Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 15, 2018

THIS WEEK:

Ineffective Assistance; Bruton

Simpkins v. State, S18A0063 (5/7/18)

Appellant was convicted of malice murder and other crimes. The evidence, briefly stated, showed that appellant and several other men associated with a street gang known as "MFG" assembled in a field outside a club. There was a block party going on and the area was crowded with people. Appellant, McGruder and several others gathered in a circle to plot an attack against a rival gang. Appellant, McGruder and another individual got into a black Dodge Charger, with McGruder driving and appellant sitting in the rear driver's-side seat. McGruder drove the Charger around the block and stopped in front of the rival gang. Appellant fired several shots at the group, killing one of them.

Appellant argued that his trial counsel was ineffective for failing to object to the admission of co-defendant McGruder's statements to police. The Court noted that *Bruton v. United States*, 391 U.S. 123 (88 SCt 1620, 20 LE2d 476) (1968) excludes only the statement of a nontestifying co-defendant that standing alone directly inculpates the defendant. However, *Bruton* is not violated if a co-defendant's statement does not incriminate the defendant on its face and only becomes incriminating when linked with other evidence introduced at trial.

Here, the Court found, the statements did not violate the Confrontation Clause under *Bruton*. Rather than introduce McGruder's statements in written or recorded form with redactions, the State called the case agent to testify about her interview of McGruder after his arrest. There was no question that, standing alone, McGruder's statements as conveyed by the agent did not inculpate appellant. Rather, they became incriminating only when linked to other evidence introduced later at trial. And by introducing the sanitized statements through the agent, they were presented without obvious changes notifying the jury that a name was intentionally omitted. Moreover, multiple individuals were present in the field before the shooting, some named and some unnamed, including multiple co-indictees—many of whom could have been the individual to whom McGruder was referring. Unlike in other cases where the Court found *Bruton* violations, here the State did not clearly link the defendant with the omitted name contemporaneously with the introduction of the statements or immediately afterward.

Nevertheless, appellant argued, the prosecutor's opening and closing statements heightened the possibility of a *Bruton* violation. The Court stated that it was true that while describing what she expected the evidence in the case to show, the prosecutor stated that someone "comes and picks up Defendant McGruder and Defendant Simpkins." But testimony of another witness introduced at trial—and cross-examined by appellant—actually named appellant as the person riding in the car with McGruder. Appellant contended that it was error for the prosecutor to state that "we know

these details because Defendant McGruder, he tells the case agent what he'd done." But even that was not a clear violation; the prosecutor's explicit statement was that McGruder told the case agent "what he'd done," not what appellant had done. As for the closing, the prosecutor noted that McGruder had said there were others in the car with him, and then went on to say "We don't know the other. We know these two[,]" apparently referring to McGruder and appellant, the remaining defendants in the case. But those statements were more obviously read as relying on the body of evidence of the case rather than asserting that McGruder identified appellant as one of his passengers. And, the Court noted, by that time the State had, among other things, detailed testimony from another witness that appellant was the shooter in the back seat. For his part, appellant's trial attorney testified at the motion for new trial hearing that he identified the potential *Bruton* issues and worked with the prosecutor to ensure that McGruder's statements were appropriately redacted. Accordingly, the Court found that trial counsel did not perform deficiently in failing to object to the McGruder statements on *Bruton* grounds.

Batson; Race-Neutrality

Taylor v. State, S18A0276 (5/7/18)

Appellant was convicted of malice murder. Forty-seven jurors were qualified by the court and brought before the parties to exercise their peremptory strikes. Appellant argued that the trial court erred by denying his *Batson* challenge on the basis that the State had exercised seven of its nine peremptory strikes to eliminate African-American members of the venire. The Court disagreed.

The Court noted that a *Batson* challenge involves three steps: 1) the opponent of a peremptory challenge must make a prima facie showing of racial discrimination; 2) the proponent of the strike must then provide a race-neutral explanation for the strike; and 3) the court must decide whether the opponent of the strike has proven the proponent's discriminatory intent. Here, the prosecutor acknowledged "the percentages are probably a prima facie case." The trial court found that appellant made a prima facie showing of purposeful discrimination.

