Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
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Issue 40-22

THIS WEEK:

- **Statements; OCGA § 24-8-824**
- **Search & Seizure; Curtilage**
- **Conflicts of Interest; *Brady* Violations**
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Statements; OCGA § 24-8-824
Mitchell v. State, S22A0771 (9/7/22)

Appellant was convicted of malice murder and related offenses. The evidence showed that appellant and his co-indictee shot the victim in the victim's apartment and robbed him. After his arrest, appellant was interviewed by police on two separate occasions — first on December 21, 2015, and again on December 23, 2015. He contended that the trial court erred by failing to grant in full the motion to suppress his December 21 and December 23 custodial statements. Specifically, appellant argued that his statements were obtained in violation of OCGA § 24-8-824, alleging that his December 21 statement was induced by the "remotest fear of injury" because officers threatened him with physical violence, and that his December 23 statement was induced by "the slightest hope of benefit" because he was promised a lesser charge in exchange for a statement. The Court disagreed.

As to the December 21 custodial interview, the evidence showed that appellant told officers that he drove to the victim's apartment the night of the murder but denied ever driving inside the apartment complex. Throughout the interview, appellant denied killing the victim, noting that they were friends. One of the detectives explained that being friends with a person does not stop murders from occurring. He then said to appellant, "I mean, we, — we could sit here and talk like this or we can have Freaky chase you down, beat you up in an apartment, and put a gun in your mouth." Appellant responded, "Freaky ain't gonna do no s**t like that. I'm talking to this man. This man ain't gonna do no s**t like that." Appellant continued to deny being present at the victim's apartment on the day of his death.

Appellant contended that his December 21 statement was induced by fear of injury because of a "credible death threat" stemming from the detective's statements about "Freaky" chasing appellant and beating him up and "put[ting] a gun in [his] mouth." But, the Court found, the trial court found that "no person in [appellant]'s position would have believed that the interviewing detective was making a credible death threat" and the record supported this conclusion. Appellant did not testify at the hearing on the motion to suppress, and the officers testified that they did not threaten appellant to obtain a statement. Reviewing the exchange as a whole, the record showed that the detective was responding to

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appellant's remarks that he would not have killed the victim because they were friends. Further, appellant's statements and demeanor in the recording of the interview supported the conclusion that appellant was not induced by any brutality or deprivation before or during the interview or by any perceived threat of future injury. Consequently, the Court held that this claim failed.

As to the December 23 interview, briefly stated, the record showed that appellant asked to speak with someone from the District Attorney's office, asking why he should talk to officers when he was not getting a deal in return. The detectives called an ADA from the interview room and stated that appellant "wants to know from you guys, if the information that he provides does pan out, as far as, like, our second suspect in this murder case, is his murder charge going to be reduced to something else." The ADA informed appellant that, "if you're looking for a deal based upon information that you might be able to bring forward, all I can tell you is, 'no sir,' there is no deal on the table." Appellant asked "[i]f I give you the truth, you're going to speak on my behalf and let them know, this is what we feel … ," after which the detectives reminded appellant that the conversation was being recorded and the prosecutor was listening and taking notes. Appellant responded "[a]lright. F**k it," and gave a statement admitting that he and his co-indictee robbed the victim.

The prosecutor then ended the call, but the detectives continued to speak with appellant. A detective told appellant that "[w]ithout him on the phone, I'm going to tell you, I'm still recording, and I'm going to tell you, man to man. Okay? I will take what I've got right here, we're going to vet this information to make sure it's accurate and I promise you, if it is, I will talk to the D.A., and we will charge you appropriately. Okay? You will get charged with something, but it won't be murder, in the event that this all pans out. Okay?" However, the trial court suppressed any statement made by appellant after the ADA got off the phone.

Appellant contended that his entire December 23 statement was induced by an improper hope of benefit, arguing that detectives repeatedly emphasized that he would "be charged appropriately, instead of with murder," if he gave a statement. The Court stated that the "slightest hope of benefit" refers to promises related to reduced criminal punishment — a shorter sentence, lesser charges, or no charges at all. However, the record showed that appellant was not promised a reduction in charges prior to making any incriminating statements. Indeed, he attempted numerous times to negotiate with the police and the prosecutor for a reduction in his murder charge. The prosecutor, however, consistently refused to engage in such negotiations, clearly telling appellant that there was "no deal on the table."

