

THIS WEEK:

- **Juveniles; Riley**
- **Confessions; Flight**
- **Ineffective Assistance of Counsel; Prior Convictions**
- **First Offender Status; Recidivist Sentencing**
- **Ineffective Assistance of Counsel; Closing Arguments**

Juveniles; *Riley*

State v. Powell, S22A0648 (10/25/22)

On February 28, 2019, police officers responded to a shooting where they discovered 15-year-old Paris Powell (“Paris”), standing beside the decedent, Bryant. Paris was interviewed by Detective Gleason on March 1, March 4, and March 25, 2019, in connection with Bryant's death. Powell's mother (“Ms. Powell”), was present at all relevant times. Very briefly stated, the record showed that on March 1, the police thought that Paris was a witness and interviewed her as such. Paris described Bryant's death as a drive-by shooting. On March 4, Mrs. Powell and Paris returned to the police department. This time, Paris stated that she knew that the passenger in the car was a man named “Chris,” that Bryant was selling drugs to the men in the car, and that Bryant had tried to rob the men in the car during the drug deal. Detective Gleason then confronted Paris with information he had obtained suggesting that Paris had “set up” Bryant for the robbery. Both Paris and her mother adamantly denied this allegation.

On March 25, at the request of Detective Gleason, Paris and her mother returned to the police station for a third interview. At the outset, Mrs. Powell asked the detective if he was “going to do the right thing and say we might need a lawyer?” Although the detective knew that he was going to ask Paris questions, the answers to which could be incriminating, he said, “I will. I'll let you know. I'll let you know.” During the first 9 minutes and 29 seconds, under questioning, Paris admitted that Bryant asked her to help him commit a robbery and that she “gave him Chris.” At the 9-and-a-half-minute mark, Detective Gleason, addressed Mrs. Powell regarding why Paris lied about her involvement, “One reason she lied is, if she admits that they were there buying marijuana, she's worried about her probation. But being part of setting up a robbery, where [Bryant] ends up dead, it's a whole different situation because now [Bryant's] blood is on [Paris's] hands. Ms. Powell: Oh my god. Do we need a lawyer? Do I need a lawyer? Det. Gleason: That's entirely up to you [Ms. Powell].” Paris then made many incriminating statements throughout the remaining 30 minutes of the interview.

The record further showed that Paris was never read her *Miranda* rights during any of the three interviews; she made a written statement at the end of each interview; and she and her mother were allowed to go home after each interview.

Paris filed a pretrial “Motion to Suppress Custodial Statement,” seeking to suppress all three of her March 2019 interviews and her subsequent written statements. She alleged that all her statements were induced by an improper hope of benefit in violation of OCGA § 24-8-824. She further alleged that the statements were made while she was in custody, triggering the requirement that she be read her *Miranda* rights, and that Detective Gleason's failure to do so rendered all subsequent statements involuntary. At the *Jackson-Denno* hearing, defense counsel further clarified that the motion also included a claim that Paris's “statements were [not] free and voluntary” as a matter of constitutional due process. After the hearing, the trial court issued a written order denying Paris's motion in part, finding that “the State has provided a prima facie showing that

the first interview, second interview, and beginning of the third interview were freely and voluntarily given by Defendant without hope of benefit or fear of injury [under OCGA § 24-8-824].” However, using the *Riley* factors, the court determined that any oral statements made after the 9 minutes, 30 second mark and the written statement in full should be suppressed. The State appealed.

First, the State argued that the trial court made a clearly erroneous factual finding when it determined that Detective Gleason improperly advised Paris “that her mother was the only person who could exercise her constitutional right to counsel.” The Court noted that in considering a trial court's suppression ruling, an appellate court must construe the evidentiary record in the light most favorable to the factual findings and judgment of the trial court. Viewing the evidence in the light most favorable to the factual findings and judgment of the trial court and giving the trial court's factual findings and credibility determinations the proper deference, the Court held that the State's claim failed. The record showed that Detective Gleason did not ask Paris directly whether she wanted to talk to him or whether she wanted to do so without a lawyer, but rather directed all discussions of Paris's constitutional rights to her mother. He further testified that, when Ms. Powell asked if “we” needed a lawyer, his reply of “[t]hat's up to you” was meant to convey, “you're her mother, what do you want to do[?]” Under these circumstances, the Court found that the trial court did not clearly erred by implicitly crediting Detective Gleason's testimony and finding that he incorrectly advised Paris that only her mother could invoke Paris's right to counsel.

