Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING MARCH 31, 2023
Issue 13-23

THIS WEEK:

- **Gang Act Violations; Sentencing**
- **Venue; Circumstantial Evidence**
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- **Search & Seizure; OCGA § 17-5-27**
- **Due Process; Failure to Preserve Evidence**
- **Ineffective Assistance of Counsel; Blood Tests**

Gang Act Violations; Sentencing

Monroe v. State, S22A1116 (3/7/23)

Appellant was convicted of numerous Gang Act violations and numerous charges of possession of a firearm during the commission of a crime. He contended that the trial court erred when it failed to merge the Gang Act charges listed in Counts 6, 7, 22 through 33, 46, and 47 with the Gang Act charges listed in Counts 34, 35, 38, 39, and 48 because the crimes in these counts alleged the same conduct, included the same victims, and were proven by the same facts at trial. The Court noted that OCGA § 16-15-4 (a) states that "[i]t shall be unlawful for any person employed by or associated with a criminal street gang to conduct or participate in criminal gang activity through the commission of any offense enumerated in paragraph (1) of Code Section 16-15-3" and OCGA § 16-15-4 (b) makes it illegal "for any person to commit any offense enumerated in paragraph (1) of Code Section 16-15-3 with the intent to obtain or earn membership or maintain or increase his or her status or position in a criminal street gang." Appellant contended that all of the crimes charged as violations of OCGA § 16-15-4 (a) should have merged as a matter of fact into the crimes charged as violations of OCGA § 16-15-4 (b) pursuant to the required evidence test of *Drinkard v. Walker*, 281 Ga. 211 (2006).

The State, however, argued that the plain language of OCGA § 16-15-4 (m), which provides that "[a]ny crime committed in violation of this Code section shall be considered a separate offense," shows the legislature's intent to allow for double punishment under the Gang Act. The Court noted that it has held that OCGA § 16-15-4 (m) allows separate punishment for both participation in criminal gang activity and for the predicate offense through which the participation in gang activity is established. However, the question of whether the language of subsection (m) provides for separate sentences for violations of different subsections of the Gang Act had not been addressed by this Court.

The Court stated that it is well settled that the legislature remains free under the Double Jeopardy Clause to define crimes and fix punishments. Accordingly, in order to determine whether the required evidence test of *Drinkard* applies, it must determine if the legislature has provided for double punishments within the relevant section of the Gang Act.

The Court noted that OCGA § 16-15-4 (m) states that "[a]ny crime committed in violation of this Code section shall be considered a separate offense." Therefore, the plain language of this provision evidences the legislature's clear intent to designate certain crimes as "separate offense[s]" subject to separate punishments. Those crimes that constitute separate offenses under subsection (m) are specifically "crime[s] committed in violation *of this Code section*." (Emphasis supplied). Subsection (m) appears within "Code section" 16-15-4. Thus, subsection (m) indicates that the crimes which should be treated as "separate offense[s]" are those violations of law defined in OCGA § 16-15-4, including, as relevant here,

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violations of subsections (a) and (b), each of which specify that "[i]t shall be unlawful" for a person to engage in certain conduct. Accordingly, the Court held, because the plain language of OCGA § 16-15-4 (m) indicates the legislature's intent to punish as "separate offenses" violations of subsections (a) and (b), charged violations of those subsections cannot merge. Consequently, appellant's 5 violations of OCGA § 16-15-4 (a) found in Counts 6, 7, 22 through 33, and 46, did not merge into his 6 counts of violating OCGA § 16-15-4 (b) found in Counts 34, 35, 38, 39, 47, and 48.

