

THIS WEEK:

- Jury Charges; Closing Arguments
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Jury Charges; Closing Arguments

Rayton v. State, S22A0441 (6/22/22)

Appellant was convicted of murdering Ladson. The evidence, very briefly stated, showed that in early May 2016, Ladson believed appellant's son, Adams, stole money from a house from which Ladson sold drugs. Ladson threatened appellant's family, including Wendy, appellant's wife. On May 19, Ladson beat up appellant. On May 20, around 1:00 a.m. appellant, Adams and Winfield were travelling on Elwood Road to a location in which appellant intended to buy cocaine from Smith, Ladson's cousin. They stopped their car behind a vehicle believed to be Smith's. Appellant got out with a jar of marijuana he was intending to trade for cocaine. Appellant went to the driver's side window, but it was not Smith in the car, it was Ladson. Appellant shot Ladson.

Appellant contended that the trial court erred in refusing to give his requested charge on voluntary manslaughter. Appellant argued that his trial testimony supported not only a self-defense theory but, alternatively, the theory that Ladson's threatening words just before the shooting, combined with his previous violent conduct that appellant had witnessed, and Ladson's terror campaign against appellant and appellant's family, amounted to a serious provocation that caused appellant to react passionately. To that end, appellant pointed to his testimony that Ladson had previously stolen his car, shot at his home, pointed a gun at him, threatened to kill him, threatened to kill his close family members, physically assaulted him the previous day, and, when he unexpectedly encountered Ladson in the middle of the night, continued to threaten to kill him and his family. However, the Court found, appellant never testified that he was angry or inflamed by Ladson's conduct just before the shooting — only that he was scared and was defending himself (as well as his family). And there was no other evidence that the shooting was the result of a sudden, violent, and irresistible passion. Thus, the Court held, appellant failed to point to even slight evidence that he reacted passionately to Ladson's conduct rather than simply attempting to defend himself. Consequently, the trial court did not err in refusing to give a jury charge on voluntary manslaughter.

Appellant next contended that his trial counsel rendered ineffective assistance by failing to object when the prosecutor stated during closing arguments that the jurors could “only think about this case in two ways. . . . Either . . . [appellant] was going down there to buy drugs, or he went down there knowing that he [was] going to murder . . . Ladson. . . . [Either] way you think about it, it's still murder. And this is why — and this is the law: a person is not justified in using self-defense if that person is attempting to commit [or] is committing . . . a felony. The purchase and sale of cocaine is a violation of

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Georgia's Controlled Substances Act, and that is a felony here. . . . You don't get to go commit felonies or attempt to commit felonies and then claim self-defense. . . . So if you believe that . . . [appellant] went down there to buy drugs, this analysis is over because you do not get self-defense.”

The Court noted that the first view of the evidence suggested by the prosecutor, that appellant traveled to Atlanta for the purpose of killing Ladson, was a reasonable inference based on the evidence, including evidence that appellant had recently said that he was going to have to kill Ladson because he was in fear for his family and his livelihood due to the threats Ladson had been making and evidence that, armed with Wendy's gun, he went to an area on Elmwood Road where Ladson was regularly known to be found selling drugs.

The alternative view suggested by the prosecutor, that Georgia law precluded appellant from claiming self-defense because he traveled to Atlanta for the purpose of buying cocaine, was a fair paraphrase of applicable law that the trial court charged the jury and was supported by appellant's own testimony and by other evidence at trial. The purchase of cocaine is a felony and under applicable law, a defendant may not claim self-defense when his use of force admittedly occurs during the attempted commission of a felony. Thus, the Court stated, the prosecutor had every right to refer to applicable law in argument; it is law that the court will *not* charge the jury that counsel is prohibited from presenting.

