Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 13, 2018

THIS WEEK:

Ineffective Assistance of Counsel; Immigration Status

State v. Aduka, S17A1717 (3/15/18)

Aduka is a citizen of Nigeria. In 2012, he pled guilty to a single count of offer for sale of Counterfeit Goods in violation of OCGA § 10-1-454. During the plea colloquy with the trial court, Aduka stated he understood that entering a guilty plea "may have an impact" on his immigration status and he understood that his guilty plea "could mean [he] could be deported." The trial court sentenced him to five years of "confinement" to be served entirely on probation and ordered him to pay a fine. In 2015, Aduka was arrested by immigration authorities due to his conviction. He filed a habeas petition alleged that plea counsel was constitutionally ineffective because he failed to advise him that pleading guilty to a violation of OCGA § 10-1-454 would subject him to mandatory deportation for committing an "aggravated felony" under federal law. The habeas court found plea counsel's informing Aduka that he "may" be deported was not reasonable upon a direct reading of the federal statute at issue. The State appealed.

The Court noted that the state of the law on April 10, 2012, the date on which Aduka entered his guilty plea, was such that anyone convicted of an offense of counterfeiting for which "the term of imprisonment is at least one year" was guilty of an "aggravated felony" under the Immigration and Nationality Act ("INA") and removable from the United States. See 8 USC §§ 1101 (a) (43) (R) (2011). But, at the time Aduka entered his plea, 8 USC § 1101 (a) (48) (B) (2011) provided as follows: "Any reference to a term of imprisonment or a sentence with respect to an offense is deemed to include the period of incarceration or confinement ordered by a court of law regardless of any *suspension* of the imposition or execution of that imprisonment or sentence in whole or in part." (Emphasis supplied.). However, because "suspension" is not defined, the statute does not on its face make clear if and how it applies in the context of those cases where, as here, a court sentences a noncitizen to a period of confinement for five years but then probates rather than "suspends" the entire prison term.

Thus, the Court found, the determination of whether 8 USC § 1101 (a) (43) (R) and 8 USC § 1101 (a) (48) (B) applied to Aduka's sentence was not "succinct and straightforward" at the time he entered his guilty plea in 2012. Although the answer, once Aduka was put into removal proceedings in an immigration court in the Eleventh Circuit, might be clear to an immigration judge or an immigration law expert studied in the decisional law as well as the INA, *Padilla v. Kentucky* does not require criminal defense attorneys to have the knowledge of immigration judges or experts. Aduka's criminal defense attorney was required to advise him that he "would" be deported only if that result was "truly clear."

Therefore, the Court concluded, plea counsel did not act outside the wide range of reasonable conduct afforded attorneys who represent criminal defendants, including those defendants who are noncitizens, when he advised Aduka that he "could be" deported, rather than informing him that he "would be" deported if he entered the plea in question. Accordingly, the judgment of the habeas court finding that plea counsel was ineffective was reversed.

Jury Instructions; Corroboration

Robinson v. State, S17A1903 (3/15/18)

Appellant was convicted of malice murder, two counts of felony murder, attempted armed robbery, possession of a firearm in commission of a felony, and possession of a firearm by a convicted felon. Relying on *Stanbury v. State*, 299 Ga. 125, 130 (2) (2016), he contended that the trial court committed plain error when it failed to instruct the jury on corroboration. Specifically, he argued that the trial court omitted the corroboration charge while also instructing the jury that the testimony of a single witness is sufficient to prove a fact, which was found to be plain error in *Stanbury*. The Court disagreed.

Here, the Court found, while the trial court omitted the corroboration charge, it did instruct the jury on the presumption of innocence and reasonable doubt, mere suspicion, mere presence, and impeachment and credibility, including that the jury could consider pending prosecutions and negotiated pleas. Moreover, the trial court instructed the jury that it must consider "whether the State has met its burden of proof as to Mr. Robinson, independent of the other defendants." Under these circumstances, the Court stated, it need not decide whether the absence of a correct instruction, rather than the presence of an incorrect instruction, is reversible error. Here, given the quantum of evidence, combined with the fact that the instruction was incomplete rather than overtly incorrect, appellant could not show that the instruction likely affected the outcome of the proceedings. Accordingly, there was no plain error.