Appellant contended that the trial court erred in step two by finding that the State provided valid, race-neutral explanations for each of the challenged strikes of African-American jurors. However, the Court found, each of the reasons offered by the prosecutor for her strikes — familiarity with the defendant, his family, or another juror; employment of the juror or a member of their family; union advocacy; criminal history of family members; expectations of what would be shown at trial; and juror demeanor during voir dire — is race-neutral on its face. Although appellant argued that some of these reasons — in particular employment as a minister or knowledge of someone with a criminal conviction — "reflect unacceptable stereotypical attitudes as to particular groups and cannot be considered race-neutral[,]" the Court found that these reasons are sufficient to satisfy the prosecutor's burden under step two.

Appellant, relying on *George v. State*, 263 Ga. App. 541, 544-545 (2) (a) (2003) and *Parker v. State*, 219 Ga. App. 361, 364 (1) (1995) contended that the State's reliance on prospective jurors' demeanor was improper, as impermissibly based on speculation and conjecture. But, the Court stated, it has disapproved the core analysis of those decisions and expressly disapproved *Parker*, noting that "both the United States Supreme Court and this Court have squarely held that a peremptory strike based upon a juror's demeanor during voir dire may be race-neutral at *Batson* step two."

Turning to the trial court's ultimate determination at step three, appellant argued that the prosecutor's explanations were not credible because they in some instances misrepresented the testimony of African-American prospective jurors and because the prosecutor did not strike similarly-situated non-black jurors. At the third step of the *Batson* analysis, the trial court makes credibility determinations, evaluates the persuasiveness of the strike opponent's prima facie showing and the explanations given by the strike proponent, and examines all other circumstances that bear upon the issue of racial animosity. That a prosecutor's explanation for a peremptory strike is not supported by the record or would apply equally to a similarly-situated non-black juror may support a finding of discriminatory intent at *Batson*'s third step. But, the Court stated, a trial court's finding as to whether the opponent of a strike has proven discriminatory intent is entitled to great deference and will not be disturbed unless clearly erroneous.

Here, the Court found, notwithstanding appellant's attempts to draw comparisons between black jurors who were struck by the State and non-black jurors who were not, it could not conclude that the trial court clearly erred in its determination that appellant had failed to prove discriminatory intent. Appellant's suggestion that the State failed to strike a non-black prospective juror who was similarly-situated to the African-American pastor struck by the State was not supported by the record, as the trial court excused the entire panel on which a non-black juror who was a minister and had visited a friend in jail appeared. Appellant contended that there were non-black jurors who, like one struck by the State, had heard about the case or had attorneys in their families, but he did not attempt to show that any of those non-black jurors knew appellant or his family, like that juror did. And although appellant argued that the State declined to strike several non-black jurors who, like another struck juror, expressed concerns about fairness to the defendant, he did not purport to show that any other juror expressed the same sort of need "to see it for myself" expressed by that State-struck juror. Finally, although appellant complained that the State did not strike non-black prospective jurors who had a family member with a criminal history, all four of the African-American venire members struck for that reason also stated that they believed that their family member had been wrongly accused, offering an additional race-neutral reason for the strikes. Of the allegedly similarly-situated non-black jurors to which appellant pointed, none responded affirmatively to the question of whether they felt they knew someone who had been falsely or mistakenly accused. Accordingly, the Court concluded that the trial court did not clearly erred in finding an absence of intentional discrimination.

Search & Seizure; Appellate Review

Caffee v. State, S17G1691 (5/7/18)

Appellant was charged with possession of marijuana. The evidence, briefly stated, showed that a deputy stopped appellant's truck for an expired tag. The deputy smelled marijuana as he approached the vehicle. Appellant denied there was marijuana in the vehicle and a pat-down revealed no weapons or contraband. A

search of the vehicle revealed only two small empty bottles that smelled of marijuana. The odor of raw marijuana dissipated from the truck during the search while the doors were open. When Deputy Patterson approached appellant, he again smelled the odor of raw marijuana. The deputy searched appellant and found in appellant's shirt pocket a small plastic bag containing less than an ounce of marijuana. Appellant did not consent to any of the searches.

