Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 7, 2016

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THIS WEEK:

- **Motions for Continuance**
- **Chandler Evidence; Jury Charges**
- **Commenting on Right to Remain Silent; *Mallory***
- **Selective Prosecution**
- **Double Jeopardy; Actual Knowledge of Prosecutor**
- **Guilty Pleas; Rejection of Negotiated Plea Agreements**
- **Venue; Sufficiency of the Evidence**
- **Motions to Withdraw Guilty Plea**

Motions for Continuance

Foster v. State, S16A0712 (10/3/16)

Appellant was convicted of felony murder and first degree cruelty to children in connection with the beating death of a fifteen-month-old. He argued that the trial court erred by denying his motion for continuance, made four days before the scheduled trial, in which he alleged that he needed time to obtain an independent expert witness to evaluate the autopsy results reached by the State's crime lab. The Court disagreed.

The record revealed that appellant's counsel announced "ready" on the day that the trial began without seeking any ruling on his motion for a continuance. Instead, just before the jury was brought in for opening arguments, counsel requested a ruling on what he referred to only as "the motion," without specifying exactly what motion he was referencing. The trial court responded by denying appellant's motion for a "change of venue," without making any mention of appellant's motion for continuance. Appellant did nothing more to pursue any ruling on his motion for continuance. Under such circumstances, the Court found, counsel abandoned the motion for continuance.

Nevertheless, the Court found, even if appellant had not abandoned his motion, his claim of error was still without merit. In his motion, appellant did not identify any expert who allegedly could have helped him at trial. Thus, because appellant made no showing as to who the expert would be, what his or her testimony would be expected to show, or how that testimony would benefit him, the trial court did not abuse its discretion by refusing to grant a continuance in this case.

Chandler Evidence; Jury Charges

Mullins v. State, S16A0710 (10/3/16)

Appellant was convicted of felony murder and related crimes. He contended that the trial court erred in denying his motion to admit evidence of the victim's specific acts of violence against a third person under *Chandler v. State*, 261 Ga. 402 (3) (b) (1991). The Court noted that in order for *Chandler* evidence to be admitted at trial, a defendant must make a prima facie showing of justification by producing sufficient evidence that the victim was the aggressor, that the victim assaulted the defendant, and that the defendant was honestly trying to defend himself. Appellant contended that the trial court never should have made any credibility determinations in regard to whether he had established a prima facie case, but rather, should have determined whether the evidence was sufficient for a jury to find that the victim was the aggressor. The Court stated that although the trial court erred to the extent it made credibility determinations, the trial

court's ultimate decision was not in error because appellant failed to produce sufficient evidence to establish a prima facie case of justification.

Appellant also argued a jury charge was in error. Relying on *Pullin v. State*, 257 Ga. 815 (2) (1988) and § 3.10.10 of the Georgia Suggested Pattern Jury Instructions (Criminal), the trial court gave the following charge to the jury: "A person is not justified in using force if that person initially provokes the use of force against himself with the intent to use such force as an excuse to inflict bodily harm upon the assailant, *is attempting to commit, is committing, or is fleeing after the commission or attempted commission of a felony*, was the aggressor or was engaged in a combat by agreement, unless the person withdraws from the encounter and effectively communicates his intent to withdraw to the other person and the other person still continues or threatens to continue the use of unlawful force." (Emphasis supplied). Defense counsel objected to the emphasized language which, the Court noted, is taken directly from O.C.G.A. § 16-3-21(b)(2).

The Court also noted that during the charge conference, the State argued the language was applicable because at the time appellant shot the victim, appellant had already completed an aggravated assault against the victim by pointing a gun at him and that appellant had been so charged in the indictment. The State also argued that the language of the entire pattern charge was applicable because there was some evidence that appellant was the aggressor by saying "I'm going to get him," or words to that effect, and telling the victim to "come here." The trial court was initially hesitant to give the charge, surmising anyone who shoots someone would never be entitled to argue self-defense; but, after reading *Pullin*, gave the full pattern charge. Appellant characterized the emphasized language as surplussage and contended the charge had the effect of confusing the jury in a manner that was not harmless error.

The Court held that given the specific facts of this case, where there was no intervening interlude between appellant pointing his gun and shooting the victim, it agreed with appellant that the trial court erred when it included the language at issue in the charge and believe the trial court was on the right track with its initial instinct to exclude the language. The Court also noted that the opinion in *Pullin* does not state what charge was actually given by the trial court in that case, but merely opines that the charge was consistent with the law as set forth in O.C.G.A. § 16-3-21(a) and (b) and so *Pullin* did not add anything to the issue at hand one way or the other. Nevertheless, the Court found that any error was ultimately harmless in light of appellant's trial testimony that he shot the victim because the victim had previously said he was going to get his "tool" (a euphemism for a gun), the undisputed evidence that the victim was unarmed when appellant shot him, and the fact that the trial court fully charged the jury on self-defense and the defense of habitation.

