Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING JANUARY 13, 2023
Issue 2-23

THIS WEEK:

- **Habeas Corpus; Juror Misconduct**
- **Motions for Out-of-time Appeals; Motions to Withdraw Guilty Pleas**
- **Rule 404 (b) Evidence; Harmless Error**
- **Extraordinary Motions for New Trial; Newly Discovered Evidence**

Habeas Corpus; Juror Misconduct

Ballinger v. Watkins, S22A1187 (12/20/22)

Watkins was convicted of murder. Very briefly stated, the evidence showed that Dawkins was driving his white pickup truck north on Hwy 27. A witness noticed a small blue car driving erratically and interacting with a white pickup truck ahead of him on the highway. The witness saw a "flash of some kind" before the white truck drove across the median, into southbound traffic, and then onto the far shoulder. Dawkins was found dead at the wheel. Around this time, Watkins, in his own white pickup truck was driving south on Hwy 27 to visit his girlfriend. There was animosity between Watkins and Dawkins. Using cell phone tower records, the State contended at trial that Watkins committed the crime.

During Watkins's murder trial, a juror named Cordle conducted a "drive test" during a break in deliberations to see whether the defendant could have been physically present at the time and place the victim was shot. The next day, the jury voted to convict Watkins of felony murder and other crimes, and he was sentenced to life in prison. Years later, Watkins's counsel learned about the juror's misconduct and filed the habeas petition. The habeas court granted relief and the State appealed.

Initially, the Court addressed whether Watkins's juror-misconduct claim is properly addressed in a habeas corpus proceeding. The Court noted that not every instance of juror misconduct is necessarily an error of constitutional dimensions. But Watkins claimed that a juror gathered information from outside the trial—typically called "extra-judicial" or "extraneous" information—which was prejudicial to Watkins's defense and brought it into the jury room. This particular kind of juror misconduct can violate a defendant's right to confront and cross-examine witnesses against him under the Sixth Amendment to the United States Constitution, which applies to the States through the Due Process Clause of the Fourteenth Amendment. Thus, the Court determined, Watkins asserted a constitutional claim that was cognizable in habeas.

As to the merits of his claim, the Court noted that a constitutional claim grounded in jurors' exposure to extra-judicial information ultimately turns on whether the defendant was prejudiced by the exposure. In this context, a new trial will be granted if there is a reasonable possibility that the improper evidence collected by jurors contributed to the conviction, because a verdict based on such extra-judicial information is inherently lacking in due process.

Furthermore, the Court stated, as a general matter, showing actual prejudice means showing not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions. And specific to juror misconduct, a court assessing prejudicial impact properly considers the type of extra-judicial information at issue (e.g., whether the information concerned sentencing or

1590 Adamson Parkway, Fourth Floor, Morrow, Georgia 30260 ▪ (770) 282-6300 ▪ www.pacga.org ▪
Facebook: https://www.facebook.com/GAProsecutors ▪ Twitter: https://twitter.com/GAProsecutors
Instagram: https://www.instagram.com/gaprosecutors/
LinkedIn: https://www.linkedin.com/company/prosecuting-attorneys-council-georgia/

the underlying substantive law), how the extra-judicial information might have been relevant to the issues decided by the jury, and whether the record evidence suggested that this information would affect the jury's decision on guilt or innocence.

Here, the Court concluded, the habeas court did not err in concluding that Watkins established actual prejudice from Cordle's unauthorized drive test. The Court found that this conclusion follows in large part from the drive test's significance in relation to the evidence that was properly before the jury. That evidence showed that Watkins's call to his girlfriend at 7:15 p.m. pinged off a cell tower that did not cover the crime scene, and the 911 dispatch received the call about Dawkins's shooting at 7:19 p.m. Naturally, this evidence called into question whether Watkins could even have been physically present when Dawkins was shot. The State argued that he could have made it to the crime scene in time if he had made his call just before reaching the southernmost boundary of the cell tower's coverage; traveled for some unknown distance to at least one mile south of the crime scene; turned around to drive north on Highway 27; "interacted" with Dawkins's truck in a blue car while traveling the distance back to the crime scene; and a little later, shot Dawkins before the witness called 911. But no evidence was introduced as to the time, distances, or any other specifics of this hypothetical route. Moreover, the Court stated, it need not speculate about whether this was a significant sticking point in the State's case, at least for Cordle: her drive test was designed and carried out specifically to address this key issue. In short, there was little question that the extra-judicial information here was highly pertinent to a critical substantive issue in the case.