The trial court denied appellant's motion to suppress and the Court of Appeals granted interlocutory review. The Court of Appeals concluded that the police officer had probable cause to believe that marijuana would be found on appellant's person because the officer had training and experience in detecting the odor of raw marijuana and physical manifestations of recent marijuana use, observed that appellant had indications of recent marijuana use (e.g., bloodshot and glassy eyes and "white and risen" taste buds), smelled raw marijuana when he approached appellant's truck, noticed that the odor dissipated during the search of the truck while the doors were open and appellant was outside the vehicle, did not find marijuana in the truck, and smelled marijuana "pretty strongly" upon approaching appellant after the vehicle search.

The Supreme Court granted appellant's petition for writ of certiorari. The Court found that the Court of Appeals' analysis was both incomplete and beyond the scope of its proper review. In an appeal from the grant or denial of a motion to suppress, appellate courts must focus on the facts found by the trial court in its order, as the trial court sits as the trier of fact. An appellate court may, however, consider facts that definitively can be ascertained exclusively by reference to evidence that is uncontradicted and presents no questions of credibility, such as facts indisputably discernible from a videotape. But here, the Court of Appeals supplemented the trial court's findings with additional findings of its own that relied on testimony that inherently presented questions of credibility and were not "indisputably discernable" from the video of the stop.

Nevertheless, while the Court of Appeals' analysis was wrong, the Court found that its ultimate conclusion that the search was reasonable was correct. The Court of Appeals affirmed the trial court's denial of appellant's motion to suppress based on a determination that there was probable cause to search appellant under the totality of the circumstances. In so doing, the Court of Appeals omitted any discussion of whether the warrantless search fell within an exception to the Fourth Amendment's warrant requirement. Although the nature of the probable cause inquiry is the same for arrests and searches, the focus of the inquiry is different for each. When reviewing whether a police officer had probable cause to search, the focus is on whether the available facts would lead a person of reasonable caution to believe that contraband or evidence of a crime was present in the place that was searched. When considering whether a police officer had probable cause to arrest, a court must evaluate whether the facts and circumstances known to the police officer would have led a reasonable officer to believe that the suspect probably had committed, was committing, or was about to commit a crime.

Because the focus of the inquiry is different for arrests and searches, finding the existence of probable cause to search does not necessarily answer whether there is probable cause to arrest, or vice versa. But in some cases — especially a possession case like this one — it does; probable cause to believe that illegal drugs were secreted on appellant's person was no different from probable cause to believe appellant was committing the crime of possession of illegal drugs. And when an officer has probable cause to believe a crime has been committed in his presence, the Fourth Amendment permits a police officer to make a warrantless arrest and perform a search of the suspect incident to that arrest. In failing to consider whether the deputy's warrantless search of appellant's shirt pocket fell within an exception to the warrant requirement, the Court of Appeals held that probable cause by itself was sufficient to authorize a warrantless search. This was wrong; no amount of probable cause can justify a warrantless search absent an exception to the warrant requirement.

But, here, limiting its review to the facts found by the trial court in its order, the Court found that the evidence established that the police had probable cause to arrest appellant for possession of marijuana. In so finding, the Court noted that criminal possession is not committed merely by being nearby the prohibited substance. Rather, it was law enforcement's ability to localize the odor of marijuana to appellant's *person* that allowed for a finding of probable cause to arrest for that crime. And, having determined that the deputy had probable cause to arrest appellant for possession of marijuana, the subsequent search of appellant was valid as a search incident to arrest, even though it *preceded* any formal arrest. Accordingly, the Court affirmed the denial of the motion to suppress.

Mental Health Experts; Ex Parte Motions

Putnal v. State, S18A0018 (5/7/18)

Appellant was indicted for malice murder and other offenses. The State is seeking the death penalty. Appellant is indigent and represented by public defenders. The facts, very briefly stated, shows that the sheriff requires that appellant (or any other inmate) must obtain an order from the trial court before any mental health experts who have been retained in preparation for his defense are able to have access to him for any purpose, including interviews, evaluations, testing, and examinations. The trial court granted two ex parte motions by defense counsel to allow defense-retained mental health experts to examine appellant at the detention center. Each order provided that the order "shall be considered confidential and shall not be disclosed until such direction from the [c]ourt."