Likewise, the detectives did not promise appellant that they would reduce his charges or that he would receive a shorter sentence prior to him making any incriminating statements. Rather, the detectives merely acknowledged that appellant wanted a deal, that he perhaps could get some arrangement, and that they would talk with the district attorney, but it was clear to appellant that any agreement would

require the assent of the district attorney. Moreover, the detectives repeatedly stated that any reduction in charges would be contingent on their ability to "validate [appellant's] story." An officer's statement urging a defendant to offer information that may mitigate or justify his role in the crimes does not qualify as an improper hope of benefit. Accordingly, the Court concluded, the trial court did not err in denying appellant's motion to suppress on this ground.

Nevertheless, appellant argued, the State failed to meet its burden of proof that his statements were voluntary under the totality of the circumstances. The Court noted that when a defendant challenges the voluntariness of his statement as a matter of constitutional due process, a trial court must consider the totality of the circumstances, with the burden of proof falling on the State to demonstrate the voluntariness of the statements by a preponderance of the evidence. And here, the Court found, the record supported the trial court's determination that, under the totality of the circumstances, appellant's December 21 and December 23 statements were made voluntarily as a matter of constitutional due process. The record showed that, prior to both interviews, appellant was informed of his *Miranda* rights. After receiving the verbal and written warnings, appellant indicated that he understood his rights and agreed to speak with officers without an attorney present. He never asked to stop the interview and in the portion of the interview that was not suppressed, appellant was not promised any leniency in charges or sentencing or coerced into making his statements. In fact, the Court found, there was no evidence of excessively lengthy interrogation, physical deprivation, brutality, or other such hallmarks of coercive police activity during either of appellant's custodial interviews. Accordingly, the trial court did not err by admitting these statements at trial.

Search & Seizure; Curtilage
Peacock v. State, S22A0578 (9/7/22)

Appellant was convicted of the malicious murder of five individuals, arson, and three counts of aggravated cruelty to animals stemming from the killing of three dogs. The evidence, very briefly stated, showed that after appellant killed the people and dogs, he torched the house where the bodies were found and then called 911 to report the fire. When emergency personnel arrived at the home, appellant's truck had been parked in the home's driveway. Emergency personnel moved the truck farther away from the home to allow them easier access to the home. The truck was at this location when the affidavit for the search warrant was written and when the search was conducted pursuant to the warrant. The investigator testified that appellant was free to leave the scene, but his truck was not.

Appellant contended that the trial court erred by denying his motion to suppress the search of his truck, which was conducted under a search warrant for the home on the day of the fire. First, he argued that the search warrant did not authorize the search of his truck because the warrant affidavit failed to mention his green Chevrolet truck at all (it mentioned only the victims' vehicles), much less demonstrate probable cause to believe that any evidence of the listed crimes was in his (not mentioned) truck. But,

relying on *McLeod v. State*, 297 Ga. 99, 105 (2015) the Court stated that appellant's arguments ignored that the warrant authorized a search of the home and a warrant that authorizes the search of a home also authorizes the search of vehicles parked within the curtilage of the dwelling, regardless of whether the warrant specifies the particular vehicle or any connection between the vehicle and the crimes.

Nonetheless, the Court stated, there was a "wrinkle to this analysis…when the vehicle in question is owned by a visitor." Although a warrant to search a home generally authorizes searching personal effects and containers without separately identifying them, such a warrant does not authorize searching a visitor merely because he is found at the home when the warrant is executed. In a similar vein, some courts faced with the question here—whether a warrant to search a home authorizes searching a vehicle on the premises—have distinguished between vehicles of mere visitors and those owned by someone with some stronger relationship to the premises or to the criminal activities in question and would uphold a search only in the latter circumstance. And, the Court noted, this question—whether to be searched under a warrant for a home, a vehicle must have some connection beyond mere proximity to the home or crimes—was not presented in *McLeod* because the owner of the vehicle searched there was also the owner of the home. The Court stated that the better rule may be to require some greater connection than mere proximity to the home or crimes, because a warrant to search a home that also allows searching vehicles of casual visitors unconnected with the home or the basis for the search looks a lot like a forbidden general warrant. But, the Court further stated, it did not need to decide whether to adopt that limiting rule (or some version of it) in this case, because appellant was far from an unexpected or one-time visitor who drove up during the search in this case. Appellant used to live at the home, was still closely associated with those who did, and was a frequent guest. He had also spent the night before at the home drinking and smoking marijuana with the victims, slept there, left shortly before the fire to get breakfast for the victims, and returned to the home and parked his truck in the home's driveway. This evidence, which the investigator knew at the time law enforcement officers sought and secured the search warrant, connected appellant and his truck quite closely with the home and the crimes being investigated. Under these circumstances, a valid search warrant for the home authorized searching his truck if the truck was in the curtilage.