Furthermore, the Court stated, it was unpersuaded by appellant's argument that the evidence established that he was not attempting to buy cocaine when he shot Ladson. Appellant argues that "[a]ttempt requires a subjective belief that a crime is factually possible," citing to OCGA § 16-4-4, which provides that it is no defense to a charge of a criminal attempt that the crime was impossible under the attendant circumstances if the crime would have been possible under circumstances "as the accused believed them to be." Based on this reading of OCGA § 16-4-4, appellant contended that "any 'attempt' to purchase crack-cocaine ended as a matter of law . . . when [he] saw Ladson [in the car]," instead of Smith, because he then "became subjectively aware that he could not purchase crack-cocaine in the manner he intended[,]" that is, from Smith. However, the Court stated, the jury was not required to believe appellant's testimony that he did not attempt to buy drugs from Ladson. The evidence, including appellant's own testimony, showed that he went to Elmwood Road to buy cocaine and that he approached Ladson's car with money in his pocket and with a jar of marijuana that he intended to exchange for cocaine. Both Winfield and Adams testified that it looked like appellant was commencing a drug deal with Ladson before appellant shot him. Therefore, the Court found, appellant failed to show that his attempt to purchase cocaine before he shot Ladson fell within the statutory definition of impossibility.

Accordingly, the Court concluded, the evidence warranted the court's charge that a person is not justified in using force if the person is attempting to commit a felony and that attempting to purchase cocaine is a felony under Georgia law; the prosecutor's argument referred to applicable law that the court did include in its jury charge; and an objection to the argument on the ground that the prosecutor was mischaracterizing the law would have been meritless. Thus, counsel's failure to make such an objection was neither professionally deficient nor prejudicial.

Voir Dire; *McCollum*

Byrd v. State, S22A0254 (6/22/22)

Appellant was convicted of malice murder and other offenses. During jury selection, appellant exercised seven of his eight peremptory strikes against white jurors, including strikes against Jurors 3, 5, 19, and 24. The State objected to his use of peremptory strikes under *Georgia v. McCollum*, 505 U. S. 42 (112 SCt 2348, 120 LE2d 33) (1992). The trial court found that the State made a prima facie case of racial discrimination. Appellant's counsel responded that he would "give [the trial court] ... race neutral reasons" for exercising his peremptory strikes. Counsel asserted that Juror 5 had been a robbery victim and had previously served as a juror in a criminal burglary case. Counsel asserted that Juror 19 was "a lawyer at King and Spalding which is a large law firm" that "potentially tends to go right of center," and contended that Juror 19 would thus "lean conservative." When the trial court responded that Juror 19 was "a director of recruiting, which is different," counsel responded: "Big law firm." Finally, counsel explained that Juror 24 was a dentist and a small business owner, and contended that "being self-employed, a dentist, tends to be more conservative, tends to lean more toward the state." Appellant's counsel then concluded, "those are my race neutral reasons."

The State then gave its reasons why these strikes were in fact based on discriminatory intent. After a discussion with both counsel, the court stated that "out of your seven strikes, I've got four that I don't accept your race neutral reasons for" and "three that I do accept your race neutral reason for." Specifically, the court rejected the race-neutral reasons appellant's counsel offered for striking Jurors 3, 5, 19, and 24 and re-seated them as part of the jury.

Appellant argued that the trial court erred because it did not perform a correct step-two analysis under *McCollum* and never performed a step-three analysis before concluding that Jurors 5, 19, and 24 were improperly stricken and reseating them. Specifically, appellant contended that "the trial judge both remained in, and misunderstood," step two of *McCollum*, and that the court never moved to step three—implicitly or otherwise—because it evaluated counsel's race-neutral reasons using considerations (such as case-relatedness, legitimacy, clarity, and specificity) that appellant characterized as "quintessential" step-two factors. The Court disagreed.