Next, reviewing the nine *Riley* factors in order, first, the record supported the trial court's finding that Paris was 15 year old when she was interviewed by Detective Gleason. Second, the record was silent as to Paris's education level; however, the trial court found, and the record showed, that Paris “understood English.” As to the third factor, the trial court found, and the record showed, that Paris knew she was being interviewed about the shooting that led to Bryant's death. However, the record also supported the trial court's findings that: Paris was consistently told that she was merely a witness; no warrants had been issued in the case; Paris was never informed that her statements could be used against her at trial or that she could “go to jail or lose her freedom” based upon what she told detectives; and that, while Detective Gleason consulted with Ms. Powell prior to each interview, he “[did not] state it was optional for [Paris] to speak with him.” Further, the record supported the trial court's finding that Detective Gleason “incorrect[ly] and erroneously advised [Paris] . . . that her mother was the only person who could exercise [Paris's] constitutional right to counsel during the third interview.”

Regarding the fourth factor, the Court found that the record supported the trial court's finding that Paris's mother was present, and Paris was allowed to consult with her during the interviews. However, the record also supported the trial court's findings that Ms. Powell actively participated in the questioning of her daughter and brought her daughter to the police station on a prior occasion in order to offer more information to detectives. Further, the video recording showed that Ms. Powell was extremely emotional throughout her daughter's interviews and, at one point, became so upset that she physically turned away from Paris while Paris was implicating herself in a crime.

The trial court made no findings as to the fifth factor; however, it was undisputed that Paris was interviewed prior to the filing of any formal charges. As to the sixth factor, the record supported the trial court's findings that Paris was given no hope of benefit in exchange for her statements, that she was provided water prior to all interviews, and that she was free to leave after her interviews. However, the record also supported the trial court's findings that Detective Gleason knew, prior to the third interview, that Paris had not been truthful with him, and that he was going to ask the 15-year-old Paris questions that, if she answered, could possibly be incriminating.

The Court further found that although the trial court made no findings with respect to the seventh factor, it was undisputed that all of Paris's interviews were less than two hours long, with the March 25 interview being the shortest in duration. As to the eighth factor, the record supported the trial court's findings that Paris's two prior statements were voluntarily given.

Finally, the trial court made no findings regarding the ninth factor; however, due to the pre-trial status of the case, there was nothing in the record currently before the Court to suggest that Paris had repudiated her statements.

Therefore, the Court concluded, while it was true that the trial court made some findings that might have weighed in favor of admitting Paris's statements at trial, it could not say that the trial court erred in concluding that, under *Riley*, the inculpatory verbal and written statements Paris made to detectives after the first 9 minutes and 30 seconds of the recorded interview on March 25 were involuntary. Accordingly, the Court affirmed the trial court's suppression of those statements.

Confessions; Flight

Simmons v. State, S22A0620 (10/25/22)

Appellant was convicted of felony murder and other offenses. He contended that the trial court plainly erred in charging the jury on confessions and flight. The Court disagreed.

Appellant argued that the trial court failed to instruct the jury completely on the principles codified in OCGA § 24-8-823 by not telling the jury that corroboration of the statements was “absolutely required” for conviction. But, the Court stated, he could not show error, much less plain error. The trial court advised the jury that “a defendant's out-of-court statement that is not supported by any other evidence is not sufficient to justify conviction, even if you believe the unsupported statement” and that “if you find that there was a statement made by the defendant that was supported by other evidence, the degree of proof necessary to convict is that you be satisfied of the guilt of the defendant beyond any reasonable doubt.” The Court found that this instruction came directly from Georgia's pattern jury instructions in effect at the time of appellant's trial. See Suggested Pattern Jury Instructions, Vol. II: Criminal Cases (2017), § 1.32.70. Thus, because appellant did not point to any authority that these instructions did not adequately cover the principles that he contended the trial court should have charged even if the corroboration requirement of OCGA § 24-8-823 were to apply to appellant's statements, he failed to show that the trial court committed error that was clear or obvious under current law.