Excited Utterances; Sentencing

Jenkins v. State, S17A1743 (3/15/18)

Appellant was convicted of felony murder, possession of a firearm during the commission of aggravated assault, and possession of a firearm during the commission of aggravated battery, all in connection with the shooting death of his 22-year-old son, Chavarious. The evidence, briefly stated, showed that appellant and his son argued in the living room of appellant's house. Appellant left and returned a minute later with a handgun. He pointed it at his son's head and threatened to kill him. The two struggled and the gun went off, hitting Chavarious in the head. Appellant then placed the pistol on a counter, went to the sofa, and held Chavarious. Appellant said to Cotton, who witnessed the events, "help me, I don't want to go to jail." At that point, Cotton left the house, and another person, who went into the living room after the gunshot, called 911.

Appellant told a law enforcement officer who arrived at his house a few minutes after the 911 call was placed that he was showing Chavarious his handgun when it accidently discharged. The State moved in limine to exclude the defense from introducing evidence of appellant's statement as inadmissible hearsay. Appellant contended that the trial court erred in agreeing with the State that the statement was inadmissible. The Court disagreed.

The Court noted that like OCGA § 24-8-803 (2), Rule 803 of the Federal Rules of Evidence creates an exception to the hearsay rule of exclusion for "[a] statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused." Fed. R. Evid. 803 (2). Although the passage of time between the event and the declarant's statement is not dispositive as to the admissibility of the statement, the trial court recognized that it is relevant to the critical inquiry — whether the declarant is still in a state of excitement resulting from that event when the declaration is made. And in that regard, even a brief period of time can provide a declarant an opportunity to couch a statement in such a way as to best serve his interests

Here, the Court found, not only was there a passage of time sufficient for appellant to formulate a specific version of the events to his advantage, but there was evidence supporting an inference that he actually did so, when he earlier asked Cotton to help him, and said he did not want to go to jail. Conversely, there was no evidence presented to the court of appellant's words or actions that showed he was actually experiencing stress or excitement at the time of his statement to the officer so as to eliminate the possibility of fabrication, coaching, or confabulation and provide sufficient assurance that the statement was trustworthy and that cross-examination would be superfluous. Thus, the Court concluded, given the totality of the circumstances, the trial court did not abuse its discretion in excluding evidence of appellant's statement to the responding officer from being placed before the jury on the basis that it was hearsay that did not fall under the exception set forth in OCGA § 24-8-803 (2).

The Court also noted that appellant received a sentence of five years in prison for the crime of possession of a firearm during the commission of aggravated assault, as well as a sentence of five years in prison for the crime of possession of a firearm during the commission of aggravated battery. But, the underlying crimes for each possession charge were committed on the same victim, as part of the same fatal encounter, and the possession charges thus merged with each other. Consequently, the Court remanded for appellant to be resentenced on only one of the possession counts, in the discretion of the trial court.

Statements; Hope of Benefit

Jones v. State, A17A1204 (2/28/18)

Appellant was convicted of burglary and armed robbery. Appellant contended that the trial court erred in denying his motion to suppress his confession. The evidence, briefly stated, showed that appellant was fourteen years old and in the ninth grade at the time of his arrest and his interrogations by the police. During the first Mirandized interrogation, a detective initially questioned appellant about his involvement in the burglary at Mycreatisha Davis's apartment, for which appellant was charged. Appellant admitted being the lookout in the Davis burglary and another burglary in Alabama. The detective asked appellant about other burglaries in the same apartment complex, but he denied involvement in any other burglaries. Appellant was then released to his mother. Thereafter, the police obtained information that appellant was involved in another burglary and an armed robbery. The police brought appellant down to the station for a second interview. During that interview,

appellant initially denied his involvement, but thereafter, based on the statements of the detective, he admitted his involvement in the burglary and armed robbery at issue in this case, despite having already denied it earlier in the prior interview.

Appellant contended that the trial court erred by admitting his incriminating statements to police because they were induced by the hope of a lighter punishment. The Court agreed. In determining whether a juvenile has given a statement voluntarily, a court considers nine factors set forth in *Riley v. State*, 237 Ga. 124 (1976). These are as follows: (1) the age of the accused; (2) the education of the accused; (3) the knowledge of the accused as to the substance of the charge and nature of his rights to consult with an attorney; (4) whether the accused was held incommunicado or allowed to consult with relatives or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) the methods used in interrogation; (7) the length of the interrogation; (8) whether the accused refused to give voluntary statements on prior occasions; (9) and whether the accused repudiated the extrajudicial statement at a later date.

