Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING MARCH 24, 2023
Issue 12-23

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Search & Seizure; Cell Phones

State v. Wilson, S22A0967 (2/21/23)

Wilson was indicted for murder and other related offenses. Prior to trial, he moved to suppress evidence located in two cell phones that were in Wilson's possession when he was arrested. The trial court granted the motion and the State appealed.

The relevant evidence, briefly stated, showed that an investigator sought a search warrant "for a forensic examination" of the cell phones. The investigator completed a sworn affidavit and submitted it to the magistrate in support of the search warrant application. Other than the information contained in the search warrant affidavit, no other material or testimony was provided to the magistrate. The magistrate subsequently issued a warrant that authorized a forensic search of Wilson's cell phones "to be completed in order to obtain any and all stored electronic information, including but not limited to; user account information, stored phone information, images, text messages, videos, documents, e-mails, internet activity, call logs, contact information, phone information, or any deleted data." The warrant further included preprinted form language stating that "[t]he foregoing described property, items, articles, instruments, and person(s) to be searched for and seized constitute evidence connected with the foregoing listed crime(s) and is/are: (check all that are applicable) (OCGA § 17-5-21)." The swearing officer then checked four boxes on the preprinted form, indicating that investigators believed the cell phones were: "intended for use in the commission of the crime(s) herein described;" "used in the commission of the crime(s) herein described;" "tangible, corporeal or visible evidence of the commission of the crime(s) set forth above," and "intangible, incorporeal or invisible evidence of the commission of the crime(s) set forth above."

The Court noted that while the State conceded that the warrant "broadly target[s] the data" in Wilson's cell phones, the State argued that when read as a whole, the warrant sufficiently limits the search of the phones to evidence connected with the crimes. The Court disagreed. The Court stated that as the State acknowledged, the search warrant broadly authorizes the seizure of "any and all stored electronic information" on the phones, "including but not limited to" various kinds of electronic information. The State pointed to the preprinted form language following this sweeping authorization as "limiting" in nature. However, the Court found, that language clearly states that "[t]he foregoing described property"—that is, "any and all stored electronic information" on the phones—"constitutes evidence connected with the crimes." Thus, the Court determined, this language could not plausibly be read, as the State suggests, to limit the otherwise limitless authorization to search for and seize any and all data that can be found on Wilson's cell phones. Indeed, the warrant's complete absence of limiting language distinguishes it from other warrants which the Court has upheld in prior cases based on the presence of so-called "residual clauses" or other limiting language. Therefore, the Court concluded, because the

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warrant was not sufficiently particularized, the trial court did not err in concluding that the warrant authorized an impermissible general search of Wilson's cell phones.

Nevertheless, relying on *Davis v. United States*, 564 U.S. 229, 241 (III) (131 SCt 2419, 180 LE2d 285) (2011), the State contended that the evidence obtained from Wilson's cell phones is admissible under the good-faith exception to the exclusionary rule. But, the Court stated, this good-faith exception applies to searches conducted by police officers in objectively reasonable reliance on binding appellate precedent that is later overruled. The State asserted that the search here was lawful under current Georgia precedent, and that if the Court concluded otherwise, the Court would be "revising" its precedent. However, the Court stated, the State incorrectly assumed that it must overrule Georgia precedent in order to affirm the trial court's order. But well-established legal precedent supports the Court's conclusion that the trial court properly suppressed the cell phone evidence in this case. As a result, *Davis* does not apply and the State's argument failed. Accordingly, the Court affirmed the trial court's order granting Wilson's motion to suppress.

Statutory Right to a Speedy Trial; Unsworn Juries

Bowman v. State, S22G0303 (2/21/23)

Appellant was indicted on one count of aggravated child molestation, six counts of child molestation, and two counts of incest. During the next term of court, he filed a Demand for Speedy Trial pursuant to OCGA § 17-7-170 and an Assertion of Constitutional Right to Speedy Trial. Later in that same term, appellant's trial began but unbeknownst to either party, neither the court nor the court clerk administered the jury oath required by OCGA § 15-12-139, which says: "In all criminal cases, the following oath shall be administered to the trial jury: 'You shall well and truly try the issue formed upon this bill of indictment (or accusation) between the State of Georgia and (name of accused), who is charged with (here state the crime or offense), and a true verdict give according to the evidence. So help you God.' The judge or clerk shall administer the oath to the jurors." Appellant was subsequently convicted.

