Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 14, 2014

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THIS WEEK:

- **Search & Seizure; Standing**
- **Ineffective Assistance of Counsel**
- **Plea Bargaining; Lafler v. Cooper**
- **Confidential Informants**
- **Indictments; Armed Robbery**
- **Victim's Propensity for Violence**
- **Discovery; Biological Material**

Search & Seizure; Standing

Ensley v. State, A14A1159 (10/29/14)

Appellant was convicted of multiple counts of sexual exploitation of children (O.C.G.A. § 16-12-100(b)) in connection with child pornography found on his home computer. He argued that the trial court erred in denying his motion to suppress information about his name and address obtained from Comcast, his internet service provider. The trial court found that appellant lacked standing to make such a challenge.

Citing *Hatcher v. State*, 314 Ga.App. 836, 837-839 (1) (2012) (physical precedent), the Court agreed with the trial court. In *Hatcher*, the defendant had not shown he had a reasonable expectation of privacy in information about an account for which he was not the subscriber. Furthermore, the United States Supreme Court and Georgia appellate courts have held that a person has no reasonable expectation of privacy in information voluntarily conveyed to another. Here, the Court found, appellant voluntarily conveyed to Comcast the subscriber information that Comcast supplied to law enforcement (his identity and address). Therefore, he cannot show that he had a reasonable expectation of privacy in that information, and consequently he lacked standing to pursue his Fourth Amendment challenge to the search of Comcast for that information.

Ineffective Assistance of Counsel

Honester v. State, A14A1395 (10/29/14)

Appellant was convicted of felony obstruction. The record showed that after the jury deadlocked and sent a note to the judge, both parties asked for an *Allen* charge. Instead of giving it, the court, over defendant's objection, sent a note back asking 1) the numerical division of votes as to guilt or innocence, and 2) whether it was likely that further deliberations would result in a unanimous verdict. The jury sent back another note stating 11-1 to acquit and "no". After determining that no juror was refusing to deliberate, the judge refused the defendant's second request to give an *Allen* charge and declared a mistrial, finding that such a charge would put undue pressure on the jury. A second trial was held five days later and appellant was convicted.

Appellant contended that his trial counsel was ineffective in failing to file a plea in bar after the first trial ended in a mistrial over the objection of the defense. The Court agreed. First, appellant met his burden of showing that trial counsel's failure to file a plea in bar was not the result of reasonable professional judgment. As counsel's uncontradicted testimony at the ineffective assistance hearing established, he exercised no professional judgment at all with regard to filing a plea

in bar. Rather, he admitted that he had no reason for such an omission and failed to file a plea in bar simply because it never "crossed [his] mind." Thus, the Court found, because counsel's failure to file a plea in bar was the result of oversight and not the result of some trial tactic or reasonable professional judgment, such failure constituted deficient performance.

Second, the Court found that the failure to do so prejudiced the defense. The Court found that a trial court should only grant a mistrial for a manifest necessity after a jury had been properly sworn and impaneled. Here, the Court found, the trial judge offered no explanation as to why a proper *Allen* charge would result in such undue pressure, and thus his reasoning appeared to be premised on the false presumption that he could have only given an improperly coercive instruction. Indeed, the Court noted, based on the trial court's unexplained reasoning, a valid *Allen* charge or other instruction to continue deliberations could never be given once a jury has claimed to be at an impasse. "This, of course, is not the law in Georgia, which has approved the use of non-coercive *Allen* charges by trial judges confronted with a deadlocked jury." Thus, the Court held, under the circumstances of this case, there was no reason why the trial court could not have simply given the pattern jury instructions for a hung jury or an otherwise appropriately non-coercive *Allen* charge. Moreover, the Court concluded, there was a reasonable probability that a reviewing court could find that there was no manifest necessity for the sua sponte declaration of a mistrial in the first trial. Accordingly, there was also a reasonable probability that the outcome would have been different if appellant's counsel had not deficiently failed to file a plea in bar.