Commenting on Right to Remain Silent; Mallory

Bullard v. State, S16A0797 (10/3/16)

Appellant was convicted of murder and other related crimes. He argued that his right to remain silent was violated by a colloquy between the prosecutor and a police investigator. At trial, the investigator testified that, when he found a red shirt that appeared to have blood on it during the search of appellant's home, he asked appellant what the substance was and appellant said that it was grease. The prosecutor then asked the investigator whether appellant ever said (1) that it was not his shirt, (2) that he did not know how the substance got there, or (3) that somebody else must have put it there. The investigator answered "no" to all three questions. After the last question, appellant objected on the ground that the questions and answers violated his right to remain silent. The trial court overruled the objection.

The Court stated that even assuming that appellant properly preserved the issue for appeal by not objecting until the third question was asked, there was no error. At trial, a woman testified that she was with the victim shortly before he was murdered and that the victim was wearing a red shirt. Appellant's defense was that the woman killed the victim and later planted the bloody shirt in appellant's home and the victim's driver's license in his garbage. Thus, the Court found, it was not improper for the prosecutor to question the investigator regarding the failure of appellant, who agreed to and did speak with the police, to mention that the red shirt was not his and that someone else put it in his home with the blood on it.

Selective Prosecution

Wallace v. State, S16A0654 (10/3/16)

A grand jury indicted appellant, Michael Pindling, and Kathryn Cortez for crimes in connection with the killing of a marijuana dealer. Wallace and Pindling were charged with malice murder, felony murder, aggravated assault, armed robbery, two counts of theft by taking, and the unlawful possession of a firearm during the commission of a felony. Cortez, however, was charged only with armed robbery and unlawful possession. Cortez pleaded guilty to armed robbery (the State dismissed the unlawful possession charge against her), and she testified at trial as a witness for the prosecution against appellant and Pindling. Appellant was convicted of murder, armed robbery, two counts of theft by taking, and unlawful possession of a firearm during the commission of a felony.

Appellant contended that the trial court erred when it rejected his claim of selective prosecution, which was based on the disparate treatment of appellant and Pindling, on the one hand, and Cortez, on the other. All three were charged with armed robbery, but only appellant and Pindling were charged with murder. The Court stated that to make out a claim of unlawful selective prosecution, Appellant had to show that his prosecution represented an intentional and purposeful discrimination which was deliberately based upon an unjustifiable standard, such as race, religion, or other arbitrary classification. Appellant presented no direct evidence that the prosecuting attorney was motivated to treat Cortez differently because of her race, gender, or any other improper ground. Instead, appellant argued that he and Cortez were equally culpable with respect to the victim's killing, and he contended, that he and Cortez were equally cooperative with law enforcement. For these reasons, he argued, invidious discrimination was the only possible explanation for the disparate treatment of Cortez. The Court disagreed.

The Court found that the record did not clearly show that appellant and Cortez were equally culpable, nor did it clearly show that they were equally cooperative with

investigators. Absent more direct evidence of discriminatory animus, the circumstances of this case did not show unlawful selective prosecution. Prosecutors are vested with discretion in deciding what charges to bring against which defendants based on evidentiary considerations such as those presented in this case. Accordingly, the Court concluded, the trial court did not err when it rejected the claim of selective prosecution.

Double Jeopardy; Actual Knowledge of Prosecutor

State v. Garlepp, A16A1230 (9/21/16)

Following a traffic stop on May 23, 2015, Garlepp received citations for failing to wear a seat belt and driving with more than 0.02 percent blood-alcohol content while under the age of 21 ("DUI per se (under 21)"). Both citations were filed with the State Court Clerk's Office that day, but for unknown reasons, they were assigned different case numbers. On June 5, 2015, an unidentified assistant solicitor general amended Garlepp's seat-belt citation, which entailed adding the applicable subsection to the offense's code section and—illegibly—initialing the edit. On June 8, 2015, Garlepp paid the fine for his seat-belt citation via the Clerk of Court's traffic tickets website, and, coincidentally, that same day, another assistant solicitor general reviewed Garlepp's DUI per se citation file, determined that Garlepp was not eligible for DUI/Drug Court, and signed a recommendation form indicating as much. An accusation was filed on June 15 charging Garlepp with DUI less safe, DUI per se (under 21), underage possession of alcohol, and following too closely. On June 24, 2015, Garlepp filed a motion in autrefois convict and plea of former jeopardy, arguing that because he disposed of the seat-belt citation by paying the fine online, any further prosecution for crimes arising out of the same conduct was barred by procedural double jeopardy under O.C.G.A. § 16-1-7. The trial court granted the motion and the State appealed.