More than four years later, in an amended motion for new trial, appellate counsel alleged that the failure to swear the jury was a structural error. At a hearing, the State informed the court that it had investigated the matter and determined that the jury oath was never administered to the 12 citizens who purported to decide appellant's case. The court entered a consent order setting aside the verdicts, appellant's judgment of conviction, and his sentence, and reinstated his case to active status on the court's trial calendar. Subsequently, through new counsel, appellant filed a motion seeking to be discharged because he was not tried within the time limits of OCGA § 17-7-170. The court agreed and appellant was released from custody.

The State appealed and in *State v. Bowman*, 361 Ga. App. 465 (2021), the Court of Appeals reversed, holding that a "trial" by an unsworn group of citizens satisfies the requirements of OCGA § 17-7-170. The Court then granted appellant's petition for certiorari.

The Court noted that in *Slaughter v. State*, 100 Ga. 323, 324 (1897) it held that administration of the jury oath now codified at OCGA § 15-12-139 is an indispensable prerequisite to a legally valid jury trial. *Slaughter* held that because no attempt had been made to comply with the jury oath statute, there was no trial at all, because there was no lawful jury. In other words, the administration of the jury oath is what turns the 12 citizens selected to hear a criminal case into a jury invested with the authority to decide whether the accused is guilty of a crime. Without the oath, there is no jury; and without the jury, there is no trial. A proceeding conducted before 12 citizens who have not taken the jury oath is nothing more than an "attempted trial," which does not satisfy the requirements of OCGA § 17-7-170.

Accordingly, the Court concluded, the Court of Appeals' erred and it reversed the judgment of the Court of Appeals.

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Notices of Appeal; Supersedeas

Gonzalez v. State, S22A1303 (2/21/23)

Appellant was convicted of aggravated battery and felony murder. The Court questioned its jurisdiction to hear the case. The Court noted that at the time appellant filed his notice of appeal, two counts alleging cruelty to children remained pending before the trial court because the trial court had granted appellant's motion for new trial as to those counts. But shortly thereafter, the trial court granted the State's motion to dismiss the two pending counts. The State then filed a motion to dismiss the appeal under *Seals v. State*, 311 Ga. 739, 742 (2021).

The Court noted that when the trial court granted appellant's motion for new trial in part, it did so because of an instructional error, not insufficiency of the evidence. Thus, at the time appellant filed his notice of appeal, the two counts of child cruelty remained pending, such that the convictions for felony murder and aggravated battery did not constitute a final, appealable judgment. In *Seals*, the Court made clear that when one or more counts of an indictment remain pending following convictions on other counts, the defendant is authorized to appeal the judgment on the convictions only by following the procedures for interlocutory review set forth in OCGA § 5-6-34 (b). And when a criminal defendant is required to follow the procedures for interlocutory appeal to challenge an order, the supersedeas effect of the defendant's filing of a notice of appeal following the grant of an application for interlocutory appeal is governed by OCGA § 5-6-46. Thus, the Court determined, the relevant question concerns the supersedeas effect of a notice of appeal when a criminal defendant has failed to follow the required interlocutory appeal procedures.

The Court stated that even if an appeal is jurisdictionally defective from the outset, a notice of appeal generally acts as supersedeas until the appeal is dismissed. However, the filing of a notice of appeal in a civil case from an order that is appealable only under OCGA § 5-6-34 (b) does not act as a supersedeas in the absence of an order from the appropriate appellate court granting the interlocutory application and does not nullify actions taken by the trial court following the filing of the notice of appeal. See *Islamkhan v. Khan*, 299 Ga. 548, 551-552 (2016). OCGA § 5-6-34 (b) applies in both civil and criminal cases. Thus, the Court concluded, the rationale of *Islamkhan* applies when a criminal defendant files a notice of appeal to challenge an order that is not directly appealable. For such a notice of appeal to be effective, it would have to have been filed after the appropriate appellate court had granted an interlocutory application. Of course, the Court stated, only an appellate court has the authority to determine if a notice of appeal is effective, and a trial court lacks jurisdiction to dismiss a procedurally improper notice of appeal.