Here, the Court found, the most notable *Riley* factor was the method used during the interrogation. Former OCGA § 24-3-50, now the nearly-identical OCGA § 24-8-824, provided at the time of appellant's trial, that to make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. It has long been understood that "slightest hope of benefit" refers to promises related to reduced criminal punishment — a shorter sentence, lesser charges, or no charges at all.

In reviewing the record, the Court found that in the second interview, the tone of the interview escalated as the detective grew frustrated with appellant's denials of involvement in any burglaries besides the Davis burglary. The detective shifted from asking questions to exhorting appellant to tell the truth about those burglaries, explicitly threatening appellant that he would be charged with the other burglaries if he did not tell the truth, and promising him not "to do anything" if he did tell the truth. Thus, the interview showed as follows: Detective: "Did I not tell you that if I found something out [after the first interview], I was going to come back and charge you? What happened?" Appellant: "You came back." Detective: "Alright, do you want to be charged with the other ones? … Didn't I promise you I wasn't going to do anything [after the first interview]? Am I not making that promise to you again?"

The Court found that in light of this explicit promise not to charge appellant with the other crimes under investigation (including the ones at issue) and his immediate confession thereafter, the trial court erred by concluding that appellant gave this confession without being induced by another by the slightest hope of benefit. Such a promise is much more than simply saying that his cooperation would be made known to the prosecution or judge. Instead, appellant was told that confessing to the crime would result in not being charged at all. This, the Court stated, "is exactly the hope of benefit which is prohibited under Georgia law." Therefore, appellant's confession was involuntary under the totality of the circumstances, it should have been suppressed at the *Jackson-Denno* hearing, and the trial court erred by denying appellant's motion for new trial.

9-1-1 Calls; Crawford

Legree v. State, A17A1782 (2/28/18)

Appellant was convicted of one count of family violence battery following a bench trial. The evidence, briefly stated, showed that the victim called 9-1-1 and identified herself as appellant's wife. The victim was seeking police assistance because appellant had just choked her. The victim stated that she just ran outside of the house and that she was currently hiding in the bushes because appellant was still walking around looking for her. An officer arrived six minutes later. He encountered appellant alone outside the residence. After speaking to him briefly, he went inside the house and spoke to the victim and a minor child that witnessed the physical altercation. Based on the statements that the officer obtained from the victim and the minor child and the visible bruising on the victim's collar bone, the police officer determined that appellant was the primary aggressor and placed him under arrest. The police officer was the only witness to testify at trial. After considering the 9-1-1 recording and the police officer's testimony, the trial court found appellant guilty of family violence battery.

Appellant argued that his constitutional right to confront his accusers was violated when the State failed to show that the victim and the minor child were unavailable to testify at trial and their out-of-court statements to the police officer at the scene were admitted into evidence over objection. The Court agreed. Under *Crawford v. Washington*, 541 U. S. 36, 68 (V) (C) (124 SCt 1354, 158 LEd 2d 177) (2004), the admission of out-of-court statements that are *testimonial* in nature violates the Confrontation Clause unless the declarant is unavailable and the defendant had a prior opportunity for cross-examination. Here, the Court found, there was nothing in the record to indicate why the victim and the minor child were absent from the trial proceedings, nor was there any showing as to what efforts were made by the State to secure their attendance at trial so that their testimony could be subject to cross-examination. Thus, the Court stated, whether appellant's constitutional rights to confrontation were violated under *Crawford*, depended on whether the victim and minor child's out-of-court statements to the police officer at the scene were "testimonial" or "nontestimonial" in nature.

First, the Court found that the 9-1-1 call did not come within the ambit of *Crawford*. These statements were made while the incident was ongoing. In the 9-1-1 call, the victim stated that appellant had just choked her, that she ran outside of the house, and that she was currently hiding in the bushes because appellant was walking around looking for her. These statements were made for the primary purpose of preventing the continuation of the domestic violence that was apparently occurring at that time, not for the purpose of establishing a past fact. Accordingly, the Court agreed with the trial court that the victim's statements in the 9-1-1 call were non-testimonial. Furthermore, as the entirety of the 9-1-1 call took place while the victim was perceiving the present danger posed to her by appellant, the statements therein were admissible under the present sense impression exception to the hearsay rule under OCGA § 24-8-803 (1).