Moreover, the Court added, even assuming error in failing to provide more complete instructions on confession-corroboration, there was ample evidence at trial to corroborate appellant's statements. Consequently, the Court concluded that there was no plain error because appellant failed to show clear and obvious error and that any purported error affected his substantial rights.

Appellant also argued that the trial court plainly erred in instructing the jury that evidence of flight had been introduced and that the evidence could only be considered if the jury found it more likely than not that appellant fled to avoid arrest. Citing *Renner v. State*, 260 Ga. 515, 518 (3) (b) (1990), the Court agreed that this instruction was a clear and obvious error. Nevertheless, the Court found, there was ample evidence other than evidence of appellant's flight to establish his guilt, including appellant's own admissions and contradicting testimony. Therefore, the Court found, there was no reason to believe that this particular instruction caused the jury to give undue weight to the flight evidence, particularly given the other strong evidence against appellant. Consequently, the Court concluded, appellant failed to show how the instruction affected his substantial rights, meaning that it probably did not affect the outcome of the trial. Accordingly, the court's instruction on flight did not amount to plain error.

Ineffective Assistance of Counsel; Prior Convictions

Willis v. State, S22A0801 (10/25/22)

Appellant was convicted of felony murder, armed robbery, carjacking, possession of a firearm by a convicted felon and other offenses. He contended that trial counsel was ineffective for failing to limit the jury's access to State's Exhibit 115, a

certified copy of his 2013 felony conviction (by guilty plea) for possession of cocaine. The State introduced the exhibit to establish that appellant was a previously convicted felon. But the exhibit also showed appellant's misdemeanor convictions from the same incident for possession of marijuana and obstructing a law enforcement officer. The narrative of the incident described appellant jumping off a second-floor balcony to avoid arrest. In addition, the exhibit showed that three days before the cocaine possession incident, appellant had an arrest warrant issued for battery and obstructing a 911 call, and that he had had his bond revoked as a result. Appellant argued that counsel should have stipulated to his status as a convicted felon to prevent the jury from seeing the full exhibit.

The Court stated that even assuming counsel's performance was deficient, Appellant failed to establish prejudice. A defendant may be prejudiced by the admission of a prior conviction into evidence when the prior conviction is of the nature likely to inflame the jury's passions and raise the risk of a conviction based on improper considerations. But here, the Court found, the material in Exhibit 115—information about appellant's misdemeanor convictions for possession of marijuana and obstructing a law enforcement officer, the narrative of him jumping off a balcony to elude arrest, and the booking report showing his arrest for battery and the revocation of his bond—was relatively mild compared to the crimes with which appellant was charged—murder, armed robbery, and carjacking, among others. Because such information was unlikely to “inflame the jury's passions” against him, and the evidence against appellant was strong, he failed to establish a reasonable probability that the result of his trial would have been different if his counsel had prevented the exhibit from being introduced in full. Thus, the Court concluded, this claim of ineffective assistance failed.

Nevertheless, appellant contended, his trial counsel was ineffective for failing to request a jury instruction limiting the jury's use of Exhibit 115 to establishing appellant's status as a convicted felon (and for failing to object when the trial court's jury charge did not include that limiting instruction). But again, the Court determined, appellant did not show a reasonable probability that the result of his trial would have been different if the trial court had given that instruction. The evidence against appellant was strong, and the information in Exhibit 115 was relatively mild compared to the crimes with which he was charged. Thus, the jury knowing all that information—rather than knowing only that appellant was a convicted felon—was not reasonably likely to change the verdict. By the same token, the absence of an instruction allowing the jury to consider the information in Exhibit 115 only for the purpose of establishing that appellant was a convicted felon was not reasonably likely to change the verdict. Consequently, the Court concluded, appellant's claim of ineffective assistance on this ground failed too.

First Offender Status; Recidivist Sentencing

McCullum v. State, A22A1064 (9/7/22)

In August 2011, appellant pleaded guilty to one count of trafficking methamphetamine and one count of manufacturing methamphetamine. She was sentenced as a recidivist pursuant to OCGA § 17-10-7 (c) and received 40 years, 12 years to serve in incarceration. Her recidivist sentence was predicated upon three prior felony convictions: a 1997 conviction; a 2001 conviction; and a 2002 conviction.