Nevertheless, appellant argued, the warrant to search the home still did not authorize searching his truck because the truck was not within the home's curtilage when it was searched. The Court disagreed. After discussing the meaning of the term "curtilage," the Court concluded that the trial court did not abuse its discretion in ruling that appellant's truck sat within the curtilage of the home when it was searched. Even after the first responders moved the truck, it was parked within the open area that the investigator described as the "yard" in front of the home, which was bordered along with the house by trees on all sides. Although the record did not specify the precise size of that area or the distance from its boundaries to the home, the area covered only a confined part of the 1.17-acre property. And its boundary, the tree line that the truck sat inside of, was close enough to the home that first responders, including a fire truck, parked there in responding to the house fire. That area was "immediately

surrounding" the house in the same apparent proximity and vicinity as porches, yards, and gardens that are routinely considered curtilage.

The Court also found that the relative seclusion of the area also supported treating it as curtilage. Although the area was not within a fence, the truck's parking area and the home were all bordered by trees, which created a natural barrier separating the home and the truck's parking area from the road and surrounding area. No barrier separated the truck from the home. Thus, the Court concluded, under these circumstances, the evidence supported the trial court's conclusion that appellant's truck was parked in an area immediately surrounding and associated with the home, Consequently, the trial court did not abuse its discretion in concluding that appellant's truck sat in the curtilage when it was searched. Accordingly, the court did not err in denying appellant's motion to suppress the search of his truck.

Conflicts of Interest; *Brady* Violations
Reed v. State, S22A0530 (9/7/22)

Appellant was convicted of murder and other offense. He contended that the DA's office should have been disqualified from prosecuting him because his attorney of record was working for the DA's office at the time of his trial, presenting a conflict of interest. Briefly stated, the record showed that the attorney had been employed by the PD's Office and filed an entry of appearance in appellant's case on July 2, 2010, along with consolidated pretrial motions, discovery requests and notices, and a motion to set bond. The attorney also represented appellant at his arraignment and at a bond hearing. In October 2010, appellant's trial was specially set for May 2, 2011. But, in December 2010, The attorney interviewed for employment with the DA's office and started work with that office on February 2, 2011. The attorney never filed a formal motion to withdraw as appellant's counsel; instead, as was the practice at the time, another attorney in the PD's office, who became appellant's trial counsel, took over the cases previously handled by the attorney. Once he began working with the DA's Office, the attorney had no further contact with appellant's case, either directly or indirectly.

The Court stated that pretermitting whether the attorney's prior employment as appellant's counsel presented a conflict of interest disqualifying the DA's office from prosecuting appellant, appellant waived this issue for appeal because he did not raise it in a timely manner. The Court noted that although it has not considered when a motion to disqualify a prosecutor based on an alleged conflict of interest should be asserted, it has held, in other contexts, that such challenges must be raised promptly after the defendant learns of a potentially disqualifying matter. And here, appellant's trial attorney was aware of the attorney's employment with the DA's office several months before trial, as she worked for the PD's office and took over the attorney's cases when he left to take his new job. Yet, she failed to assert a conflict of interest, nor did she seek to disqualify the DA's office; instead, appellant first raised the issue in a post-trial motion for new trial. Consequently, the Court concluded, this delay precluded the Court's review of the matter on appeal.

Next, appellant contended that he was denied the right to effectively confront his accusers when the State failed to turn over exculpatory evidence contained in Crime Stoppers reports in violation of *Brady*. The Court noted that to prevail on a *Brady* claim, a defendant must establish four factors: (1) [t]he State, including any part of the prosecution team, possessed evidence favorable to the defendant; (2) the defendant did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) a reasonable probability exists that the outcome of the trial would have been different had the evidence been disclosed to the defense.

The record showed that in April 2019, appellant's intermediate appellate counsel filed a post-trial *Brady* motion to obtain exculpatory evidence, including evidence of any payments by Crime Stoppers Atlanta to three of the State's witnesses, Burns, Wilson, and Smith. The evidence at a subsequent hearing on that motion showed the following. Crime Stoppers is a private entity, separate from the DA's office and the Atlanta Police Department (the "APD"), and is governed by a group of business and community leaders, not the APD. Tips to the Crime Stoppers phone line are handled anonymously and identified by a number. Following a "meaningful prosecution," the tip goes to an independent board that determines its value. The APD never knows whether a tipster received money for a tip, and the evidence was unclear as to whether any records exist showing payments to individuals by name, rather than by tip number.

