Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 4, 2018

THIS WEEK:

Funds for Hiring an Expert Witness; Ineffective Assistance of Counsel

Williams v. State, S18A0001 (4/16/18)

Appellant was convicted of murder and other offenses relating to the beating death of a four-year-old. He contended that the trial court erred in denying him funds to obtain a medical expert. The Court disagreed.

In order to obtain funds for an expert witness, a motion on behalf of an indigent criminal defendant should disclose to the trial court, with a reasonable degree of precision, why certain evidence is critical, what type of scientific testimony is needed, what that expert proposes to do regarding the evidence, and the anticipated costs for services. Here, appellant made no showing to the trial court as to what the expert proposed to do regarding the evidence, or what the anticipated cost for the expert's services would be. Due to appellant's failure to provide sufficient information to the trial court to allow the court to make an informed decision about his need for assistance, the Court found that the trial court did not abuse its discretion in denying the motion for funds.

Appellant also argued that that his trial counsel was ineffective for failing to provide the trial court with sufficient information to allow it to grant his request for funds to hire an expert witness. The Court again disagreed. Assuming without deciding that trial counsel's performance was deficient in this regard, appellant has failed to show prejudice. Despite appellant's expert testifying at the motion for new trial hearing that the victim's injuries could possibly have occurred as the result of a fall, the expert ultimately agreed with the State's medical examiner that the victim most likely did not suffer the skull fracture and brain injury from falling onto a plastic truck, and that the cause of the fatal injury was blunt force trauma. Accordingly, appellant's claim that the victim's brain injury was caused by a short fall onto a toy truck would have remained with almost no support — even from his own expert — had this defense expert testified at trial. Appellant therefore failed to demonstrate a reasonable probability that the outcome of the trial would have been different had trial counsel obtained funds for his own medical expert to testify at trial.

Forfeiture-By-Wrongdoing; OCGA § 24-8-804 (b) (5)

Hendrix v. State, S18A0382 (4/16/18)

Appellant was convicted of felony murder and related crimes. He contended that the trial court erred in admitting into evidence statements made by Thomasina Hendrix, appellant's grandmother, to police pursuant to the forfeiture-by-wrongdoing exception to the rule against hearsay pursuant to OCGA § 24-8-804 (b) (5). The record showed that Thomasina voluntarily contacted the police

after appellant confessed to her that he shot the victim during a carjacking attempt that went awry. Thereafter, Thomasina received threats from appellant. At the courthouse during trial, appellant again threated her and told her not to testify. Thomasina was later called to the witness stand, and, when presented with transcripts of her prior interviews to refresh her recollection, she stated that she did not want to read it and that she did not want to remember what happened. The State then asked that Thomasina's prior statements to police be admitted into testimony pursuant to the forfeiture-by-wrongdoing exception to the rule against hearsay. The trial court granted this request.

OCGA § 24-8-804 (b) (5) provides: "The following [type of statement] shall not be excluded by the hearsay rule if the declarant is unavailable as a witness: . . . . A statement offered against a party that has engaged or acquiesced in wrongdoing that was intended to, and did, procure the unavailability of the declarant as a witness." If, as supported by a preponderance of the evidence, a trial court finds that a party has acted with the purpose of making a witness unavailable to testify against him, a trial court does not abuse its discretion in allowing the unavailable witness's statements to be admissible at trial against the party who caused the witness's absence.

To admit a statement against a defendant under the rule of forfeiture-by-wrongdoing, the State must show (1) that the defendant engaged or acquiesced in wrongdoing, (2) that the wrongdoing was intended to procure the declarant's unavailability, and (3) that the wrongdoing did procure the unavailability. Here, the Court found, all three factors were shown by a preponderance of the evidence. First, appellant sent correspondence to Thomasina and called her a "snitch," and then he engaged in further wrongdoing by screaming at Thomasina repeatedly not to talk to the State or say anything, to the point that Thomasina began shaking and could barely hold on to her walking cane. Second, that wrongdoing was intended to procure Thomasina's unavailability, as appellant directly commanded Thomasina not to cooperate with the State. Finally, a preponderance of the evidence showed that appellant's wrongdoing procured Thomasina's unavailability. Shortly after Thomasina received the first note from appellant calling her a snitch, she became reluctant to testify and explained to the State that she was afraid "they would kill me." Later, despite the fact that she had initially contacted police of her own accord, she refused to show up for appellant's trial and ultimately had to be brought in on an arrest warrant. Then, after being confronted with irate admonitions from appellant at the courthouse, Thomasina was visibly shaken, and, when asked about her statements to police on the witness stand, she stated that she did not want to remember them and was uncooperative. See OCGA § 24-8-804 (a) (3) (a declarant is unavailable when she "[t]estifies to a lack of memory of the subject matter of the declarant's statement.") Therefore, a preponderance of the evidence showed that appellant engaged in wrongdoing intended to procure Thomasina's unavailabilty, and that wrongdoing did actually cause her unavailability. Concomitantly, the trial court did not abuse its discretion by admitting Thomasina's statements to police under OCGA § 24-8-804 (b) (5).