Therefore, the Court held that appellant's timely filing of a notice of appeal from the entry of the judgment of conviction on the felony murder and aggravated battery counts, which notice of appeal was unauthorized in the absence of an order from the Court granting an interlocutory application, did not preclude the trial court from dismissing the child cruelty counts that remained pending. Accordingly, the trial court's entry of an order of dismissal resolved the pending child cruelty counts, resulting in a final judgment that was appealable under OCGA § 5-6-34 (a). In so holding, the Court distinguished footnote 2 in *Seals* which implied a contrary answer to the question presented in this case.

In summary, because the trial court's prompt dismissal of two pending child cruelty counts rendered the judgment final, appellant's previously filed premature notice of appeal ripened. Consequently, the Court determined, the appeal was properly before the Court.

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Juries; Exposure to Extra-judicial conversations

Charles v. State, S22A1080 (2/21/23)

Appellant was convicted of malice murder and related offenses relating to the shooting death of appellant's girlfriend. Briefly stated, the record showed that following a 15-minute recess, the trial court was made aware of a conversation had between the victim's mother and appellant's mother in the Ladies' Room and which may have been overheard by jurors. The Court heard from the victim's mother, who stated that appellant's mother "just said that she was sorry and she wished it could have been her." When asked if there was "any conversation about what may have happened," the victim's mother nodded her head "negatively." When asked by the court about the conversation, appellant's mother stated, ""I just — she was crying and I just hugged her and told her that I was so sorry. And if I could have took her daughter[']s place I would." When asked if "[t]hat's the total extent of the conversation," appellant's mother stated, "That was it." The court asked "[h]ow many jurors were in the restroom at the time," and appellant's mother responded, "I didn't know that there was any. I'm sorry. I thought they had all walked out. All I seen was her at the sink washing her hands, crying."

Appellant requested a mistrial, arguing that the conversation could have been construed by an overhearing juror as an admission that appellant's mother believed her son was guilty of the offenses. The Court then brought the jury back and questioned them as a whole. Satisfied with their collective response, the court denied the mistrial.

Appellant argued that "the trial court abused its discretion in failing to inquire more specifically whether any jurors overheard the conversation and what impact it might have had on them." Specifically, "the trial court offered a blanket instruction and asked if jurors could follow it" without determining "whether any of [the jurors] heard the conversation and what particular things they heard." Appellant further argued that, if jurors overheard the conversation, they could have inferred from the apology and expression of remorse that appellant's mother believed appellant had killed the victim.

The Court stated that appellant was correct that the wording of the court's yes-or-no question appeared to have impaired the court's ability to determine whether any juror overheard the restroom conversation and thus whether any juror irregularity might have occurred. The court's question to the jurors was compound, asking them both whether they had overheard a conversation related to the case and whether they could disregard such a conversation. As a result, the jurors' lack of a response to the question might have indicated either that the jurors *had not* overheard the conversation in the restroom or that they *had* overheard the conversation but believed they could disregard what they heard.

However, the Court found, under the circumstances, the court did not abuse its discretion by failing to determine whether jurors were exposed to the extra-judicial conversation between appellant's mother and the victim's mother. Through its questioning of the two mothers, the court established that "the total extent" of the conversation in the restroom was limited to appellant's mother stating that she "was so sorry" for the victim's mother's loss and that appellant's mother would have traded "place[s]" with the victim if she could. The victim's mother further confirmed that there was no discussion of "what may have happened" to the victim. Therefore, the Court found, based on the record, it could not say that the trial court clearly erred in finding that the extra-judicial statements were mere expressions of sympathy for what had happened to the victim, as opposed to an apology for any role appellant may have played in the victim's death, and that the expressions of sympathy did not give rise to an inference that appellant's mother believed appellant had committed the offenses for which he was being charged. Consequently, any juror irregularity that might have occurred was an immaterial irregularity without opportunity for injury and thus, the record established beyond a reasonable doubt that no harm occurred. Accordingly, the court concluded, the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

