Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 17, 2018

THIS WEEK:

Double Jeopardy; Post-Conviction Changes in the Law

Levin v. State, A18A0255 (6/18/18)

In 1994, appellant was convicted of kidnapping with bodily injury, two counts of aggravated assault, burglary, cruelty to children, aggravated battery, and other offenses. In 2014, the Supreme Court of Georgia heard appellant's habeas appeal and reversed his conviction for kidnapping with bodily injury based on the State's failure to satisfy the asportation requirement as set forth in *Garza v. State*, 284 Ga. 696 (2008). *Levin v. Morales*, 295 Ga. 781 (2014). In 2016, appellant was re-arraigned on the kidnapping with bodily injury. The same day, he filed a motion in autrefois convict, which the court denied.

Appellant argued that the trial court erred in denying his motion. Specifically, he contended that because the Supreme Court of Georgia reversed his conviction based on insufficiency of the evidence, double jeopardy bars retrial. The Court disagreed.

The Court stated that normally, once a reviewing court reverses a conviction solely for insufficiency of the evidence to sustain the jury's verdict of guilty, double jeopardy bars retrial. This principle, however, did not squarely answer the issue presented here, which is: where a reviewing court determines that the evidence presented at trial has been rendered insufficient only by a post-trial change in law, does double jeopardy preclude the government from retrying the defendant?

The Court found the issue to be one of first impression in Georgia. Nevertheless, Justice Blackwell, in his concurring opinion in *Levin v. Morales*, addressed the issue. Citing cases from other jurisdictions, Justice Blackwell found that when the State can know what proof the law requires, but fails to offer such proof at trial, the State ought not have another chance to convict the accused. But when the State relies on a longstanding and settled understanding of the law, and it offers evidence sufficient to carry its burden consistent with that understanding — only to have that understanding suddenly upended years later by an appellate court undertaking a course correction — it is not so clear that the State should be denied a second chance. Thus, where a reviewing court determines that the evidence presented at trial has been rendered insufficient only by a post-trial change in law, double jeopardy concerns do not preclude the government from retrying the defendant. Applying Justice Blackwell's reasoning to this case, the Court held that the trial court did not err by denying appellant's motion for autrefois convict.

Rules 413 and 414; Out-of-State Convictions

King v. State, A18A0182 (6/19/18)

Appellant was convicted of one count of aggravated child molestation and one count of sexual battery as a lesser-included offense of child molestation. He contended that the trial court erred in admitting evidence of his prior Illinois conviction under OCGA §§ 24-4-413 and 24-4-414. Specifically, the State failed to prove that the allegations for which he was convicted in Illinois constituted an offense under OCGA §§ 24-4-413 or 24-4-414 in Georgia. The Court agreed.

The State presented evidence that appellant pleaded guilty to aggravated criminal sexual abuse under former Illinois statute, 720 ILCS 5/12-16 (d), which provides: "A person commits aggravated criminal sexual abuse if that person commits an act of sexual penetration or sexual conduct with a victim who is at least 13 years of age but under 17 years of age and the person is at least 5 years older than the victim." But rather than presenting any testimony to establish the factual basis for appellant's guilty plea, the State *only* introduced the indictment, which charged the offense of aggravated criminal sexual abuse by alleging that appellant "committed an act of sexual penetration with [the victim], who was at least 13 years of age but under 17 years of age, said act involving the penis of the defendant and the vagina of [the victim], and [the] defendant… was at least 5 years older than [the victim]." Importantly, the State presented no evidence during trial as to the specific age of the Illinois victim, providing instead only the alleged age range via the indictment.

The Court found this failure to be problematic because while in Illinois, engaging in the act, *as alleged in the indictment*, with a 16-year-old victim is a crime, it is not a crime in Georgia. Indeed, the age of consent in Georgia is 16. Consequently, generally speaking, it is not a crime in Georgia to have physical sexual contact with a willing participant who is 16 years of age or older. And no language in the count of the Illinois indictment to which appellant pleaded guilty alleged lack of consent by the victim. Thus, the State failed to show that the Illinois victim was a minor under Georgia law or that appellant engaged in sexual intercourse with her without her consent. As a result, the State failed to prove that appellant's prior conviction constituted evidence of his "commission of another offense" under the plain meaning of either OCGA §§ 24-4-413 or 24-4-414.

