/22)

Appellant and a co-defendant were convicted of armed robbery, aggravated assault, and possession of a firearm during the commission of a crime. During opening statements of the joint trial, the co-defendant's counsel made comments that cast appellant in a guilty light. He began by saying, "Ladies and gentlemen, welcome to the trial of [Appellant] and, and? Well, that's the question." Later, he said, "[My client's] wallet and ID were the only evidence of him around the scene here. They were left there because he happened to leave them before [Appellant] and — committed this crime." Appellant's counsel did not object to these remarks.

Citing *Bruton v. United States*, 391 U. S. 123, 126 (88 SCt 1620, 20 LEd2d 476) (1968, appellant contended that his trial counsel rendered constitutionally ineffective assistance by failing to object to those comments. The Court disagreed.

First, the Court stated, it is not clear that comments made during an opening statement are even subject to a *Bruton* challenge. But even assuming that a *Bruton* challenge would have been appropriate, it would have failed. The Court found that there was no question that counsel's comments here implicated appellant, but comments by counsel don't raise *Bruton* issues just because they implicate the defendant. Instead, the Confrontation Clause problem with such comments arises only if they introduce a statement of a non-testifying co-defendant that standing alone directly inculpates the defendant. And here, counsel for the co-defendant said only that the co-defendant's belongings were at the scene of the crime "because he happened to leave them before [Appellant] and — committed this crime." Because counsel neither introduced nor even alluded to any out-of-court testimonial statement, any objection to the co-defendant's counsel's comments was likely to be meritless. At the very least, the Court stated, it could not say that no reasonable lawyer would have failed to object, so appellant failed to establish that his counsel's performance was deficient for this reason.

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Miranda; Ineffective Assistance of Counsel

Herring v. State, A22A0273 (4/20/22)

Appellant was convicted of sexual exploitation of a child for possessing a digital image file of the uncovered genitals of his pre-pubescent daughter. He contended that he invoked his right to remain silent during his custodial interrogation when he told police, "Now, look, I'm done." The Court disagreed.

The Court noted that under *Miranda*, people in custody have a right to cut off questioning. But to invoke that right, the person in custody must clearly and unambiguously state that he or she wants to end a custodial interrogation. Without that clear statement, a police officer is under no obligation to clarify or to stop questioning. Here, the Court found, appellant did not clearly ask the police to stop questioning him. After appellant said "[n]ow, look, I'm done," the officer asked him to clarify, and appellant explained, "I want this done. I want us to get through this. I want to find out who the F is doing this." Thus, the Court agreed with the trial court that far from suggesting that he wanted to end the interrogation right then, these statements indicated to the officers that he wanted to continue the interrogation. Therefore, the trial court did not err in finding that appellant did not unambiguously invoke his right to remain silent.

Appellant next argued that his trial counsel's case load of "between 230 and 250 felony cases" rendered her unable to render effective assistance. The Court again disagreed. Citing *Whatley v. Terry*, 284 Ga. 555, 561-62 (III) (2008), and *Wood v. State*, 304 Ga. App. 52, 54-55 (3) (c) (2010), the Court found that appellant offered no evidence that his counsel's case load affected the amount of time she actually devoted to his case. Therefore, his claim of ineffective assistance on this ground failed.

Finally, appellant contended that his prosecuting attorney was subject to a conflict of interest because appellant's first trial counsel left the public defender's office and joined the district attorney's office. But, the Court noted, appellant offered no evidence that his former counsel personally participated in his prosecution; instead, he appeared to argue that the entire district attorney's office should have been "disqualif[ied]." However, the Court stated, it could find no authority that supports this position. A defendant has the burden of showing an actual conflict. The mere fact that appellant's former counsel worked for the district attorney's office in some capacity is not enough to show an actual conflict.

Fingerprinting; OCGA § 40-5-20

Herrera v. State, A22A0184 (4/20/22)

Appellant was issued a traffic citation for driving without a valid Georgia license in violation of OCGA § 40-5-20. Before trial, the trial court entered an order requiring him to report to the sheriff's office for fingerprinting or face possible arrest. Appellant appealed the order under the collateral order doctrine.