And given the significance of the drive test, the Court could not say the habeas court erred in concluding that it caused Watkins actual prejudice. Putting aside its serious flaws, the drive test worked to Watkins's actual and substantial disadvantage because it "proved" to at least one juror (Cordle) that Watkins could have been physically present when Dawkins was shot, clearing up and satisfying a key and heavily disputed question of fact necessary to meet the State's burden of proof against Watkins. This prejudice conclusion was further supported from the sequence of events: deliberations began on a Saturday and concluded without reaching a verdict that evening; Cordle conducted her drive test on Sunday; and on Monday morning, the jury voted to convict Watkins. Although no one could know exactly what moved the needle for the jury between Saturday and Monday, this timing was consistent with the conclusion that the extra-judicial information here contributed to the verdict.

Finally, the Court noted that the State did not dispute that Cordle conducted the drive test or that she determined, based on that test, that Watkins could have been physically present when Dawkins was shot. Instead, the State argued that the habeas court clearly erred in finding that Cordle shared her drive test or its results with the other jurors. But even assuming all the findings that Cordle shared anything with other jurors were clear error—a doubtful conclusion on the appellate record — Watkins still showed actual prejudice because there was no dispute that the extra-judicial information here was introduced to and affected at least one juror: Cordle herself. Accordingly, the Court concluded, the habeas court did not err in concluding that Watkins had shown that Cordle's improper drive test caused him actual prejudice. Therefore, the Court affirmed the habeas court's grant of habeas relief based on Watkins's juror-misconduct claim.

Motions for Out-of-time Appeals; Motions to Withdraw Guilty Pleas

Harvey v. State, S22A1083 (12/20/22)

In 2005, appellant entered negotiated guilty pleas to two counts of malice murder and was sentenced the same day to two consecutive life sentences. Seven years later, she filed a pro se motion for an out-of-time appeal in which she argued that her plea counsel provided constitutionally ineffective assistance of counsel and that she was entitled to withdraw her guilty pleas because counsel's ineffectiveness frustrated her ability to seek review of her pleas. The trial court denied the motion on February 19, 2021, and the Court affirmed. *Harvey v. State*, 312 Ga. 263 (2021) ("*Harvey I*").

In January 2022, appellant filed another motion for an out-of-time appeal and a motion to withdraw her 2005 guilty pleas. The trial court denied the motions and appellant appealed.

Citing *Cook v. State*, 313 Ga. 471 (2022), the Court found that the trial court should have dismissed the motion for out-of-time appeal rather than denying the motion. Nevertheless, citing *Cook*, appellant argued that the Court should recall the remittitur in *Harvey I* and remand that case to the trial court with direction that the motion be dismissed because the trial court lacked jurisdiction to consider her first motion for out-of-time appeal on its merits. However, the Court stated, its holding in *Cook* applies only to cases that were on direct review or otherwise not yet final when the opinion issued. Appellant's first motion for an out-of-time appeal was denied by the trial court in February 2021, and that denial was affirmed on August 10, 2021, before *Cook* was decided. The denial of appellant's initial motion for an out-of-time appeal became final before *Cook* was issued and was unaffected by that decision. Accordingly, there was no basis for the Court to recall the remittitur in *Harvey I*.

Next, appellant contended that the trial court erred by dismissing the motion to withdraw her guilty pleas. The Court noted that under Georgia law, a motion to withdraw a guilty plea must be filed within the same term of court as the sentence entered on the guilty plea. And, if a defendant seeks to withdraw a guilty plea after expiration of the term of court in which the sentence was imposed, the defendant must pursue such relief through habeas corpus proceedings. Here, appellant's motion to withdraw her guilty pleas was filed more than 16 years after her 2005 sentencing. It was, therefore, untimely, and the trial court lacked jurisdiction to consider the motion on its merits. Accordingly, it was properly dismissed.