The Court noted that in *McCollum*, the test announced in *Batson v. Kentucky*, 476 U. S. 79 (106 SCt 1712, 90 LE2d 69) (1986), forbidding purposeful racial discrimination in the State's use of peremptory strikes, was extended to peremptory juror challenges made by criminal defendants. When the State raises a *McCollum* objection, the trial court must engage in a three-step process to determine if the defendant's peremptory challenges were used in a racially discriminatory manner. First, the State is required to make a prima facie showing of racial discrimination. Second, the burden of production shifts to the proponent of the strike to give a race-neutral reason for the strike. At step two, the proponent of the strike need only articulate a facially race-neutral reason for the strike. Step two does not demand an explanation that is persuasive, or even plausible. Nor does step two require the race-neutral explanation to be case-related or specific. Third, the trial court decides whether the opponent of the strike has proven discriminatory intent. At step three, the trial court must decide whether the opponent of the strike has proven the proponent's discriminatory intent in light of all the circumstances that bear upon the issue of racial animosity. Those circumstances may include an evaluation of the credibility of the strike's proponent, which in turn may depend on the specificity and case-relatedness of the explanation for the strike given at step two. Although the burden of production shifts to the defendant if the State makes a prima facie case, the ultimate burden of persuasion as to discriminatory intent rests with—and never shifts from—the State.

And here, the Court found, the trial court followed this three-step process. The trial court specifically pointed out (much like the State did earlier in voir dire) that appellant's counsel did not question the prospective jurors, which can support an inference of purposeful discrimination. Additionally, the trial court expressed its belief that appellant's counsel did not provide a reason for the peremptory strikes "related to the case," which is a factor that courts may consider as part of step three. Finally, the trial court expressly stated that it was "analyzing" the race-neutral reasons appellant offered and that it "[c]ould not imagine that [appellant] had any other basis for them based upon review of my notes and all and then what you stated as your reasons." The court concluded: "I find that four of [the strikes] I don't find them to be race neutral." Moreover, the Court noted, although the trial court, after listening to the prosecutor's responses to appellant's race-neutral reasons, stated at one point that it did not find appellant's counsel's explanations to be "race neutral"—a term typically associated with step two—that statement could not be read in isolation and was not dispositive of whether the trial court properly conducted the *McCollum* analysis.

Therefore, the Court concluded, based on appellant's arguments and the circumstances of the case, and viewing the record as a whole, the record showed that the trial court allowed appellant's counsel to offer race-neutral reasons for each of his peremptory strikes; afforded the prosecutor the opportunity to respond to counsel's race-neutral reasons for making the challenged strikes; engaged with the parties and analyzed their arguments; rejected appellant's asserted race-neutral reasons for striking Jurors 5, 19, and 24; and reseated those jurors. Accordingly, the Court further concluded that step two was conducted, and that the trial court implicitly moved to step three and satisfied *McCollum*'s three-pronged test.

Motions to Sever; Fourth Amendment Waivers

Gainey v. State, A22A0226 (6/1/22)

Appellant was convicted of five counts of sexual battery against a child under 16 (OCGA § 16-6-22.1 (d)) and three counts of child molestation. The record showed that appellant was indicted for a total of 13 different crimes, consisting of both child molestation and sexual battery against a child under 16, against three different victims. The incidents were alleged to have occurred between July 4 and 10, 2010, between June 4 and October 18, 2012, and on September 26, 2012. Appellant contended that he received ineffective assistance of trial counsel due to counsel's failure to move to sever his charges because there were three separate victims. The Court disagreed.

The Court noted that under Georgia law, when two or more crimes of the same general nature are committed against different persons, at different times and places, and are charged in separate counts of an indictment, severance is mandatory upon the defendant's motion if the crimes are joined solely because they are of the same or similar character. If the offenses are not joined solely because they are of the same or similar character, and evidence of one charged offense would be admissible as a similar transaction during trial on another charged offense, the trial court is vested with discretion in deciding whether to grant a motion to sever.