Nevertheless, the Court added, it agreed with appellant that the trial court erred in sentencing him on two counts. Count 47 charged that appellant possessed a firearm "with the intent to *maintain* his status," in violation of OCGA § 16-15-4 (b), while Count 48 charged that he possessed the same firearm "with the intent to *increase* his status," also in violation of OCGA § 16-15-4 (b). Citing *Nolley v. State*, 335 Ga. App. 539, 545, 547 (2016), the Court stated that that there is no statutory basis to conclude that the Legislature intended that proof of intent to "maintain" status or position in the gang would constitute a separate "unit of prosecution" in OCGA § 16-15-4 (b) from proof of intent to "increase" status or position in the gang. Accordingly, because the charges in Counts 47 and 48 were duplicative and resulted in appellant being punished twice for a single offense, the Court vacated appellant's convictions on Counts 47 and 48 and remanded for resentencing on only one of those counts.

Appellant next argued that the trial court erred by imposing a 10-year sentence for each of the weapon charges listed in Counts 11, 13, 15, 17, 19, and 21. The Court noted that appellant was tried on a 48-count indictment, which included seven charges of possession of a firearm during the commission of a crime. The Court noted that appellant was properly sentenced to five years on the first weapon charge (Count 3). However, when the trial court reached the weapons charges in Counts 11, 13, 15, 17, 19, and 21, it determined erroneously that these charges were separate convictions triggering the enhancement provisions of OCGA § 16-11-106 (c), which states that, "[u]pon the second or subsequent conviction of a person under this Code section, the person shall be punished by confinement for a period of ten years."

The Court stated that where, as here, there are several crimes arising from the same conduct that are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution. Appellant was tried on a multi-count indictment in a single prosecution. He was not convicted of a crime until he was found guilty by a jury and a sentence was entered by the trial court. Thus. because the weapon charge convictions did not qualify as a "second or subsequent conviction" for sentencing purposes, appellant could only be sentenced to five years on each count for possessing a firearm during the commission of a crime. Accordingly, the Court held that the trial court erred by imposing separate 10-year sentences on Counts 11, 13, 15, 17, 19, and 21 and consequently vacated these sentences and remanded for resentencing.

Venue; Circumstantial Evidence

Allaben v. State, S23A0061 (3/7/23)

Appellant was thrice convicted of malice murder arising from the strangulation death of his wife, Maureen. The first two convictions were overturned by the Court. See *Allaben v. State*, 294 Ga. 315 (2013) (*Allaben* I) and *Allaben v. State*, 299 Ga. 253 (2016) (*Allaben* II). The evidence, very briefly stated, showed that when Maureen did not show up for work on January 4, her coworkers went to her house in Dekalb County to check on her. That same day, appellant and the couple's two children showed up at appellant's sister-in-law's house in Virginia. After appellant told her that Maureen died by accident and the body was in the back of his truck, she told him to leave and then called the police. Appellant showed up the next day in Clayton County at the home of a former coworker. The coworker and appellant then surrendered to the police and a Clayton County officer found the body in the back of appellant's truck.

Appellant contended that the State failed to prove venue in Dekalb County where he was tried for the murder of Maureen. Specifically, he contended that the State failed to question its witnesses about when and where Maureen died and because her body was discovered in Clayton County. The Court disagreed.

The Court stated that venue is a jurisdictional fact that the State must prove beyond a reasonable doubt and can do so by direct or circumstantial evidence. Thus, even if no witness was ever directly asked to identify the county in which the cause of death was inflicted, or in which the events surrounding the victim's death occurred, the evidence nevertheless could have been sufficient for the jury, under an appropriate instruction from the trial court, to find beyond a reasonable doubt that venue was properly laid.

And here, the Court found, the circumstantial evidence in this case that venue was proper in DeKalb County included the following. When Maureen did not go to work on the morning of January 4, her co-workers went to appellant's marital residence in DeKalb County and found Maureen's minivan there. While driving from Georgia to Virginia, appellant admitted to his children that he had already killed Maureen, and after arriving in Virginia, he admitted to his sister-in-law that his wife's body was in the truck that he had driven from Georgia. Maureen was not dressed for leaving home but was only partially clothed. A blue moving blanket found at the appellant's DeKalb County house was of the same kind that was wrapped around Maureen's body. Given this evidence, the Court concluded, the jury could reasonably infer that Maureen was strangled to death in the DeKalb County house, wrapped in a moving blanket kept in the house, carried to appellant's truck, and then driven away. Moreover, until appellant returned to Georgia with his wife's body and went to his former co-worker's home in Clayton County, there was absolutely no evidence that Clayton County had any connection whatsoever to his wife's murder. In addition, several law enforcement officers and the medical examiner testified that they were employed by DeKalb County when they worked on the case, even though the victim's body was first made available to law enforcement in Clayton County.