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The Court noted that in its order, the trial court did not indicate the legal authority, statutory or otherwise, for requiring appellant to give his fingerprints before his conviction. Appellant contended that the order is unconstitutional and that it contravened the text of OCGA § 40-5-121 (a), which provides in relevant part that a person convicted of the misdemeanor offense of driving without a license as required by OCGA § 40-5-20 "shall be fingerprinted" and that "[s]uch fingerprints, *taken upon conviction*, shall be forwarded to the Georgia Crime Information Center … for the purpose of tracking any future violations by the same offender." (Emphasis added). The Court agreed that OCGA § 40-5-21 (a) does not provide a legal basis for a court to require a defendant to give his fingerprints before conviction.

Nevertheless, the State argued, the trial court was authorized to impose the pre-conviction fingerprint order under OCGA §§ 17-4-23 (a) (1) and 35-3-33 (a) (1) (A). The Court noted that OCGA § 17-4-23 (a) (1) provides in relevant part that "[a] law enforcement officer may arrest a person accused of violating any law or ordinance … governing the operation, licensing, registration, maintenance, or inspection of motor vehicles … by the issuance of a citation. …" OCGA § 35-3-33 (a) (1) (A) requires the Georgia Crime Information Center ("the GCIC") to "[o]btain and file fingerprints … on persons who … [h]ave been or are hereafter arrested or taken into custody in this state [in certain specified circumstances]." However, the Court found, neither statute speaks to the trial court's authority to obtain an accused's fingerprints under these circumstances prior to conviction.

Finally, the Court stated that because of the unique procedural posture of the case and the lack of tolling of the time to file a notice of appeal, appellant did not raise any specific objection to the collection of his fingerprints in the trial court, and the trial court did not have the opportunity to rule on those objections. Accordingly, the Court vacated the trial court's order and remanded for the trial court to consider his objections in the first instance.

Sufficiency of the Evidence; Conspiracies

Penciel v. State, A22A0221 (4/21/22)

Appellant was convicted of kidnapping, hijacking a motor vehicle, aggravated assault with a deadly weapon, aggravated assault, false imprisonment, terroristic threats, and possession of a firearm during the commission of a felony. Briefly stated, the evidence showed that a group of men grabbed the victim as she was leaving a store. They hit her in the head with guns, forced her into an SUV, blindfolded her and drove off with her in the back seat. They then photographed her and sent the photo to the victim's sons with a demand for money.

Late that night, after midnight, appellant took his girlfriend's Dodge Magnum without her permission and drove the car to meet up with the group. Appellant turned the Magnum over to another member of the group. Appellant then got into the driver's seat of a Dodge Durango. The group placed the victim in the back seat of the Durango, and three other members of the group joined appellant in the vehicle. The victim's sons planned to meet the kidnappers at a gas station to purportedly pay the ransom, at which time the police would instead attempt to rescue the victim. Appellant drove the

Durango to the gas station with the victim in the back seat. When appellant saw the police, he pulled out of the gas station, engaged in a short high-speed chase, and crashed the vehicle approximately a mile down the road. Appellant and another defendant were arrested as they tried to flee. The other members of the group were subsequently arrested. The police took the victim to the hospital, where she received treatment for her injuries.

Appellant argued that the evidence was insufficient to support his convictions. Specifically, he contended that the hijacking, kidnapping, and assault were already "completed" before he joined the group that night. He also argued that the evidence showed that he was unaware of his co-defendants' goals or misdeeds. The Court disagreed.

The Court stated that when persons associate themselves in an unlawful enterprise, any act done by any party to the conspiracy to further the unlawful enterprise is the act of all the conspirators. One who joins a conspiracy takes it as he finds it and is responsible for acts previously done in carrying out such conspiracy. While mere presence at a crime scene is alone insufficient to convict one of being a party to a crime, one's presence, companionship, and conduct before, during, and after the commission of the crime are factors, even if only circumstantial, that the jury may consider in determining whether the defendant participated in a conspiracy to commit the crime.