In November 2020, pursuant to OCGA § 42-8-66, which allows a sentencing court to retroactively grant first offender treatment to qualifying defendants, appellant filed a motion seeking retroactive first offender treatment for her 1997 conviction. The superior court in the county that sentenced her granted the motion and discharged her without an adjudication of guilt in the 1997 case. Then, in 2021, appellant filed a motion to correct a void sentence in the superior court which sentenced her in 2011. She argued that her recidivist sentence was void based on her discharge in the 1997 case. The court denied her motion.

Appellant argued that the court erred in denying her motion because the retroactive grant of first offender treatment for her 1997 conviction, which served as a predicate felony for her recidivist sentence, rendered her recidivist sentence void. The Court disagreed.

The Court noted that after a sentencing court has imposed a sentence of imprisonment, its jurisdiction to later modify or vacate that sentence is limited. Generally, the sentencing court loses jurisdiction to modify or vacate such sentence one year after the sentence has been imposed, although it may vacate a void sentence at any time. Here, appellant filed her motion to correct her sentence nearly ten years after the sentence was imposed. Thus, the Court stated, the sentencing court had jurisdiction of her motion only to the extent that it presented a cognizable claim that the sentence was void.

The Court stated that a crime is to be punished according to the provisions of the law existing at the time of its commission. If the law existing at the time a sentence is issued does not allow the punishment imposed, the sentence is void and it may be challenged at any time. But if the sentence issued falls within the statutory range of punishment, it is not void. And here, there was no dispute that the recidivist sentence issued to appellant fell within the statutory range of permissible punishment at the time it was imposed. Thus, the Court held, the sentence was not void.

Appellant argued nevertheless that subsection (g) of OCGA § 42-8-66, which extends the statute's provisions to any sentence issued on or after March 18, 1968, compelled a different result. The Court again disagreed. Although subsection (g) defines the oldest conviction to which the benefits of OCGA § 42-8-66 may be conferred, neither it nor anything else in the text of the statute mandates the retroactive nullification of an otherwise lawfully imposed recidivist sentence. Such an extension of the statute would be a task for the legislature, not the Court.

Therefore, the Court held, because appellant's motion presented no cognizable claim that her sentence was void, the sentencing court should have dismissed the motion for lack of jurisdiction. Accordingly, the Court vacated the order denying appellant's motion and remanded the case to the sentencing court for dismissal of the motion.

Ineffective Assistance of Counsel; Closing Arguments

Alvarado v. State, A22A0882 (9/7/22)

Appellant was convicted of rape and child molestation. He contended that his trial counsel was ineffective for failing to object when the prosecutor asked the victim if she had told the truth during her forensic interview because the inquiry was “impermissibly bolstering[.]” The Court stated that it has been repeatedly held that a witness, even an expert, can never bolster the credibility of another witness as to whether the witness is telling the truth. But here, appellant argued that the victim bolstered her own testimony by stating that she told the truth in her forensic interview. The Court stated that it knows of no legal reason why a witness should be prohibited on direct examination from asserting his or her own credibility by testifying that he or she is telling the truth and giving some explanation. Furthermore, the Child Hearsay Statute actually contemplates testimony from both the child and those witnessing the child's later reaction, even if the hearsay may be “bolstering” and any “bolstering” can be explored by defendant in cross-examination. Thus, a bolstering objection would have been without merit, and failure to make a meritless objection could not be evidence of ineffective assistance.

Next, appellant contended that his trial counsel was ineffective for failing to object to the State's closing argument. The Court noted that the decision to object to a particular part of a prosecutor's closing argument is a tactical decision, and counsel's decision not to make an objection must be patently unreasonable to rise to the level of deficient performance.

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 9, 2022

Issue 48-22

Here, appellant pointed to a statement by the prosecutor in her closing argument that appellant did not retain the presumption of innocence. The prosecutor stated: “At the beginning of this trial this Defendant was cloaked in the presumption of innocence. But that's not a permanent status. That doesn't stay with him forever. Keep that in mind. Just because he had it in the beginning doesn't mean he has it now.” However, she then said “[i]t's my burden and I bear it.” The Court stated that while the prosecutor's closing argument was unclear, she immediately attempted to clarify her remarks. Moreover, the trial court properly instructed the jury on the burden of proof and presumption of innocence, and the Court presumes that jurors follow the law. Consequently, the Court found appellant's claim to be meritless.