Nevertheless, acting sua sponte and without prior notice to the defense, the trial court filed a document that it had created entitled "Filing of Motions," which listed the two ex parte motions that appellant had submitted to the trial court in chambers. The designations by which these ex parte motions were listed on the trial court's "Filing of Motions" included the names of the defense-retained mental health experts and the fact that those experts were to examine appellant, yet the trial court did not file this document under seal. At the same time, the trial court also filed the actual motions that appellant had originally filed ex parte with the trial court in chambers and the signed orders granting those motions for access to appellant in the detention center by his two named mental health experts. However, the trial court did not seal those motions or orders. Then the trial court immediately served the State and defense counsel via e-mail with its "Filing of Motions" and attached copies of the motions that appellant had filed ex parte in chambers. After the trial court denied appel-

lant's motions to seal the two ex parte motions, the Court granted interlocutory review to address "Whether the trial court erred in denying [appellant]'s motion to proceed ex parte and under seal with regard to matters pertaining to his expert mental health investigation"

The Court stated that in *Ake v. Oklahoma*, 470 U. S. 68 (105 SCt 1087, 84 LE2d 53) (1985), the United States Supreme Court held that due process requires that an indigent defendant be given access to a competent mental health expert upon a showing that his sanity at the time of the offense will be a significant factor at trial. In *Brooks v. State*, 259 Ga. 562 (1989), the Court found that a hearing to determine whether a defendant should receive public funds for investigative or expert assistance must be conducted ex parte.

The State argued that *Brooks* is inapplicable to appellant's situation because appellant does not have to apply to the trial court for funds, given that funds for his expert assistance are being provided by the State through the capital defender division of the Council. However, the Court stated, the State's argument failed to recognize the reasoning behind this Court's decision in *Brooks*. Just as a defendant could be placed in a position of revealing his theory of the case in order to make the showing required to support his request for funds for expert assistance, a defendant also could be placed in that position in making other requests to the trial court related to utilizing that assistance, such as obtaining an order allowing a defense-retained expert to access the defendant for purposes of testing and examination. And, the Court noted, in either case, *Brook*s holds that a defendant "has the right to obtain [expert] assistance without losing the opportunity to prepare the defense in secret."

The Court also noted that in *Zant v. Brantley*, 261 Ga. 817, 817, 818-819 (2) (1992), it considered an appeal in which a defendant, like appellant, was required to obtain an order from the trial court before his mental health experts could have access to him in the facility where he was incarcerated. The *Brantley* Court reaffirmed that the relevant question in determining whether a defendant is entitled to proceed ex parte and under seal is not whether the matter involves an application for funds for expert assistance but whether not proceeding ex parte and under seal could improperly place a defendant in "a position of revealing his theory of the case to the prosecution." Moreover, particularly significant to appellant's case is the *Brantley* Court's recognition that a defendant's motion seeking access for an expert to evaluate him could improperly place a defendant in such a position and its holding that, under those circumstances, the defendant is entitled to proceed ex parte and under seal.

The State argued that *Brantley* was wrongly decided to the extent that it held that the State was properly excluded from matters regarding an order that only disclosed the identity of an expert whom the defendant's counsel had retained to examine him. The Court disagreed. Learning the identities of a defendant's experts points the State toward the type of investigation that the defendant is conducting and thus the trial strategy that he is considering. And here, the trial court's disclosures occurred less than three months after the State filed a notice of its intent to seek the death penalty, and the disclosures revealed the identities of the first two mental health experts that defense counsel have retained to examine appellant. As a result, the State has known since the beginning of the defense's investigation of the case what defense theory and mitigation strategy were being considered and explored. Accordingly, the Court concluded, appellant's case is controlled by *Brantley*.

The State next argued that assuming *Brantley* applies, ex parte communications regarding appellant's motions and orders seeking access to him by his mental health experts were not authorized because appellant failed to follow the procedures outlined in *Brooks*, specifically, that a defendant present his motion to the trial court at an ex parte hearing that is reported and transcribed and that the State be given an opportunity to submit a brief to be considered at the time of the ex parte hearing. The Court again disagreed. First, regarding the State's claim that it should have been given the opportunity to file a brief, the purpose of such a procedure is to allow for the State's input regarding matters in which it has an interest, such as the defendant's indigence or the costs of the expert assistance. Neither of those matters were at issue in appellant's case. Moreover, the Court found, the State asserted no legitimate interest in any matter related to appellant's motions for access, and the Court did not discern any. Second, as to the lack of a hearing, the Court agreed with other jurisdictions that determined that the goals behind affording an ex parte hearing to an indigent defendant requesting expert assistance are met when an indigent defendant is afforded an opportunity to communicate his request to the trial court in the State's absence. The Court also rejected the State's claim that the proceedings should have been reported and transcribed in order to create a record for appellate review.