Crime Stoppers offered a reward for information on the victim's murder, and the lead detective on the case announced this reward on the evening news the night of the crime. Appellant asserted that the three witnesses wanted the Crime Stoppers money. When cross-examined at trial, Wilson denied receiving any payment from Crime Stoppers but, on cross-examination, admitted asking about whether there was any money for him. Burns admitted asking the lead detective for the Crime Stoppers money, but the detective told him that APD had nothing to do with it. Smith was not questioned about Crime Stoppers. And, the Court noted, appellant pointed to no evidence showing that either the APD or the DA's office had any record of payments to those witnesses.

Thus, the Court determined, because appellant failed to present any evidence that the State was in possession of, and failed to disclose, exculpatory information from Crime Stoppers, his claim that the trial court violated his rights under *Brady* and the Sixth Amendment failed.

Accountability Courts; Due Process
Dave v. State, A21A1585 (8/1/22)

In 2019, appellant, while represented by counsel, entered a guilty plea and the superior court admitted her to the mental health court program. However, on February 18, 2021, the mental health case manager sought to terminate her from the program. A notice of the hearing was mailed to appellant,

return receipt requested, at her last known address. There was no evidence that appellant's plea counsel was served with notice. The hearing was held on February 25. Neither appellant nor her plea counsel attended. The trial court subsequently entered a judgment of conviction and imposed upon appellant a five-year sentence, with two years served in confinement.

Appellant argued that the termination order, judgment of conviction, and sentence violated her right to due process by terminating her participation in the mental health court program without providing her with sufficient notice of the hearing and an opportunity to be heard. The Court agreed. The Court found that the termination of appellant's participation in the mental health court program resulted in her loss of liberty; she was sentenced to a term that included confinement. Thus, she had a right to due process of law regarding the hearing that included, at the least, the right to notice of the time and place of the termination hearing.

The State argued that appellant was properly served with written notice because it was mailed to her last known address. But, the Court found, appellant was represented by counsel and thus, it was insufficient because the law required that the notice be served on her counsel, which did not occur.

Nevertheless, the State contended, the superior court stated in the termination order that appellant was not represented by counsel at the time of the termination proceedings and that in any event, plea counsel's representation ended when she entered her guilty plea and was referred to the mental health court program. The Court disagreed.

First, the Court found that the record did not support the trial court's finding. Rather it showed that appellant was represented by counsel on November 6, 2019, when she entered her plea and was referred to the mental health court program and that a notice of substitution of counsel replacing plea counsel was filed on April 1, 2021, over a month after the conclusion of the termination proceedings and the entry of the judgment and sentence against her. The record contained no court order permitting plea counsel to withdraw before April 1, 2021, or other support for the superior court's statement that, at the time of the hearing on February 25, 2021, appellant was unrepresented.

Second, the Court noted that the State did not cite, and it could not find any authority providing that counsel's representation of a criminal defendant ends when the trial court refers that person to an accountability court but does not enter a judgment of conviction and sentence. Generally, where no judgment of conviction and sentence has been entered, counsel remains counsel of record until the trial court enters an order permitting withdrawal or substitute counsel enters an appearance. In so holding, the Court distinguished *White v. State*, 302 Ga. 315 (2017), finding that the case has no application where, as here, the question was whether appellant had counsel at a time *before* the trial court entered a judgment of conviction and sentence.

Nevertheless, the State argued, appellant waived her due process rights related to the hearing by "absconding" from the mental health court's supervision. But, the Court stated, a criminal defendant must *knowingly* waive the right to notice. And here, the Court declined to view appellant's alleged failure to comply the mental health court program requirements as a knowing waiver of her right to have notice of and an opportunity to respond to those allegations at the termination hearing.

Finally, the Court found that the due process violation was not harmless. Appellant was not notified of the time and place of the termination hearing, and so she had no opportunity to explain her alleged failure to comply with the mental health court program requirements or make any arguments in mitigation based on her mental health condition. Furthermore, because the superior court's statement in her order that she "[did] not always terminate from the program," it appeared that, in an appropriate case, the trial court could be persuaded not to terminate a defendant's participation in a mental health court program merely because of noncompliance. Accordingly, the judgment and sentence were reversed.