The Court stated that procedural double jeopardy under Georgia law is set forth in O.C.G.A. § 16-1-7(b), which "prohibits multiple prosecutions for the same conduct." More specifically, O.C.G.A. § 16-7-1(b) provides that "[i]f the several crimes arising from the same conduct are known to the proper prosecuting officer at the time of commencing the prosecution and are within the jurisdiction of a single court, they must be prosecuted in a single prosecution . . . ." Thus, the statutory provision requires the State to prosecute crimes in a single prosecution if the crimes (1) arise from the same conduct, (2) are known to the proper prosecuting officer at the time of commencing the prosecution, and (3) are within the jurisdiction of a single court." And, for procedural double jeopardy to attach, all three prongs must be satisfied.

Here, the Court found, it was undisputed that the subject crimes arose from the same conduct and that they were both within the jurisdiction of the State Court. Thus, the focus was on the second prong of O.C.G.A. § 16-1-7(b), the knowledge of the proper prosecuting officer. The Court stated that the O.C.G.A. § 16-1-7(b) applies only to such crimes which are *actually known* to the prosecuting officer actually handling the proceedings. Moreover, under this "actual knowledge test," the defendant bears the burden of affirmatively showing that the proper prosecuting officer actually knew that there were other crimes arising out of the same conduct as the crime that the officer was prosecuting. Thus, the critical question for resolving a plea in bar under O.C.G.A. § 16-1-7(b) pertains to the prosecuting officer's knowledge of all the charges on the date when the defendant's guilty plea was accepted to fewer than all the crimes arising from his conduct.

The Court noted that the trial court found that because the seat-belt citation was amended by an unknown assistant solicitor general on June 5, 2015, the solicitor general's office, in its entirety, was aware of that seat-belt offense when it posited that Garlepp was not eligible for DUI Court on June 8, 2015, and certainly when it charged him, via accusation, with DUI per se and other offenses on June 15, 2015. But, the Court found, the trial court erred in looking not to the first proceeding, but to the later prosecution in state court, to determine the knowledge of the prosecuting officer. Rather, the only knowledge that mattered was the knowledge of the assistant solicitor general who amended the seat-belt citation or the assistant solicitor general, if any, who handled the disposition of that offense. But here, the citation for the seat-belt offense was filed separately from the citation for DUI per se, and nothing on the face of the former citation would have provided the unknown assistant solicitor general who amended the citation with any indication that other charges were pending against Garlepp. And furthermore, the seat-belt citation was issued by a police officer, filed in State Court, and disposed of online without the direct intervention of anyone in the solicitor general's office or a judge. Given these particular circumstances, the Court concluded, Garlepp failed to sustain his burden of showing that the solicitor general had actual knowledge of the DUI per se and other charges at the time he disposed of his seat-belt citation. Accordingly, the trial court erred in granting Garlepp's motion and plea in bar of former jeopardy.

Guilty Pleas; Rejection of Negotiated Plea Agreements

Underwood v. State, A16A1158 (9/21/16)

Appellant appealed from the denial of his motion to withdraw his guilty plea. The record showed that under the terms of a negotiated plea agreement, the State recommended a sentence of two-and-a-half to three years' confinement followed by probation, concurrent with any other sentence appellant was serving, and a waiver of recidivist treatment. The trial court stated that it would not accept the negotiated agreement. Specifically, the court stated: "And the Court is going to reject the plea agreement in the case. I'm going to tell you what I'm inclined to do in the event Mr. Underwood would like to reconsider. I'm inclined to sentence him to ten years of incarceration on count 1, followed by ten years of probation on count 2, if you would like to consider that." Appellant conferred with his attorney, who advised the court that appellant still wanted to plead guilty. The trial court then entered a judgment of conviction and imposed the twenty-year sentence it had described. Appellant subsequently filed a timely motion to withdraw his guilty plea, which the court denied.