Accordingly, the Court held, viewed in the light most favorable to the verdict, and pursuant to OCGA § 17-2-2 (h), the circumstantial evidence was sufficient to authorize a rational jury to find beyond a reasonable doubt that the murder of Maureen "might have been committed" in DeKalb County.

Pro Se Defendants; Access to Digital Discovery Materials

Behl v. State, S23A0377 (3/7/23)

Appellant was convicted of felony murder and a weapons charge. Two months before trial, appellant's public defender successfully moved to withdraw, and appellant was given permission by the court to self-represent. The record indicated that, prior to counsel withdrawing, the State provided to appellant's counsel a number of discs containing digital evidence, including photographs, police body-worn camera footage, and audio-and/or video-recorded statements, filing those items with the trial court. At appellant's *Faretta* hearing, appellant's counsel represented that he would give appellant "all of the discovery." The trial court then asked appellant whether he was "comfortable knowing you're going to get all of that information and have access to it through all of the discovery materials," and appellant responded, "Yeah, once I get the replacement copy." When appellant asked about what options might be available in the event that appellant was not provided necessary resources, the trial court responded, "If you feel like you're being denied resources that you're constitutionally entitled to, then you can file a motion in that respect." And in a subsequent order, the trial court directed the sheriff, his deputies, and the staff at the County Detention Center to give appellant "priority access to the law library and legal research materials at the jail" so that he could prepare for trial.

Following his convictions, appellate counsel contended that after electing self-representation, appellant was unable to review any of the discs provided in discovery. Counsel also represented that the County Detention Center "does not

permit pro se inmates to review discovery contained on DVDs and CDs." A hearing on the motion was held, but appellant introduced no evidence. The trial court denied the motion.

Appellant argued that the Georgia constitutional right to due process was violated when, while acting pro se, he was prevented from viewing discovery due to being incarcerated. The Court stated that a due process claim must be asserted in a timely fashion. And here, appellant pointed to no instance prior to or during trial in which he raised with the State or the trial court any issue with the ability to access the materials in question, and the Court stated that it found none in the record. Appellant filed no motion seeking access to the materials — despite the trial court having explained to him that filing a motion was an option if he were denied necessary resources. Appellant did not seek a continuance to review the materials in the courtroom. Appellant did not object to the admission of any testimony or other evidence — including photographs and the one digital recording, body-worn camera footage, that was admitted at trial — on the basis that he had not been able to review any digital materials. And appellant does not contest the trial court's finding that he was aware that the materials had been provided in discovery. In fact, the Court noted, the record showed that the State filed a list of "all discoverable material," including references to audio and video recordings, with the trial court nearly two years before appellant was granted the ability to proceed pro se. Thus, the Court concluded, under these circumstances, appellant waived any claim of a violation of due process based on any inability to access the materials in question.

In so holding, however, the Court stated in a footnote that "[a]lthough we do not reach the merits of whether any denial of access to discovery violated [appellant]'s constitutional rights, we note that some of us are concerned about the possibility — apparently accepted as true by the trial court — that a jail would as a matter of policy categorically deny a self-represented inmate access to all digital discovery materials, including materials the possession of which is not generally proscribed by law."