Sufficiency of the Evidence; Defense Admissions

McKie v. State, A17A1443 (3/9/18)

Appellant was indicted for malice murder, three counts of felony murder, aggravated assault, attempted violation of the controlled substance laws, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony. The convicted-felon possession charge alleged that appellant had possessed a firearm "after having been convicted of a felony, … to wit: Forgery in the First Degree." Appellant received a directed verdict of acquittal on one of the felony murder charges and the substance charge, and the jury found him not guilty of the remaining charges with the exception of the charge for possession of a firearm by a convicted felon. Appellant was convicted on this charge alone and sentenced to five years to serve. Appellant contended that his conviction should be reversed because there was insufficient evidence that he was a convicted felon. In a 2-1 decision, the Court disagreed.

The record showed that just before resting its case, the State proffered what it characterized as "a certified conviction of [McKie] from Fulton County for the offense of forgery in the first degree." When appellant did not object, the prosecutor stated that she was "just going to show the face of [the exhibit] to the jury." The document duly admitted as State Exhibit 35 was a copy of an October 2011 indictment for first-degree forgery against appellant. At the bottom of the indictment is a section of printed text stating that the defendant "waives [a] copy of indictment, list of witnesses, formal arraignment and pleads X Guilty." This plea section of the form was signed by appellant, his counsel, and the prosecutor on November 14, 2011, and filed the following day.

In the course of closing argument, appellant's counsel made the following statements: "You'll have the indictment, you'll have the certified, [McKie] got *convicted of forgery* back in Fulton County some years ago. And technically, he *is a convicted felon*….Yes, [McKie] *is a convicted felon*. We admit that all day. It's true."

The Court noted that State's Exhibit 35, was an indictment and guilty plea to the crime of first-degree forgery. Citing *Tiller v. State*, 286 Ga. App. 230 (2007), the Court stated that evidence of a guilty plea is, by itself, insufficient to establish the underlying felony necessary to support a conviction for possession of a firearm by a convicted felon. However, the Court found, this case is distinguishable from *Tiller*, because appellant twice admitted during closing argument that he had been convicted of the felony charge of forgery.

Thus, the Court stated, while closing arguments generally are not evidence to be considered by the factfinder, unequivocal statements in closing argument can amount to an admission of a material fact, rendering that fact no longer in dispute. And here, the evidence establishing that appellant was a convicted felon including not only his guilty plea to a charge of first-degree forgery, a felony, but also his admissions in closing argument that he had been convicted on just this charge. Viewed in favor of the jury's verdict, this evidence was sufficient to sustain his conviction for possession of a firearm by a convicted felon.

Motions for New Trial; General Grounds

State v. Arline, A17A1773 (3/14/18)

After a jury found Arline guilty of aggravated child molestation, rape, and child molestation, the trial court granted his motion for new trial on the general grounds. The trial court found dispositive the alleged victim's revelation to prosecutors — on the seventh day of trial, after the State had rested — that,

contrary to what she had said up to that moment, she had been sexually active with an adult male other than Arline during the period of time alleged in the indictment. The Court noted that this revelation, which "the trial court explained in a detailed and thoughtful order, presented defense counsel with a 'strategic dilemma': if he called the victim to the stand, he would have 'no guarantee of what she might say.'" Defense counsel decided not call her, and the jury never learned of the belated disclosure. The State appealed.

The State argued that the trial court misconstrued OCGA § 5-5-20 because the statute has two required elements. Specifically, a trial court may not grant a new trial under that provision unless "the verdict of a jury is found contrary to evidence *and* the principles of justice and equity." In other words, because the trial court found the verdict not contrary to the evidence that the jury did hear, he was without power to remedy a violation of the principles of justice and equity. The trial court was without power, the State argued, because that injustice and inequity was wrought by the alleged victim's failure to timely disclose vital evidence the jury consequently did not hear.