In so holding, the Court rejected appellant's suggestion that it should recognize a defendant's right to file an otherwise untimely motion to withdraw a guilty plea because, she argued, habeas corpus is a constitutionally inadequate remedy. Citing *Schoicket v. State*, 312 Ga. 825, 827 (1) (2021), the Court declined the invitation to "invent additional remedies that might further complicate our post-conviction jurisprudence." 312 Ga. at 826. The General Assembly enacted habeas statutes balancing the competing interests of a defendant's constitutional rights and ensuring finality of judgments, and thus, the Court lacks the authority to substitute its policy preferences for those of the General Assembly and thereby allow a defendant to skirt the legislatively established process.

Rule 404 (b) Evidence; Harmless Error

Cavison v. State, S22A1040 (12/20/22)

Appellant was convicted of the 2014 malice murder and arson in the first degree in connection with the death of his 92-year-old mother. He contended that the trial court abused its discretion in admitting evidence pursuant to OCGA § 24-4-404 (b) that he had written a book in 2005, titled "The Philosophy of Murder," about a serial killer stalking actresses in Hollywood. He contended that the evidence was unduly prejudicial and that his conviction must be set aside. The Court disagreed.

Briefly stated, the record showed that prior to trial, the prosecutor notified the trial court and defense counsel that the State intended to introduce evidence of the novel at trial. The trial court reserved ruling and directed the parties to approach the bench before attempting to introduce any evidence concerning the book at trial. During trial, after appellant testified that his mother's death was an accident, the State cross-examined him on whether he had written any books between 2004 and 2005, and defense counsel objected. Following a hearing outside the presence of the jury, the court ruled that the prosecutor could ask appellant about the book.

The Court noted that even if a trial court abuses its discretion in admitting certain evidence, such non-constitutional error is deemed harmless and does not require reversal if it is highly probable that the error did not contribute to the verdict. And here, the Court stated, assuming, without deciding, that the trial court abused its discretion in admitting evidence about appellant's novel, it was highly probable that the evidence did not contribute to the verdicts given appellant's explanation of the plot and the very short time devoted to this line of questioning during cross-examination. The State

asked a total of three questions related to the novel, and the only evidence placed before the jury was that appellant wrote "The Philosophy of Murder," a romance novel with a serial-killer subplot that was published in 2005. The novel itself was not introduced. In contrast, the State presented an overwhelming amount of evidence unrelated to the novel on the issue of appellant's guilt. For example, 18 witnesses testified for the State, many of whom recounted appellant's admissions that he killed his mother. Others gave expert testimony explaining either how the fire was intentionally set or how repeated and intense blunt force inconsistent with an accidental fall was necessary to cause the victim's severe injuries. Thus, the Court concluded, any undue prejudice from admitting evidence about the novel was offset by the overwhelming evidence of appellant's guilt and the improbability of his accident defense. Consequently, it was highly probable that the evidence did not contribute to the verdicts.

Extraordinary Motions for New Trial; Newly Discovered Evidence

Smith v. State, S22A1051 (12/20/22)

Nineteen years ago, appellant was convicted of the murder of his infant son based on a theory of "shaken baby syndrome" (SBS). In 2001, he filed an extraordinary motion for new trial arguing that the science regarding diagnosis of brain injuries in infants has changed so much since his trial that he is entitled to a new trial. He cited position papers from experts in the field and attached an affidavit from Dr. Ghatan, the chair of neurosurgery at Mount Sinai West and Mount Sinai Morningside. Dr. Ghatan opined that the cause of the victim's death was pre-existing conditions resulting from birth injury and other events, and not from SBS.

Without holding a hearing, the trial court found that appellant failed to meet his burden as to at least two *Timberlake* requirements. As to the first requirement, the court found that the sort of evidence offered as new — a different expert interpretation of the medical records that were used at trial — categorically did not meet the definition of newly discovered evidence. Moreover, the trial court determined, the substance of the expert opinion on which appellant relied — in particular, "expert opinion to challenge the scientific basis of shaken baby diagnosis" — "has been available since the 1990s and was available at the time of the Defendant's trial[,]" and so was not "newly discovered." The trial court concluded that, for similar reasons, appellant also failed to satisfy the second *Timberlake* requirement because he had not shown that he could not have obtained through due diligence a medical expert to challenge at trial the medical conclusions of the State's experts.