Search & Seizure; OCGA § 17-5-27

Underwood v. State, A22A1448 (1/27/23)

Appellant was convicted of trafficking in methamphetamine and possession of tools for the commission of a crime. The evidence showed that after conducting a buy from appellant's home using a wired CI, the officers obtained a search warrant for the residence. As the house's own surveillance cameras recorded the scene, the officers knocked on the door of the residence and announced their presence and purpose, saying, "Sheriff's Office, search warrant." After hearing a shuffling of feet as they continued to knock on the door, the officers opened the unlocked door and saw appellant sitting on a couch a few feet inside. The lapse of time between the first knock and the entry was not more than three seconds.

Appellant contended that the trial court erred when it denied her motion to suppress because police entered her house only three seconds after announcing their presence. Specifically, she contended that the police entry violated OCGA § 17-5-27. A divided court disagreed.

The Court noted that that OCGA § 17-5-27 provides: "*All necessary and reasonable force may be used to effect* an entry into any building or property or part thereof to execute a search warrant if, after verbal notice or an attempt in good faith to give verbal notice by the officer directed to execute the same of his authority and purpose: (1) *[h]e is refused admittance*; (2) *[t]he person or persons within the building or property or part thereof refuse to acknowledge and answer the verbal notice* or the presence of the person or persons therein is unknown to the officer; or (3) [t]he building or property or part thereof is not then occupied by any person. (Emphasis supplied). The State conceded that subsection (3) of the statute, concerning unoccupied properties, did not apply here, and appellant did not contest the validity of the search warrant itself. The only question, then, was whether police were authorized to enter the house three seconds after giving "verbal notice" to the occupants.

The Court stated that a law enforcement officer entering an occupied residence for the purpose of executing a search warrant is required to give or attempt to give verbal notice of his authority and purpose. And here, it was undisputed that after announcing their presence, the officers heard "shuffling" inside rather than any verbal response, and relying on *Swan v. State*, 257 Ga. App. 704, 706 (3) (2002) the Court found that a three-to five-second time lapse between announcement and entry complied with OCGA § 17-5-27 (1) and (2).

Nevertheless, the Court noted that with the benefit of hindsight, appellant implied that the absence of firearms at her residence rendered the situation less dangerous such that a rapid response to the occupants' apparent "refus[al] to acknowledge and answer the verbal notice" was unreasonable. But, the Court stated, the only relevant inquiry was whether, at the moment they entered the house, police might have reasonably expected to encounter firearms or other resistance to the search and its purpose, including the destruction of contraband, such that their decision to delay entry for only a short time was reasonable. And, "[b]ecause we believe that these officers' decision to enter this drug house only three seconds after knocking was objectively reasonable, we affirm."

Due Process; Failure to Preserve Evidence

State v. Newberry, A22A1467 (1/30/23)

Newberry was indicted for furnishing methamphetamine, marijuana, and tobacco to an inmate in violation of OCGA § 42-5-18 (b) and for crossing the guard lines with methamphetamine in violation of OCGA § 42-5-15. The evidence showed that the warden, while observing inmate visitation on a live video feed, saw Newberry pull something out of her waistband and give it to her inmate son. The son was searched as well as Newberry's vehicle and the contraband was discovered.

After making repeated requests for the video footage, Newberry filed a motion to compel discovery. When the State responded that it had no video footage of the incident in its possession, Newberry filed a motion to dismiss the charges against her. In her motion, Newberry argued that the video footage would demonstrate that she did not commit the charged crimes, and that she had no way to obtain comparable evidence by other means.

At the hearing, the warden testified that the video footage of the visitation incident was not available to be provided to the defense because the prison had undergone computer and camera system upgrades and on that particular weekend, they were able to view live footage, but could not download the footage to a disk for evidence purposes. The warden acknowledged that the system had worked the weekends prior to and following the incident and that "policy states that every visitation has to be recorded and reviewed by the chief of security that following Monday to check for any discrepancies" and to ensure that "staff is following policy and procedures when it comes to shaking down the visitation area." He testified that any footage of the incident at issue could no longer be accessed because the system had been completely upgraded.