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Sentencing; Remorsefulness

Taylor v. State, S22A1003 (2/21/23)

Appellant was convicted of the aggravated battery of one victim and the malice murder of another victim. At sentencing, the following exchange occurred: THE DEFENDANT: I just want to say I'm sorry. But I also want to say I'm sorry for taking an innocent man's life. THE COURT: It is clear from the evidence in this case that this was a result of substance abuse of a long nature. Mr. Taylor, you did not accept responsibility for your actions. The State prior to trial in this case offered you an opportunity to accept responsibility, and offered you a sentence of life with the possibility of parole. THE DEFENDANT: Yes, ma'am. THE COURT: You declined to accept that and you declined to accept or admit any responsibility for this action. And you come from a good and loving family.

Appellant contended that the trial court erred by using his decision to forgo a plea deal as a consideration during sentencing. Appellant did not rely on a "presumption of vindictiveness" in advancing his claim, and instead pointed to what he deemed the trial court's "improper consideration of the rejection of a plea deal." Specifically, the record showed that the trial court punished him for choosing to exercise his right to trial because the proximity of the court's statement that appellant "declined to accept" the plea with its finding that appellant "declined to accept or admit any responsibility" necessarily implied that the court considered appellant rejecting the plea deal in assessing whether he accepted responsibility. He contended that inference was particularly strong because the record—which showed him stating three times during sentencing that he was sorry and also stating that he "accepted responsibility"—contradicted the trial court's finding that appellant "did not accept responsibility" and "did not show any remorse."

The Court stated that although the trial court's reference to appellant declining the State's plea offer—particularly in such close proximity to its finding that appellant "declined to accept or admit any responsibility"—could be viewed as implying that the trial court equated appellant rejecting a plea (and then exercising his right to trial) with a lack of acceptance of responsibility and remorse, it could not say that was definitively so. At most, appellant showed that the record was ambiguous with respect to the court's motive in sentencing appellant. The Court stated that it reached this conclusion in large part because after making the potentially problematic statements, the trial court expressly stated that "the sentence [wa]s not intended to punish [appellant] for exercising [his] right to trial," and that the sentence was based on the court's finding that appellant "did not accept any responsibility or show any remorse." And the record could be viewed as supporting that conclusion: the trial court was authorized to evaluate appellant's credibility and the genuineness of his remorse, and it was authorized to discredit appellant's statement that he accepted responsibility for the crimes—especially given that he immediately followed one of his apologies by saying "I would accept manslaughter" (not the murder charge for which he was convicted) "because that is what I felt like I have done"—a comment that the trial court could have viewed as undermining the genuineness of any or all of appellant's apologetic statements.

Nevertheless, the Court stated, if the trial court exercised its discretion to give appellant the maximum available sentence because it did not, in fact, believe his multiple apologies were genuine, or because his professed acceptance of responsibility was not credible, the better course under these particular circumstances would have been for the trial court to make those findings on the record and make no suggestion—implicit or explicit—that the exercise of appellant's constitutional right to trial motivated the trial court's sentence. But viewing the record as a whole, and in light of the presumption that the trial court knew and applied the law, the Court concluded that appellant did not carry his burden of showing that the trial court penalized him for exercising his right to trial.