Finally, the State argued, the trial court's disclosures did not reveal the results of any evaluation or whether appellant plans to proceed with a defense at trial that is based on the examinations to which they refer. Thus, the State maintained, appellant can suffer no harm from the trial court's order. Again, the Court disagreed. The Court found that the improper disclosure may have given the State a glimpse of at least some aspects of the theories of defense and trial strategies that appellant and his counsel are exploring, undermining appellant's legitimate interest in developing his defense theories and trial strategies in secret. This information cannot simply be extracted from the minds of those with whom it has been improperly shared, and for that reason, a reversal of the unsealing of the ex parte motions and orders may not be sufficient to cure any prejudice that arises from the disclosures. Although it is impossible to know with certainty before trial whether and to precisely what extent appellant has been prejudiced, it is conceivable that, without additional curative measures, he could turn out to have been prejudiced to an extent that would require any conviction or sentence to be set aside.

On remand, the trial court should consider whether additional curative measures are now in order to reduce the risk that these proceedings have been impermissibly tainted by the improper disclosures to the State. In particular, the trial court should weigh the potential harms to appellant that might arise from those disclosures, discounted by the possibility that the harms might never materialize, against the cost of additional and prophylactic curative measures. The level of detail in the information revealed to the prosecution bears upon the likelihood that any of the conceivable harms to appellant actually will materialize, and the trial court should hear from the parties about what the prosecution might reasonably have gleaned from the information disclosed to it about appellant's potential theories of defense and trial strategies. But in doing so, the trial court should take care not to require appellant to reveal *even more* about his poten-

tial defense theories and trial strategies than already has been disclosed to the prosecution.

In so holding, the Court express no opinion about what additional curative measures, if any, are in order at this point. The trial court, however, should do what it can to ensure that the proceedings from this point forward are not tainted by its improper disclosures of appellant's ex parte motions and orders to an extent that ultimately would require the setting aside of any conviction or sentence.

Search & Seizure

Francis v. State, A18A0334 (5/1/18)

Appellant was convicted of possession of cocaine and marijuana. The evidence, briefly stated, showed that an officer and her partner went to a house to execute an arrest warrant for a person thought to be at that address. The homeowner admitted the two officers through the front door and into his living room and told them that the person identified in the warrant was "no longer there." While her partner searched the house to confirm this fact, the officer remained in the living room, where appellant also was. While the partner searched, the officer determined that appellant had an outstanding bench warrant. The officer waited for her partner to return to the living room before handcuffing or arresting appellant because she needed her partner for "backup . . . in case there were any issues" with getting appellant into custody. Between the officer's entrance into the house and her learning of the existence of a bench warrant for appellant's arrest, less than 15 minutes passed.

Appellant contended that the trial court erred in denying his motion to suppress. The Court noted these officers encountered appellant in the living room of the house and address as to which they had secured a warrant to arrest another person, and appellant raised no objection on appeal as to the legality of that arrest warrant. For Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within. Having shown probable cause for the issuance of an arrest warrant at this specific location, the officers were entitled to enter and to search anywhere in the house in which the subject of that warrant might be found, regardless of the homeowner's representation that the subject of the arrest warrant was not present.

Furthermore, the Court stated, the officers having encountered appellant "almost immediately" on entering the house, his seizure was authorized pending his identification and, if he proved not to be the wanted fugitive, pending a further search of the house for the subject of the arrest warrant. Until that person was found, the search for him was not yet over, and there was still that particular justification for entering any place that had not yet been searched. Finally, the officer's decision, made for her own safety, to wait for some minutes for her partner to complete his search of the house before attempting to arrest appellant did not unreasonably delay appellant's detention.

Accordingly, the Court found, the evidence showed that being in possession of a valid arrest warrant for the house in question, these officers legally entered the house. They found appellant in the living room, detained him for a short time during the period of a further search of the house for the subject of the arrest warrant, and arrested him after determining that he was the subject of an outstanding bench warrant. Because no portion of appellant's detention under these circumstances was unreasonable, the trial court did not err when it denied his motion to suppress the evidence found in the wake of his arrest.