Here, the Court found, appellant faced multiple charges of child molestation and sexual battery against three different victims. Although the crimes involved different victims, each crime occurred against similarly-aged victims while appellant was a houseguest in the victims' residences. He approached each victim as they slept and abused them by touching their breasts as he touched his penis. Each of the victims testified, and the evidence was not so complex and the charges not so

numerous as to cause confusion. Accordingly, the Court found, trying appellant's crimes together did not reasonably impinge upon a fair determination of appellant's guilt or innocence as to each offense charged. As a result, severance of the charges was not required. However, the Court noted, even had the charges been severed, evidence of one crime would have been admissible as a prior act in the trial of the others. Consequently, appellant's proposed motion to sever would have been unsuccessful, and trial counsel will not be found ineffective for failing to file a futile motion. Therefore, appellant failed to demonstrate ineffective assistance of counsel.

Next, appellant argued that the trial court impermissibly imposed a Fourth Amendment waiver as a condition of the probation portion of his sentence. However, the Court held, because appellant failed to raise any argument in the trial court concerning the imposition of the Fourth Amendment waiver as a condition of probation, the argument was waived.

Nevertheless, the Court stated, it could still review appellant's claim if his sentence is void. A sentence is void if the court imposes punishment that the law does not allow, and the illegality of such sentences may not be waived. Furthermore, a sentencing court retains jurisdiction to correct a void sentence at any time.

The Court stated a trial court's imposition of a Fourth Amendment waiver as a condition of probation, without first securing a defendant's consent, is erroneous, but is not "unlawful per se" and that the condition need not be modified. As a result, here, no warrantless search has taken place in assertion of appellant's Fourth Amendment waiver, and the Court will not presume that any search that may take place in the future under the authority of a probation officer will be unreasonable, even if it is warrantless.

Accordingly, the trial court's imposition of a Fourth Amendment waiver did not render appellant's sentence void.

Search & Seizure; Sufficiency of Affidavit Supporting the Search Warrant

Medina-Hernandez v. State, A22A0102 (6/1/22)

Appellant was charged with VGCSA. The trial court denied his motion to suppress but granted a certificate of immediate review. The Court then granted appellant's petition for an interlocutory appeal.

Very briefly stated, an affidavit supporting a search warrant alleged that an undercover officer met with an unknown male who was a passenger in a 2011 Yukon Denali. The vehicle was registered to a female at 483 Rustic Ridge Circle. An unknown female was driving the vehicle. During the meeting, the unknown male showed the undercover officer a trafficking amount of heroin. The undercover officer did not purchase the drugs and left the area. Other agents followed the Yukon to 483 Rustic Ridge Circle. The agents observed the vehicle's occupants walk towards the right front side of 483 Rustic Ridge where the front door of the residence was located. The agents were unable to observe the unknown male and female enter the residence due to foliage blocking the view from the roadway. Based on this information in the affidavit, a magistrate issued a search warrant for the home and the Yukon. The search revealed 28 grams of methamphetamine in the residence and over 1000 grams of heroin in the Yukon.

Appellant contended that the trial court should have granted his motion to suppress evidence found within the residence based upon a lack of probable cause that drugs would be found within the residence. The Court noted that no Georgia decisions addressing a fact scenario substantially like that presented in this case. Specifically, whether evidence of drug

trafficking by an unknown male passenger in a vehicle provides probable cause to search an address at which the vehicle was registered to an unidentified female, where that unknown female drove herself and the unknown male to the address immediately after the drug trafficking activity, parked the car, and presumably went inside the premises with the unknown man.

The Court noted that other jurisdictions considering whether drug activity outside a residence provides probable cause to issue a warrant to search a residence have reached different conclusions. However, regardless of which approach should be applied in Georgia, a common thread in the cases is that the address to be searched is known to be the residence of a suspected drug dealer or trafficker. And here, it did not appear that the police conducted surveillance to determine how long the unknown male and female remained at the premises and the affidavit provided no information about the time of day they went inside. Nor was any information included about the ownership of the residence or whether the driver's license information for the female to whom the car was registered matched a description of the unknown female who entered the residence. Finally, nothing in the affidavit showed that either occupant of the vehicle carried something believed to be illegal drugs into the residence. Therefore, the Court concluded, based upon the totality of the particular facts and circumstances of this case, there was not a substantial basis for concluding that probable cause existed to search the residence. Accordingly, the trial court erred by denying this portion of appellant's motion to suppress.