Here, the Court found, there was sufficient evidence for the jury to find that appellant was a party to the conspiracy to kidnap and ransom the victim. Appellant gave the car he was driving to a co-conspirator, drove the vehicle that had the victim blindfolded in the back seat, and led the police on a high-speed chase. While there was countervailing testimony from a testifying codefendant that suggested appellant was unaware of the ransom plot, in considering a sufficiency claim, the Court noted that it does not re-weigh testimony, determine witness credibility, or address assertions of conflicting evidence. Thus, even though appellant might not have been present during the initial abduction, he became responsible for those acts because he joined the conspiracy, and the offenses were a natural consequence of the ransom plot. Accordingly, there was sufficient evidence to convict appellant of the offenses charged in the indictment.

Out-of-state Witnesses; Certification of Materiality

Bowman v. State, A22A0008 (4/22/22)

Appellant was convicted of family violence aggravated battery, two counts of family violence aggravated assault, and false imprisonment. The incidents that led to the charges against appellant began when the victim and appellant attended a party at the residence of their friend Krystal Chroma. Chroma apparently moved to Pennsylvania after the incident involving appellant and the victim at her residence. The record showed that three days before jury selection was scheduled to occur, appellant filed a motion for certification of materiality of out-of-state witness, requesting that the trial court certify to the proper Pennsylvania court that Chroma was a material witness in his case. Appellant asserted that Chroma was a material witness because she was present outside of her residence when he allegedly struck the victim and dragged her to his car, and it was expected that Chroma would testify that he did not strike the victim and that she left with him

willingly. In support of the motion, appellant submitted notes from Hicks, an intern with the Public Defender's office, regarding a telephone conversation with Chroma. The trial court denied the motion.

Appellant contended that the trial court erred in denying his motion for certification of materiality of Chroma. The Court noted that under the Uniform Act to Secure the Attendance of Witnesses from Without the State (the "Uniform Act"), OCGA § 24-13-90 et seq., a party desiring to secure the attendance of an out-of-state witness in a prosecution or grand jury investigation pending in a Georgia court may request that the court issue a certificate of materiality regarding that witness. The Georgia court presented with such a request is charged with deciding whether the sought-after witness is a "material witness." A "material witness" is defined as a witness who can testify about matters having some logical connection with the consequential facts, especially if few others, if any, know about these matters. Any certificate issued by the Georgia court is presented to a judge of a court of record in the out-of-state county in which the witness is found, and that court shall issue a summons directing the witness to attend and testify in the Georgia criminal proceeding if it determines that the witness is material and necessary to the proceeding, that compelling the witness to attend the proceeding and testify would not cause an undue hardship to the witness, and that Georgia will give the witness protection from arrest and the service of civil or criminal process.

In considering a motion for certification of materiality of an out-of-state witness, a trial court is not prohibited from considering hearsay evidence but should give hearsay evidence such weight as the court's judgment and experience counsel. The trial court retains the prerogative as the fact-finder to determine the weight and credibility of the evidence submitted, and in making this determination, the court may consider the fact that evidence was presented in the form of hearsay rather than testimony subject to cross-examination or evidence bearing other indications of trustworthiness.

And here, the Court found, appellant failed to show that the trial court abused its discretion in denying his motion. The only evidence appellant submitted in support of his motion consisted of the notes from Hicks, which simply summarized the contents of a conversation between Chroma and appellant's former counsel, and the court was permitted to assign little or no weight to this hearsay evidence. Furthermore, the police report apparently indicated that Chroma was inside of her residence when appellant attacked the victim outside, and the victim's trial testimony confirmed this fact. The court was also permitted to consider the fact that, while the information regarding Chroma was contained in the police report and therefore known to appellant, appellant filed his motion just three days before jury selection was set to occur. Accordingly, the Court concluded, there was no error.