Furthermore, the Court found, although the State's notice of its intent to present evidence of other bad acts referenced OCGA § 24-4-404 (b), in addition to §§ 24-4-413 and 24-4-414, ultimately, the State did not seek to admit the prior conviction under Rule 404 (b) and the court did not rule on its admissibility on the basis of Rule 404(b). Thus, the Court declined to consider whether the prior conviction would have been admissible under Rule 404 (b).

Finally, the Court found that given the evidence presented, the admission of the prior Illinois conviction was not harmless error. According, the Court reversed appellant's convictions and remanded the case for retrial.

Ineffective Assistance of Counsel; HGN Testing

Reado-Seck v. State, A18A0421 (6/19/18)

Appellant was convicted of first degree vehicular homicide and DUI (less safe). She contended, for the first time on appeal, that she received ineffective assistance of counsel. Specifically, her trial counsel's failure to object to testimony by a law-enforcement officer who administered the HGN test at the scene, observed six out of six clues of impairment, and opined that, based upon her training, a person who exhibits six out of six clues would "not only have a visual impairment present, but their … blood/alcohol concentration would be at or above a .10."

The Court stated that in general, when an appeal presents the earliest practicable opportunity to raise an ineffective-assistance-of-counsel claim, it will remand the case to the trial court for an evidentiary hearing on the issue. The State conceded that this was the first opportunity to raise the issue, but argued that a remand was not mandated because the court could determine from the record that appellant could not establish ineffective assistance of counsel.

Relying on the Supreme Court of Georgia's recent decision in *Spencer v. State*, 302 Ga. 133 (2017), the Court stated that it is generally accepted that the HGN test has reached a state of verifiable certainty in the scientific community and is admissible as a basis upon which an officer can determine that a driver was impaired by alcohol. Nevertheless, whether the HGN test may properly be used as evidence that a driver is impaired by alcohol is not the same question as whether the HGN test has been established as an indicator of either a specific number or a numeric range of blood alcohol content. Thus, the *Spencer* Court reversed the defendant's conviction for driving under the influence (less safe) when the State presented inadmissible testimony as to a correlation between the HGN test and numeric blood-alcohol content. Thus, the Court concluded, in light of this well-established precedent, the lack of an objection to the relevant testimony by appellant's trial counsel, and the evidence presented at trial, the Court remanded the case to the trial court for an evidentiary hearing and determination in the first instance on appellant's ineffective assistance of counsel claim.

Child Hearsay; Prior Difficulties

Blackwell v. State, A18A0696 (6/19/18)

Appellant, the long-time boyfriend of the victim's mother, was convicted of aggravated child molestation, aggravated sexual battery, and statutory rape. The indictment alleged that the offenses were committed between October 1, 2010, and May 1, 2014. The evidence showed that the abuse started in Ohio around 2006 and continued after the family moved to Georgia in 2010.

Appellant alleged that his trial counsel rendered ineffective assistance by failing to object to the victim's testimony about sexual abuse that took place in Ohio because the trial court lacked subject matter jurisdiction over those crimes. But, the Court stated, any objection would have been futile because the evidence was admissible to show the prior difficulties between Blackwell and the victim under OCGA § 24-4-404 (b). Unlike similar transactions, prior difficulties do not implicate independent acts or occurrences, but are connected acts or occurrences arising from the relationship between the same people involved in the prosecution and are related and connected by such nexus. Thus, because the evidence was admissible in this case, the Court found that appellant failed to show deficient performance by counsel.

Appellant also argued that his trial counsel was ineffective in failing to file a motion in limine to exclude the out-of-court statements the victim made to her friend's mother, her brother, the investigating officer, and the forensic interviewer (hereinafter, "the hearsay witnesses") about any acts of sexual assault he committed against her prior to July 1, 2013. In a related argument, he contended that his trial counsel was ineffective in failing to object to that hearsay testimony at trial.

The Court noted that the indictment charged appellant with sexually assaulting the victim between October 2010 and May 2014. Thus, two different versions of Georgia's Child Hearsay Statute applied in this case. Between July 1, 2013, and May 1, 2014, OCGA § 24-8-820 applied. The Court noted that appellant conceded that any out-of-court statements made by the victim to the hearsay witnesses about acts of sexual abuse committed by him between July 1, 2013, and May 1, 2014, were admissible under OCGA § 24-8-820.