Relying on Uniform Superior Court Rule ("USCR") 33.10 and *State v. Germany*, 246 Ga. 455(1980), the Court stated that where a trial court intends to reject a negotiated plea agreement, the trial court shall, on the record, inform the defendant personally that (1) the trial court is not bound by any plea agreement, (2) the trial court intends to reject the plea agreement presently before it,

(3) the disposition of the present case may be less favorable to the defendant than that contemplated by the plea agreement, and (4) *that the defendant may then withdraw his or her guilty plea as a matter of right.* This is a "bright line rule" and requires the trial court to "expressly" inform the defendant, "personally and on the record," of his right to withdraw his guilty plea.

The Court found that here, the trial court did not advise appellant that, because it had decided not to impose the recommended sentence, he could withdraw his guilty plea as a matter of right. Moreover, citing *Mulkey v. State*, 265 Ga. App. 631 (2004), the Court found that this deficiency was not cured by defense counsel advising the defendant, off the record, of the same principle. Accordingly, the trial court's failure to comply with the directives of USCR 33.10 and *Germany* necessitated a reversal in this case.

Venue; Sufficiency of the Evidence

Payne v. State, A16A1049 (9/22/16)

Appellant was indicted for armed robbery, attempting to elude and other crimes. He was convicted of only the attempt to elude. He contended that the evidence was insufficient to support his conviction because the State failed to prove venue. The Court disagreed, but admonished prosecutors not to overlook venue as they set out to prove their cases.

The evidence showed that an officers responded to a fight at a trailer park. The officers noticed appellant's vehicle leaving the trailer park, which was located in Chatham County, where the case was tried. A responding officer testified that appellant attempted to flee as he turned on to 43rd Street and continued onto Skidaway Road. The officer activated his blue lights just after the van turned onto 43rd Street, and they remained activated as appellant turned onto Skidaway. The video from the dash-cam clearly showed appellant driving evasively after making the turn onto Skidaway. The Court noted that the offense of eluding an officer is complete when a defendant refuses to stop his vehicle despite visual and audible signals to do so. Thus, appellant committed this offense on every road down which he fled, including Skidaway. And, when considered in the context of the question asked him, a taxi driver who saw appellant flee past him as he ate at a fast food restaurant described Skidaway as a road in Chatham County. Additionally, the van ultimately crashed into a tree that an investigating officer identified as also being in Chatham County. Pinpointing each of these three locations identified as located in Chatham County — the trailer park, the fast food restaurant, and the crash site — on maps put in evidence provided a visual that further underscored that at least part of appellant's act of fleeing or eluding took place in, and the crime was completed within, Chatham County, as the vehicle's path in part fell within the triangular area created by these three points. Accordingly, the Court stated, although our Supreme Court has clearly held that "slight evidence" of the proper venue is not enough to sustain a verdict, here the evidence of venue was sufficient to sustain the verdict.

Motions to Withdraw Guilty Plea

Charles v. State, A16A1088 (9/26/16)

As part of a negotiated plea, on Dec. 9, 2014, appellant pled guilty to robbery as a lesser include offense of armed robbery, aggravated assault, and possession of a firearm during the commission of a felony. He was sentenced to fifteen years to serve ten on the robbery; fifteen years to serve ten on the aggravated assault, to run concurrent to the robbery sentence; and 5 years of probation to run consecutive to the other charges. Appellant was also given First Offender treatment. On Jan. 5, 2015, he sent a pro se letter to the clerk of court stating that he wanted to withdraw his guilty plea. Thereafter, through counsel, he filed a motion to vacate illegal conviction by failing to merge the aggravated assault into the robbery conviction; an amended motion to withdraw his guilty plea; and a motion for an out-of-time appeal. Following a hearing, the trial court vacated the aggravated assault conviction and denied the other two motions.

Appellant argued that the trial court erred in denying his motion to withdraw his guilty plea. The Court disagreed. The Court first noted that the trial court correctly found that even assuming the letter to the clerk was a motion to withdraw his guilty plea, it was untimely because it was filed out-of-term.

But, appellant argued, because the trial court granted his motion to vacate illegal conviction, his motion was timely because where a void sentence has been entered, a motion to withdraw his plea could be entered at any time before re-sentencing. The Court, however, found that even accepting that the aggravated assault conviction was "void", appellant failed to demonstrate that the trial court erred in finding that his motion lacked substantive error. Here, appellant argued that his plea was not knowing and voluntary because, through the ineffective assistance of counsel, he thought that by receiving first offender treatment, he would be receiving as a sentence straight probation and no jail time. But, the Court found, the record was very clear that appellant understood that when he entered his plea, that he would be receiving a sentence of 15 years with 10 years to serve and that there would be an additional 5 years of probation to run consecutive to his robbery conviction. Accordingly, the trial court did not err in denying his motion to withdraw his plea of guilty.