However, the statements made by the victim and minor child after the officer arrived on the scene did not indicate that any crime was in progress at this point, or that there was an ongoing emergency with regard to the domestic dispute. Rather, these circumstances were indicative of the police officer's efforts

to gather information to determine if a crime had been committed. Although the officer did not testify as to his perception of the victim's demeanor at the time of the questioning or the specific questions he asked of her, his testimony indicated that the victim gave him all of the background facts leading up to the incident, as well as the specific facts regarding the physical assault. After observing the victim's injuries, which were consistent with the victim's account of the physical assault, the officer then proceeded to obtain a statement from the parties' minor child, who was an eyewitness. During the time the victim and minor child were being questioned by the police officer, appellant remained at the residence at the officer's request. Appellant posed no apparent threat to anyone, and the victim and the minor child made statements to the officer under circumstances that objectively indicate that the primary purpose of the interrogation was to establish the facts necessary for criminal prosecution. Therefore, the Court found, the admission at trial of the victim's and the minor child's statements to the police officer infringed upon appellant's constitutional right to confront the witnesses against him, since he had not had a prior opportunity to cross-examine the declarants about the contents of the hearsay statements. Moreover, since the trial court specifically relied on the victim and the minor child's out-of-court statements to the police officer in rendering its judgment of conviction, the Court reversed appellant's conviction and remanded the case for a new trial.

Sufficiency of the Evidence; Jury Instructions

Stroud v. State, A17A1679 (3/1/18)

Appellant was convicted of a single count each of possession of cocaine, failure to maintain lane, and driving with a suspended license. He contended that the evidence was insufficient to sustain his conviction for failure to maintain lane. The Court agreed.

Appellant was charged with a violation of OCGA § 40-6-48 (1), which provides, in relevant part, that "[w]henever any roadway has been divided into two or more clearly marked lanes for traffic … [a] vehicle shall be driven as nearly as practicable entirely within a single lane and shall not be moved from such lane until the driver has first ascertained that such movement can be made with safety." Thus, to convict a defendant of violating this statute, the State must prove that the road on which the defendant was driving at the time of the alleged violation was, in fact, "divided into two or more clearly marked lanes for traffic." Here, no evidence was presented to establish that street upon which appellant traveled was "divided into two or more clearly marked lanes." Thus, the evidence was insufficient to convict appellant of failure to maintain lane.

Appellant also argued that the trial court erred in failing to give his requested jury charge on the language of what was then OCGA § 24-4-6, which provides, "[t]o warrant a conviction on circumstantial evidence, the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused." The Court again agreed.

First, the Court noted, because appellant failed to object to the jury charge given at trial, the Court's review was limited to whether the refusal to give the requested charge constituted plain error. The Court stated that in 1994, the Supreme Court of Georgia established in *Mims v. State*, 264 Ga. 271, 272-273 (1994) a bright-line rule requiring a trial court to charge the jury on former OCGA § 24-4-6 when the State introduces both direct and circumstantial evidence against the defendant and the defendant requests such a charge. Thus, given this well-established law, the trial court's refusal to give the requested charge constituted plain and obvious error.

Next, the Court stated that in determining whether this error likely affected the outcome of the proceedings, the State's case against appellant for possession of cocaine was entirely circumstantial. Specifically, the evidence of possession consisted of the circumstance that the contraband was found in appellant's car. Thus, given that the evidence against appellant was not overwhelming and that appellant offered in his defense what the jury might have viewed as a reasonable hypothesis supporting his innocence, the Court found that this error likely affected the outcome of the proceedings.

Finally, the Court found that the trial court's refusal to give the requested charge seriously affected the fairness and integrity of the judicial proceedings. This conclusion was based not only on the obvious nature of the error, but also on the fact that the error both lessened the State's burden and usurped, to some degree, the function of the jury. Specifically, as the instruction was not given, the jury did not know that the State was required to exclude every reasonable hypothesis other than the accused's guilt and that the jury was required to determine whether such a hypothesis existed. Accordingly, the Court found that the trial court's refusal to give appellant's requested charge on former OCGA § 24-4-6 constituted plain error. The Court therefore reversed the denial of appellant's motion for a new trial on the charge of possession of cocaine.