However, the Court also found that appellant was correct that the hearsay witnesses' testimony recounting statements made by the victim about acts of sexual abuse by appellant that occurred before July 1, 2013, were not admissible under OCGA § 24-3-16, because the victim was 15 years old at the time she made the statements. Nevertheless, the Court found, pretermitting whether appellant's trial counsel's performance was deficient in failing to object to this evidence, appellant failed to show that there was a reasonable probability that the outcome of the trial would have been different if the evidence had been excluded. Here, the hearsay witnesses' testimony recounting the victim's statements about sexual abuse that occurred prior to July 1, 2013, was merely cumulative of the victim's trial testimony and other evidence in this case, all of which was both admissible at trial and sufficient to sustain the jury's verdict. The failure to object to hearsay evidence that is merely cumulative of other, properly admitted evidence is harmless and, thus, does not constitute ineffective assistance of counsel. Consequently, appellant failed to meet his burden of demonstrating prejudice that arose from the improper admission of this evidence.

Probation Revocations; Out-of-State Offenses

Beavers v. State, A18A0323 (6/19/18)

In 2007, appellant pled guilty to two counts of aggravated assault and one count of false imprisonment, and was sentenced to a total of twenty years, with eight years to be served in confinement and the following twelve to be served on probation. In 2017, the State filed a probation revocation petition after he was charged with committing the offense of possession of a firearm by a convicted felon in North Carolina. After a hearing, the trial court revoked four years, ten months and twenty-five days (the equivalent of 58 months and 25 days) of appellant's probation, noting that this period of confinement would run until December 31, 2021.

Appellant contended that the trial court erred by not considering North Carolina law when imposing the sentence in this case because the 58 months and 25 days exceeds the maximum sentence for the North Carolina law that he violated (N.C. Gen. Stat. § 14-415.1 (a)) and thus, under OCGA § 42-8-34.1 (d), exceeds the maximum sentence authorized for revocation of his Georgia probation sentence based on the commission of that new crime. The Court agreed.

The State contended that the trial court correctly "looked to the Georgia statute [OCGA § 16-11-131]" when sentencing appellant. OCGA § 16-11-131 (b) provides that possession of a firearm by a convicted felon is punishable by up to 5 years (equivalent to 60 months). Appellant contended that the trial court should have instead considered the maximum sentence prescribed by North Carolina law for the violation of N. C. Gen. Stat. § 14-415.1 (a). The maximum punishment authorized for the offense of possession of a firearm by a convicted felon under North Carolina law depends on the defendant's criminal history and the presence or absence of mitigating or aggravating factors. But even assuming that a defendant's criminal history falls under the highest "prior record level" under the North Carolina sentencing statute, and assuming the presence of aggravating factors, the maximum punishment authorized for this offense would be 39 months.

The Court stated that when considering the meaning of a statute, it must presume that the General Assembly meant what it said and said what it meant. When a statute contains clear and unambiguous language, such language will be given its plain meaning and will be applied accordingly. OCGA § 42-8-34.1 (d) refers to the "maximum time of the sentence authorized to be imposed *for the felony offense constituting the violation of the probation*." (Emphasis supplied). The definition of "felony offense" in that statute includes crimes that are felonies, or are misdemeanors but would be felonies if committed in Georgia. Thus, when the new offense in question is a felony, the maximum punishment referred to OCGA § 42-8-34.1 (d) is the punishment *for that felony*. The statute does not state that the maximum punishment to be considered for such an offense is the punishment provided for the equivalent offense under Georgia law.

The authorized punishment for appellant's violation of N.C. Gen. Stat. § 14-415.1 (a) (at most, 39 months) is less than the balance of his probation at the time of the probation revocation hearing (121 months, ending March 6, 2027). Therefore, the Court found, pursuant to OCGA § 42-8-34.1 (d), the trial court was authorized to revoke no more of appellant's probation time than the maximum time of the sentence authorized to be imposed for his violation of N. G. Gen. Stat. § 14-415.1 (a) by N. C. Gen. Stat. § 15A-1340.17 (c), (d). Consequently, the Court vacated appellant's revocation sentence and remanded the case for resentencing.