First, the Court found that the trial court erred by categorically rejecting appellant's evidence as a basis for a new trial on the ground that it was opinion evidence, without holding a hearing. The text of OCGA § 5-5-23 does not exclude expert opinion evidence from the sort of evidence that may provide the basis for an extraordinary motion for new trial. The statute provides that the new evidence supporting such a motion may include "any material evidence, not merely cumulative or impeaching in its character but relating to new and material facts," that is discovered by the applicant after trial and presented to the court with the requisite diligence. Of course, expert opinion testimony is "evidence." It may be that expert opinion evidence does not fall within the term "facts," but the text of OCGA § 5-5-23 does not provide that the evidence in question must itself be "new and material facts." It requires only that the evidence must be *relating* to new and material facts. Expert opinion testimony may, indeed, relate to new and material facts.

Relying on *State v. Gates*, 308 Ga. 238 (2020), the Court determined that the trial court erred by denying appellant's extraordinary motion on the basis that "[e]xpert opinion does not constitute 'new and material facts'" and "opinion evidence … fails to constitute newly discovered evidence[,]" without considering whether the expert opinion that is offered as the primary support for appellant's motion relates to new and material facts. Thus, the Court stated, while it will leave that ultimate determination for the trial court to make in the first instance, appellant certainly offered a pleading sufficient to satisfy that standard for purposes of obtaining a hearing.

Next, the Court held that the trial court erred by denying the extraordinary motion without a hearing on the basis that appellant had failed to show that his motion was based on evidence that has come to his knowledge since the trial. Specifically, on its face, Dr. Ghatan's opinion could not have been offered at the time of trial, let alone in the 1990s. Dr. Ghatan's opinion as outlined in his affidavit purported to be based on developments that occurred *after* trial. Moreover, the extraordinary motion itself contains several statements of fact to the effect that the medical community's approach to infant head trauma has changed since the time of appellant's trial. In particular, the motion states that, around the time of appellant's trial, medical schools taught that shaking was the primary or exclusive cause of the so-called "triad" of subdural hemorrhage, retinal hemorrhages, and cerebral edema — and the AAP also took the position that this "constellation" of symptoms gave rise to a presumption of abuse and did not occur with short falls, seizures, or because of vaccination. Now, the motion states, "the medical and pediatric community agree that child abuse is no longer the presumptive diagnosis when an infant presents with head injuries. Instead, a thorough examination of the full medical record is necessary, as it may reveal one of numerous possible alternative and unintentional causes, including birth trauma." Many of these factual assertions in the motion and affidavit involve research, clinical observations, or organizational changes of position occurring after the time of trial. Assuming for the sake of the Court's analysis the truth of these statements in the extraordinary motion and supporting affidavit, appellant could not have discovered prior to trial the same factual and opinion evidence that he offers now.

Finally, the Court held that the trial court erred by denying the extraordinary motion on the pleadings on the basis that appellant had failed to show that he had exercised due diligence. Again, assuming the truth of statements contained in the extraordinary motion and supporting affidavit, appellant could not have discovered prior to trial the same factual and opinion evidence that he offers now. To the extent that the State challenged the credibility of the statements made in the extraordinary motion and supporting affidavit to the effect that scientific developments have in fact occurred subsequent to trial, and that Dr. Ghatan's opinion is in fact based on those developments, that presents a factual dispute calling for a hearing.

Thus, the Court concluded, the trial court erred by denying appellant's extraordinary motion for new trial on the ground that it was based on opinion evidence that could never support such a motion. The trial court also erred by denying the motion, without a hearing, on the alternative bases that appellant had not shown that his motion was based on evidence that has come to his knowledge since the trial or that he had brought that evidence to the court's attention with due diligence. The State did not oppose appellant's bid for a hearing on other grounds. The Court therefore vacated the trial court's order denying the motion and remanded for the trial court to consider the motion anew after affording appellant an evidentiary hearing.