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Insanity Defense; Legal opinions of Experts

Middlebrooks v. State, S22A1328 (2/21/23)

Appellant was convicted of murder and cruelty to children in the first degree in connection with the stabbing death of her daughter, Sky. Appellant raised an insanity defense at trial. In relevant part, the State presented Dr. Vitacco's expert testimony to rebut the testimony of appellant's expert witnesses that they found no evidence of malingering, either in appellant's past mental health records or in their own evaluations. At the end of Dr. Vitacco's direct testimony, the prosecutor asked him "what happens when a person is found not guilty by reason of insanity?" Defense counsel did not object before Dr. Vitacco responded that the person "would come to our hospital for a period of 30 days. And then we would evaluate that individual … to determine if they were mentally ill … and dangerous to themselves or others. And then we would have a hearing in 30 days to determine if they could be released[, as required by] state law[.]" The prosecutor asked, "[b]y law, if that person is not a danger to themself or others and is not suffering from a mental illness, what is the [c]ourt obligated to do?" Dr. Vitacco answered, "[A]ccording to the Supreme Court[, the trial court would] be obligated to release that individual." Appellant's counsel objected to "this man giving a legal opinion" and moved to strike the testimony, arguing that "Georgia law tells us what the law is. [Such a person does not] get out until you say they get out. … [T]he [j]udge gives the law … not the State's witness." The trial court overruled the objection and declined to strike the testimony.

Appellant contended that the trial court abused its discretion in overruling her objection to Dr. Vitacco's testimony about what happens after a jury finds a criminal defendant not guilty by reason of insanity and in denying her motion to strike the testimony. She argued that the testimony constituted improper legal opinion testimony and that the law should have come only from the judge. In addition, appellant contended that Dr. Vitacco's testimony paraphrased parts of OCGA § 17-7-131, pertaining to evaluation and commitment following a verdict of not guilty by reason of insanity, information that should not have been conveyed to the jury, and that his paraphrase was incomplete and misleading.

The Court found that Dr. Vitacco introduced aspects of the consequences of a verdict of not guilty by reason of insanity that appear in parts of OCGA § 17-7-131 and the statutory criteria for involuntary civil commitment that were not pertinent to the issues to be decided by the jury. And he did so in a way that could have been misleading. Specifically, Dr. Vitacco referred to an evaluation at "our hospital," while the statute provides that a person found not guilty of a crime by reason of insanity would be detained at a state mental health facility chosen by the Department of Behavioral Health and Developmental Disabilities. More importantly, his statement that, after 30 days' evaluation, "we would have a hearing" to determine whether the person was legally entitled to be released obscured the fact that the trial court would "retain jurisdiction" over appellant, and that she could only be discharged from involuntary commitment by order of the trial court in accordance with procedures specified in OCGA § 17-7-131 (f).

Furthermore, the Court stated that if could see where Dr. Vitacco's testimony about the consequences of a verdict of not guilty by reason of insanity, if credited by jurors as a correct statement of applicable law, could have reinforced, rather than corrected, any misconceptions jurors may have had that only a guilty verdict would prevent appellant's nearly immediate release. If taken in this light, Dr. Vitacco's testimony undermined an essential purpose of OCGA § 17-7-131. Thus, the Court found, given the narrow focus of the statutorily prescribed jury instructions, the State should not have elicited such extraneous testimony. Assuming the trial court erred in allowing the testimony to stand, the Court turned to a consideration of whether the error was harmless.

The Court noted that the State's burden under the applicable harmless-error test — showing that it is highly probable that the error did not contribute to the verdict — is a heavy one. Even so, to overturn the jury's verdicts on the basis of Dr. Vitacco's improper testimony, there must be more than a theoretical possibility that the error contributed to the verdicts.

In assessing nonconstitutional error, the Court stated that it does not look to a single aspect of Dr. Vitacco's testimony, divorced from the context of the entire trial. Instead, the Court considers all of the evidence, and weighs the evidence as it would expect reasonable jurors to have done. Having reviewed all of the evidence de novo and weighed it as it would expect reasonable jurors to have done, the Court concluded that it was highly likely that Dr. Vitacco's brief testimony about the general consequences of a verdict of not guilty by reason of insanity was not an important factor for the jury compared to the substantial evidence that appellant had the mental capacity to distinguish right from wrong in killing Sky. Because it was highly probable that the trial court's ruling on appellant's objection and motion to strike the testimony did not contribute to the verdict, a new trial was not warranted.