Venue; False Statements

Reeves v. State, A18A0175 (6/20/18)

Appellant was convicted of making false statements pursuant to OCGA § 16-10-20, and misdemeanor obstruction. The evidence showed that the sheriff's office had an arrest warrant for appellant's son, Aaron. Appellant and her co-conspirator, Langston, made two telephone calls to the officers holding the arrest warrant in which they provided false information to the officers that the father of Aaron had died in order to prevent Aaron's arrest and to get visitation with Jason and Christian, appellant's other two sons, who were already in the county jail.

Appellant contended that the evidence was insufficient to prove that the crimes occurred in the county. Specifically, citing *Spray v. State*, 223 Ga. App. 154, 157-158 (2) (1996), appellant contended that venue was the county where the calls originated, not the county where the calls were received and where she was prosecuted. The Court disagreed.

The Court noted that the *Spray* Court determined that because a defendant was charged with making false statements by falsifying a document, the crime occurred in the county in which the defendant completed the document and not in the county where the government subdivision receiving the document was located. In this case, however, the false statements made were made over a telephone call, and therefore, the mechanism by which the crime was committed is different than that in *Spray*. Also, the Court noted, its research revealed no case in this State in which either of these crimes have been assessed for proper venue when committed over the telephone.

OCGA § 17-2-2 (a), the general venue statute of Georgia states that "[c]riminal actions shall be tried in the county where the crime was committed, except as otherwise provided by law." Nevertheless, it further states that "[i]f in any case it cannot be determined in what county a crime was committed, it shall be considered to have been committed in any county in which the evidence shows beyond a reasonable doubt that it might have been committed." With regard to other telephone based crimes, the Court found that it has generally relied on this provision of the venue statute to hold that venue can be either the location from which the call originated or the place at which the call is received. Accordingly, the Court held that the evidence supported a finding that the crimes occurred in the County where the officers heard appellant's and Langston's false statements to them about the purported death.

Motions for Continuance; Substitution of Trial Counsel

Partlow v. State, A18A0436, A18A0437 (6/21/18)

Appellants Partlow and Hill were convicted of trafficking in cocaine and possession of cocaine with intent to distribute. The evidence showed that the drugs were found during a September 12, 2012 traffic stop on I-75 in which Partlow was the driver and Hill (who had given a false name to the officers) was the passenger. After the cocaine was discovered, Hill bolted across the Interstate and got away. However, his identity was subsequently discovered and he was eventually indicted with Partlow in August of 2014.

Hill contended that the trial court abused its discretion in failing to grant his request for a continuance so he could hire an attorney. The record showed that at some point prior to or shortly after his indictment, Hill was placed in federal custody on unrelated charges. Pursuant to an Interstate Agreement on Detainers ("IAD"), Hill requested a transfer from federal prison to the temporary custody of the Sheriff's Office in April 2015 so that he could have a "speedy and efficient prosecution" on the pending indictment in this case. In the IAD, Hill explicitly requested that counsel be appointed to represent him at trial. Hill was transferred on April 23, 2015.

The Georgia Public Defender Council appointed two attorneys to represent Hill at least ten days before trial, and they received discovery from the State in a timely manner. On June 15, 2015, the first day of trial, however, one of Hill's appointed counsel moved for a continuance, telling the court that Hill "is in the process of hiring different counsel. And because of that he has instructed me to ask the Court for a continuance to allow him time to do that because of the recency in which [his two appointed counsel] were appointed to represent him." Hill did not provide the name of the attorney he was attempting to hire. The trial court denied the motion for a continuance, ruling that Hill had asked for a trial on these charges, had been transferred from federal custody in order to get the charges quickly and efficiently resolved, and, as requested, had been appointed counsel, who had had sufficient time to prepare for trial

The Court stated that when a motion for a continuance is predicated on the basis of counsel's lack of preparation for trial, the conduct of the party is a relevant and proper consideration of the court in the exercise of its discretion in order to prevent a party using the discharge and employment of counsel as a dilatory tactic. In all cases, the party making an application for a continuance must show that he has used due diligence in obtaining private counsel. Generally, whether a defendant has exercised due diligence in hiring counsel is a factual question, and the trial court's grant or denial of a continuance on this basis will not be disturbed absent an abuse of discretion.