The trial court ruled that the missing video footage was material, and its "apparent exculpatory value" was the fact that "the State stated it was able to observe [Newberry] transfer contraband to the inmate and connect other evidence later gathered in the Investigator's search." The court also ruled that the State acted in bad faith in failing to preserve the evidence because the prison officials did not comply with Georgia Department of Corrections regulations requiring them to maintain video recordings of prisoner visitation. The State appealed both rulings.

The Court stated that in evaluating whether a defendant's constitutional right to due process was violated when the State failed to preserve evidence that could be exculpatory, a court must determine both whether the evidence was material and whether the police acted in bad faith in failing to preserve the evidence. To meet the standard of constitutional materiality, the evidence must possess an exculpatory value that was apparent before it was destroyed and be of such a nature that the

defendant would be unable to obtain comparable evidence by other reasonably available means. And when considering materiality, the fact that evidence may be "potentially useful" in a defendant's attempt at exoneration is insufficient to sustain a claim that the defendant has suffered an abridgment of due process of law due to the destruction or loss of the evidence. The key is the "apparent exculpatory value" of the evidence prior to its destruction or loss and "apparent" in this context has been defined as "readily seen; visible; readily understood or perceived; evident; obvious."

The Court found that the only evidence regarding the content of the missing video footage was that it showed Newberry's commission of the charged crimes and was therefore inculpatory. The record did not show that any exculpatory value of the footage was apparent before it became unavailable. As a result, the evidence was not constitutionally material, and the trial court therefore erred in granting Newberry's motion to dismiss the indictment. And, given this conclusion, the Court stated that it did not need to address the trial court's finding that the State acted in bad faith in failing to preserve the evidence.

Ineffective Assistance of Counsel; Blood Tests

Swanson v. State, A22A1554 (2/1/2023)

Appellant was convicted of DUI (less safe). The record showed that during the course of his testimony, the officer explained various standardized field sobriety tests that can be performed on a suspect and then included, "Is it required to do these to convict somebody of DUI? No." Appellant contended that the officer's comment that field sobriety tests are not necessary for a DUI conviction violated the ultimate issue rule, and his trial counsel was ineffective in failing to object to that testimony.

The Court state that while a witness generally may testify to an ultimate issue of fact, he may not testify as to his opinion regarding ultimate legal conclusions. Courts must remain vigilant against the admission of legal conclusions, and an expert witness may not substitute for the court in charging the jury regarding the applicable law.

However, even if the officer's testimony was objectionable and trial counsel was deficient in failing to object, appellant failed to prove prejudice. Here, the Court found, the evidence against appellant was very strong. Furthermore, the officer's testimony regarding field sobriety testing was a correct statement of the law and thus did not mislead the jury about the law applicable in this case. Additionally, the jury was instructed that, in deciding whether a driver was under the influence of alcohol to the extent that it was less safe for him to drive, the jury could "consider anything — any evidence that you find relevant in deciding whether the defendant was a safe driver," including "*among other factors*" whether "any tests indicated the presence of alcohol in the defendant's system." (Emphasis supplied.) Thus, the instructions to the jury made clear that evidence of testing was not dispositive in determining the defendant's guilt, and it is presumed that jurors follow the instructions of the trial court. Therefore, the Court concluded, given the strength of the evidence, the fact that the officer's testimony did not misstate the law, and the fact that the jurors were properly instructed on what evidence they could consider, appellant did not establish a reasonable probability that the result of the trial would have been different if his counsel had objected to the testimony.

Appellant also argued that his trial counsel was ineffective in failing to seek suppression of evidence that he refused to take the State-administered blood test requested by the Officer. However, the Court noted, in contrast to a refusal to take a breath test, admission of a defendant's refusal to consent to blood testing does not implicate the constitutional right against self-incrimination and is admissible. Ineffective assistance premised on a failure to file a motion to suppress requires a strong showing that the motion would have been granted and because appellant could not make such a showing, his ineffective assistance claim failed.