Plea Bargaining; Lafler v. Cooper

Maines v. State, A14A1108 (10/29/14)

Appellant was indicted for aggravated stalking. The State offered to recommend a sentence of five years, with one year to be served in confinement, in exchange for appellant's guilty plea. Appellant rejected the offer and made a counter-offer for six months in confinement. The State rejected the counter-offer and appellant entered a non-negotiated guilty plea and received a sentence of 10 to do 6. Thereafter appellant successfully moved to withdraw his guilty plea due to ineffective assistance of counsel. The court, citing *Lafler v. Cooper*, 566 U. S. ___ (132 S.Ct. 1376, 182 L.E.2d 398) (2012), further ordered that the State was required to re-offer its original plea proposal to appellant. After the State refused to do so, the trial court reconsidered and gave appellant the choice to re-enter a plea or go to trial. Appellant chose the former and was given the same sentence (10 to do 6) but granted first offender status.

Appellant contended that the trial court erred in not forcing the State to re-offer its plea recommendation. The Court disagreed. While *Lafler* does provide that in certain circumstances it may be an appropriate remedy for a trial court to require the State to re-offer an earlier plea proposal, those circumstances did not exist here. Thus, there was no offer for a plea to a lesser count than the aggravated stalking count for which appellant was convicted after his first guilty plea, nor was there a mandatory sentence confining the judge's sentencing discretion. Therefore, the circumstances contemplated by *Lafler* which might have necessitated a re-offering of the plea proposal simply were not present in this case. Moreover, the Court added, even if such circumstances were present, *Lafler* still clearly states that such a remedy would be up to the trial court's discretion.

Confidential Informants

Freeman v. State, A14A1222 (10/30/14)

Appellant, Tracey Freeman, was convicted of trafficking in cocaine and misdemeanor possession of marijuana. The evidence showed that law enforcement used a CI to conduct a controlled buy at a residence. They then used that controlled buy to obtain a search warrant which they executed later that day. Appellant contended that the trial court erred in admitting the out-of-court statements of the CI, arguing that this evidence violated his right to confrontation under the Sixth Amendment to the United States Constitution. The Court agreed.

At trial, defense counsel asked the investigating officer if the CI provided a general description of the person who sold the CI the cocaine. The officer responded that the CI stated it was a "black male" but additional information would have been included in his "buy report" which the officer did not have. The next day, at the defense's insistence, the State produced the "buy report" in which the CI indicated the purchase was made from an individual whom the CI knew as "Trace." Over appellant's objection, the State was permitted to introduce the report. The trial court found that the defense opened the door to this evidence and that the court would instruct the jury that it was not being admitted to prove the truth of the matter asserted, but rather to explain the officer's conduct.

The Court found that the CI's statement in the "buy report" and the officer's testimony regarding that statement were clearly testimonial. And although the Confrontation Clause does not bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted, contrary to the trial court's ruling and its subsequent instructions to the jury, the crux of the officer's testimony—that the CI claimed to have purchased crack cocaine from a person named "Trace"—was not offered merely to explain why a government investigation was undertaken or to demonstrate the effect of the out-of-court statements on the officers. Rather, the purpose of this testimony was to establish that the person named "Trace" was involved with the illegal drug activity occurring at the residence. In fact, the Court noted, the State's argument during closing that "Trace is often a nickname for Tracey" made this exact point and belied any contention that the statement merely provided an explanation for the lead officer's conduct. Moreover, appellant had no opportunity to cross-examine the CI. Accordingly, the buy report and the officer's testimony concerning its details clearly violated appellant's Sixth Amendment Confrontation Clause rights. In so holding, the Court found that defense counsel did not open the door to such testimony and that the admission of the evidence was not harmless. Therefore, the Court reversed appellant's convictions.

Indictments; Armed Robbery

Walker v. State, A14A1252 (10/28/14)

Appellant was convicted of armed robbery and related crimes. He argued that the trial court erred by convicting him on a void indictment because it lacked an essential element of the offense of armed robbery. The indictment alleged as follows: "The Grand

Jurors . . . charge and accuse [appellant] with the offense of Armed Robbery for that the said accused in Lowndes County, Georgia, on or about the 25th day of September 2010, then and there with intent to commit a theft, did unlawfully take lawful U.S. Currency, from the immediate presence of [the victim], by the use of an offensive weapon, to-wit: a pistol, contrary to the laws of said State, the good order, peace and dignity thereof."