Here, the Court found, the trial began ten months after Hill was indicted, and seven weeks after Hill requested appointed counsel and was transferred from federal custody to the custody of the Sheriff's Office. Yet, there was nothing in the record that showed Hill expressed his intention to retain private counsel before the first day of trial, and, at that time, Hill failed to identify the attorney he was planning to hire or demonstrate what efforts, if any, he had taken to do so.

Moreover, the Court stated, the fact that Hill's appointed counsel had a fairly short time to prepare for trial does not, by itself, demonstrate a denial of Hill's right to counsel. In fact, mere shortness of time will not reflect an abuse of the trial court's discretion in denying a continuance, where the case is not convoluted and is without a large number of intricate defenses. Additionally, when there is no showing that a continuance would have benefitted the defendant, he has not established harm in the denial of the continuance.

To show harm, Hill was required to specifically identify what other evidence or witnesses he would have put forth in his defense if his counsel had been given more time to prepare; speculation and conjecture are not enough. And, the Court found, Hill presented no evidence to meet this burden, nor did he assert a claim of ineffective assistance of counsel alleging any missteps or oversights by his appointed counsel during trial. Accordingly, the Court concluded, the trial court did not abuse its discretion in denying Hill's request for a continuance.

Golden Rule Argument; Justification Defense

McClure v. State, A18A0324 (6/21/18)

Appellant was convicted of two counts of aggravated assault. The evidence, briefly stated, showed that the two victims (a male and female) went to appellant's house to pick up a female friend. Appellant and the victim were arguing outside when they arrived. Appellant went into the house and came back with a rifle (later determined to be a BB rifle) and pointed it at the two victims. At trial, appellant testified that he retrieve the weapon because the male victim threatened him. He further testified that he did not point the weapon at either victim, but instead, kept it over his shoulder at all times.

During closing, the prosecutor argued, "when you get [the BB rifle] back in the jury room, I want you to take a look at the tip. I want you to take a look at the end of the barrel and I want you to think about how that would

look pointed at you in the dark." Appellant's objection was overruled. Continuing, the State argued, "[a]sk yourselves if that's the kind of thing that would place a reasonable person in apprehension in fear of immediately receiving a violent injury." Appellant contended that the trial court abused its discretion by overruling his objection to an argument the State made during its closing that he alleges violated the "golden rule."

The Court stated that a "golden rule" argument is one that, regardless of the nomenclature used, asks the jurors to place themselves in a victim's position. Such an argument is impermissible because it encourages the jurors to depart from neutrality and to decide the case on the basis of personal interest and bias rather than on the evidence. And here, the Court found, the State's argument violated the "golden rule" by asking the jurors to place themselves in the victims' position, and thus, the trial court abused its discretion in overruling the objection.

However, error in a trial court's failure to sustain an objection to improper closing argument is subject to harmless error analysis. And here, after the State made the improper statement and the objection was overruled, the State immediately followed up by asking the jurors to consider whether a reasonable person would be in fear of a violent injury upon seeing the barrel of the BB rifle pointed at him or her. The second statement helped to ameliorate any potential harm from the first statement by focusing the jurors on what a reasonable person would feel like looking at the barrel of the BB gun. Considering the entire argument in context and the strength of the State's evidence on the counts for which appellant was convicted, the Court concluded that it was highly probable that the trial court's error in overruling the objection did not contribute to the verdict and thus, was harmless error.

Appellant also contended that the trial court erred by failing to instruct the jury on the affirmative defense of justification in defense of self and defense of habitation. The Court noted that these defenses require a defendant to admit all of the elements of the crime except intent. Thus, to assert a defense of justification, like self-defense, a defendant must admit the act, or he is not entitled to a charge on that defense. Therefore, the Court held, the trial court did not err in refusing to give the jury charge because appellant did not admit to aiming the BB rifle at the victims, an element of aggravated assault as charged.

In so holding, the Court voted 2-1 with Judge McFadden dissenting. After reviewing the history of the rule regarding admission of the acts constituting the offense, he stated, "I am persuaded that the rule we construe today is one this court adopted without due consideration, if not accidentally. If authorized to do so, I would be strongly inclined to overrule it. But our Supreme Court has followed us and made the rule its own. See, e.g., *McLean v. State*, 297 Ga. 81, 83 (2) (772 SE2d 685) (2015). So the exclusive authority to reconsider the rule now rests with that court."