The Court disagreed. The Court noted that the State cited no authority for the proposition that a trial judge considering the general grounds must disregard matters heard by the court but not by the jury. Instead, even when the evidence is legally sufficient to sustain a conviction, a trial judge may grant a new trial if the verdict of the jury is "contrary to the principles of justice and equity," OCGA § 5-5-20, or if the verdict is "decidedly and strongly against the weight of the evidence." OCGA § 5-5-21. When properly raised in a timely motion, these grounds for a new trial — commonly known as the "general grounds" — require the trial judge to exercise a "broad discretion to sit as a 'thirteenth juror.'" In exercising that discretion, the trial judge must consider some of the things that he cannot when assessing the legal sufficiency of the evidence, including any conflicts in the evidence, the credibility of witnesses, and the weight of the evidence. Although the discretion of a trial judge to award a new trial on the general grounds is not boundless, it nevertheless is, generally speaking, a substantial discretion. Therefore, the Court concluded, because the trial court did not abuse its discretion and the law and facts did not demand the verdict rendered, it affirmed the trial court's ruling.

Citing *Liteky v. United States*, 510 U.S. 540, 555 (II), (114 SCt 1147, 127 LE2d 474) (1994), the State also contended that by granting the motion for new trial, the trial court revealed such a high degree of favoritism and antagonism as to make a fair judgment impossible. The Court disagreed. Instead, the Court found, the State failed to show any actual bias to support its claim. Moreover, contrary to the State's argument, the granting of a motion for new trial on the general grounds is not an usurpation of the jury's role, but is a duty imposed upon a trial judge faced with a meritorious motion for new trial on the general grounds. And the Court stated, even more fundamentally, a trial court's performance of its duty to sit as a thirteenth juror and weigh the evidence is not, as the State suggests, an "affront to the victim's sense of justice and equity." Judges are required to decide difficult questions that evoke strong feelings.

In so holding, the Court stated "[w]hile counsel, no less than parties and other interested persons, may be disappointed in a ruling, our standards of professionalism mandate courtesy and formality. In particular Court of Appeals Rule 10 provides, 'Personal remarks that are discourteous or disparaging to any judge, opposing counsel, or any court, whether oral or written, are strictly forbidden.' We abstain, in an exercise of our discretion, from deciding whether the state should be sanctioned for violating that rule.

OCGA § 16-11-127 (c); License Holders

GeorgiaCarry.Org, Inc. v. Atlanta Botanical Garden, A17A1639 (3/14/18)

Atlanta Botanical Garden is a private, non-profit corporation that operates a botanical garden complex on property secured through a 50-year lease with the City of Atlanta. Evans holds a Georgia weapons carry license and is a member of GeorgiaCarry, a gun-rights organization. Evans visited the Garden, openly carrying a handgun in a holster on his waistband. He was escorted off the property and told that weapons were prohibited on the Garden premises, except by police officers. He and GeorgiaCarry filed suit seeking declaratory and injunctive relief on the basis that OCGA § 16-11-127 (c) authorized Evans—and similarly situated individuals—to carry a weapon at the Garden. The trial court held that the Garden's property was considered private, allowing the Garden to exclude weapons and, consequently, granted summary judgment to the Garden.

The Court noted that OCGA § 16-11-127 (c) provides, in pertinent part, that: "A license holder . . . shall be authorized to carry a weapon . . . in every location in this state not [otherwise excluded by] this Code section; provided, however, that private property owners or persons *in legal control of private property through a lease*, rental agreement, licensing agreement, contract, or any other agreement to control access to such private property *shall have the right to exclude or eject a person who is in possession of a weapon or long gun on their private property* . . . (Emphasis supplied.) Thus, the unambiguous text of OCGA § 16-11-127 (c) leaves no doubt that the legislature afforded only private property owners, or those in control of private property through a lease or otherwise, the power to exclude licensed weapons holders from that private property. Consequently, the Court stated, the issue is whether the land leased by the Garden constitutes public property or private property within the context of OCGA § 16-11-127 (c).

The Court also noted that the statute does not specifically define those terms. Evans and GeorgiaCarry contended that although the Garden, as lessee, is a private organization and operates as a private entity, the property it leases is considered public for the purposes of OCGA § 16-11-127 (c) because the lessor of the property is the City of Atlanta. The Court disagreed.

Citing "well-established Georgia precedent" governing tax-related issues, the Court found that when a public authority conveys a leasehold interest to a private lessee, the leasehold estate "is severed from the fee" and classified as private property. Thus, the Court concluded, the Garden, a private entity with a leasehold interest in what is deemed to be private property, may exclude licensed weapons holders from entering that property. Accordingly, the Court affirmed.