Appellant also argued that all evidence seized pursuant to the search warrant should have been suppressed because the affidavit submitted in support of the search warrant failed to include the undercover officer's qualifications or facts supporting the undercover officer's reliability. Specifically, he contended that the officer submitting the affidavit failed "to include any information in the affidavit regarding his own knowledge or qualifications relevant to the case, or his knowledge of the unidentified officer's qualifications." The Court stated that since it had already concluded that a search of the residence was not justified by probable cause, it would only consider whether these arguments provided a basis to suppress the evidence found in the vehicle.

The Court found no merit in appellant's claim with regard to the reliability of the undercover officer. The Court noted that it has repeatedly held that one officer may present an affidavit in support of a search warrant based on statements obtained from another officer; that such hearsay is reliable under the circumstances; and that the officer communicating the information to the affiant need not personally appear before the magistrate. As to the affiant's failure to explain his relationship to the case, the magistrate was entitled to draw reasonable inferences from the material supplied to him and conclude that the affiant was involved in the investigation outlined in his affidavit. Thus, based on the totality of the circumstances and the deference the Court owes to the magistrate's decision, the Court held that the magistrate had a substantial basis for concluding that probable cause existed to search the vehicle.

Aggravated Assault; Sufficiency of the Evidence

Cruz v. State, A22A0462 (6/2/22)

Appellant was convicted of aggravated assault on a peace officer, removal of a weapon from a public official, attempted removal of a weapon from a public official, and misdemeanor obstruction of an officer. Very briefly stated, the relevant evidence showed that appellant and members of her family obstructed officers when the officers tried to talk to a 16-year-old runaway, who was with appellant's teenage son.

Appellant contended that the evidence was insufficient to sustain her conviction on aggravated assault on a peace officer. The Court stated that it was “constrained to agree.”

The Court noted that appellant was charged with the crime of aggravated assault on a peace officer in that she: “did knowingly make an assault upon the person of [Sergeant Long], a public safety officer, with a taser, a device which when used offensively against a person is likely to result in serious bodily injury *by pointing it at him and cycling it*, while said officer was engaged in the performance of his official duties ...” (Emphasis supplied). Consequently, the State had the burden of proving that appellant assaulted Sergeant Long by intentionally pointing the taser at him and/or by intentionally cycling it.

The Court found that the evidence established that appellant repeatedly failed to comply with Sergeant Long's commands; she forced the taser out of the sergeant's hand and into her own; the taser's laser skimmed over the sergeant's pant leg as he and appellant struggled over its possession, indicating that the probes would hit him if discharged; and the sergeant experienced reasonable apprehension because of appellant's actions. Nevertheless, the Court found, although appellant's act of taking the taser from the sergeant was undeniably intentional, the sergeant admitted that her act of pointing it at him was not.

Moreover, the sergeant testified that he — not appellant — discharged the taser as they fought for its control, and that the discharge resulted in the taser cycling for five seconds. The sergeant could thus hear the taser cycling for the brief seconds that appellant held it. But the sergeant admitted that appellant never had her hand on the grip of the taser, and that she dropped it almost immediately upon possessing it. Consequently, the Court determined, there was no evidence that appellant herself cycled the taser and, even if she had, there was no evidence from which to conclude that she did so intentionally.

Consequently, the Court concluded, the evidence was insufficient to sustain appellant's conviction on aggravated assault on a peace officer as that crime was charged in the indictment. Therefore, appellant's conviction on that count was reversed.