The Court noted that O.C.G.A. § 16-8-41(a) defines the offense as follows: "A person commits the offense of armed robbery when, with intent to commit theft, he or she takes *property of another* from the person or the immediate presence of another by use of an offensive weapon, or any replica, article, or device having the appearance of such weapon." (Emphasis supplied). Appellant correctly asserted that the fact that the currency was the property of another was not alleged in the indictment under which he was convicted. But, the Court found, he did not raise this issue in the trial court by a timely general demurrer, or after trial by a timely motion in arrest of judgment. And, the failure to file a general or special demurrer, or a timely motion in arrest of judgment, waives any claim that could have been raised in a general or special demurrer. Accordingly, this enumeration presented nothing for review.

Victim's Propensity for Violence

Oliver v. State, A14A0751 (10/29/14)

Appellant was acquitted of malice murder, felony murder predicated upon burglary, and possession of a firearm during commission of a burglary. However, the jury convicted him on the charges of voluntary manslaughter, as a lesser-included offense of the remaining felony murder count, aggravated assault, criminal trespass, as a lesser included offense of burglary, and possession of a firearm during the commission of an aggravated assault. He contended that the trial court erred under O.C.G.A. §§ 24-4-404(a) and 24-4-405 in finding inadmissible his proffered evidence of the victim's propensity for violence.

The Court found that for either the victim's general reputation for violence or specific acts of violence by the victim to be admissible, the defendant must, among other procedural and substantive burdens, make a prima facie showing that the victim was the aggressor, that the victim assaulted the defendant, and that the defendant responded with force only to defend himself or herself. And under the new Evidence Code, except as modified by statute, the common law as expounded by Georgia courts shall continue to be applied to the admission and exclusion of evidence and to procedures at trial. Thus, the Court found no reason to construe O.C.G.A. §§ 24-4-404 and 24-4-405 as a modification of Georgia's long-standing requirement that a defendant must first make a prima facie showing of self-defense before requiring a trial court to determine whether evidence pertaining to the victim's character is admissible. And here, the Court concluded, appellant failed to make a prima facie showing that he acted in self-defense. Accordingly, appellant could not satisfy O.C.G.A. §§ 24-4-404(a)(2)'s requirement of demonstrating a "pertinent trait of character of the alleged victim of the crime."

Discovery; Biological Material

Davis v. State, A14A0814 (10/29/14)

Appellant was convicted of rape, aggravated child molestation, and enticing a child for indecent purposes. The evidence showed that the twelve year old victim got pregnant as a result of the rape. The victim had an abortion over two months later. Appellant contended that the State improperly destroyed the biological material collected after the abortion, which could have shown the victim was impregnated after the rape, violating both O.C.G.A. § 17-5-56 and his Due Process rights. The Court disagreed.

First, the Court found that O.C.G.A. § 17-5-56 did not apply because by its plain language, it applies to physical evidence containing biological material that could identify the perpetrator and is collected at the time of the crime. But here, the biological material was collected two months later. Moreover, by the time the sample came into the possession of the State, it had already been contaminated due to the storage procedure used by the medical clinic and there was no usable biological material that would "relate to the identity of the perpetrator" under O.C.G.A. § 17-5-56(a).

The Court further found that the State did not violate appellant's due process rights when it destroyed the biological material. While appellant may not have been able to obtain comparable evidence, the biological material could not be considered constitutionally material because it had no apparent exculpatory value at the time the State received it. Notably, the evidence showed that the biological material from the victim's abortion was contaminated by formaldehyde. The fetal sample thus had no exculpatory value because no DNA could be extracted from it. Moreover, the Court found, even assuming that the destroyed evidence was constitutionally material, there was no evidence that the State engaged in bad faith. The private clinic's contamination of the sample could not be attributed to the State. Bad faith is reserved for those cases in which the State's conduct indicates that the evidence could form a basis for exonerating the defendant. Here, the State destroyed the biological material after discovering that it had no usable DNA.