Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 24, 2017

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State Prosecutor

THIS WEEK:

Ineffective Assistance of Counsel; Immigration Status

State v. Addaquay, S17A1046 (10/30/17)

In 2012, Addaquay pled guilty to criminal damage to property in the second degree under OCGA § 16-7-23 (a) (1) for conduct that occurred in 2002. He was sentenced as for a misdemeanor, as permitted under OCGA § 17-10-5, to 11 months and 29 days on probation. At that time, Addaquay was a lawful permanent resident of the United States, a status evidenced by the issuance of a "green card" to him. In 2015, Addaquay filed a petition for habeas corpus relief, contending that his plea counsel provided constitutionally ineffective assistance because he misinformed Addaquay that his plea of guilty to a felony would not affect his immigration status. At the hearing, Addaquay testified that he had recently spoken to an immigration attorney who told him that the guilty plea would prevent him from being able to renew his "green card" and to pursue an application for citizenship. The habeas court ruled that Addaquay was deportable as a result of his plea of guilty, that plea counsel performed deficiently in telling Addaquay that he would not be deportable, and that, but for plea counsel's misinformation, there was a reasonable probability that Addaquay would not have pled guilty, but rather would have proceeded to trial. The State appealed.

The Court noted that Addaquay hinged his case on his testimony that an immigration lawyer told him that he could not renew his "green card" because of the conviction, and the habeas court concluded that he therefore could be deported. However, the Court stated, whether an offense constitutes a deportable crime is a question of law subject to de novo review. In reviewing federal law, the court stated that a conviction for violating OCGA § 16-7-23 (a) (1) could perhaps constitute a deportable offense under two provisions of 8 USC § 1227. First, under 8 USC § 1227 (a) (2) (A) (iii), "[a]ny alien who is convicted of an aggravated felony at any time after admission is deportable." But, even assuming that criminal damage to property in the second degree constitutes a crime of violence, because Addaquay was only sentenced to 11 months and 29 days in prison, the conviction is not considered an aggravated felony under 8 USC § 1101 (a) (43) (F).

Second, an alien may be deported under 8 USC § 1227 for committing a crime of moral turpitude. Specifically, 8 USC § 1227 (a) (2) (A) (i) provides that "[a]ny alien who — (I) is convicted of a crime involving moral turpitude committed within five years (or 10 years in the case of an alien provided lawful permanent resident status under section 245 (j) [8 USC § 1255 (j)]) after the date of admission, and (II) is convicted of a crime for which a sentence of one year or longer may be imposed, is deportable." Accordingly, the Court stated, the decisive

issue is whether Addaquay committed the crime within five years of his "date of admission" to this country. Here, Addaquay offered evidence of only one date of admission, which was in 1995, and that date of admission was not within five years of the date of the commission of the crime in 2002. Consequently, Addaquay failed to prove that he was deportable by virtue of having committed a crime of moral turpitude.

The Court also agreed with the State that the habeas court erred in concluding that Addaquay's plea makes him deportable because it will prevent him from renewing his "green card."Addaquay's "green card" is "merely evidence or proof" of his status as a lawful permanent resident, a status which he has had since at least 2005, and that status does not terminate until entry of a final administrative order of exclusion, deportation, or removal. Moreover, a person in deportation, exclusion, or removal proceedings is entitled to his permanent resident status until ordered excluded, deported, or removed. Accordingly, the decision that will make Addaquay deportable does not concern his "green card," but rather, the order of deportation itself. Thus, Addaquay did not adequately prove that he was deportable.

Finally, the Court also agreed with the Stated that the habeas court erred to the extent it granted relief on the ground that Addaquay's plea counsel was constitutionally ineffective because he misinformed Addaquay about the impact the plea might have on an application for citizenship. First, Addaquay testified at the habeas hearing that he told his plea counsel that his primary concern in taking the plea was to ensure that he could remain in the United States legally, not that he be able to obtain citizenship in the future. Moreover, the Court noted, there is no controlling authority extending the reasoning of Padilla and holding that the Sixth Amendment's guarantee of effective assistance of counsel encompasses advice about applications for citizenship or naturalization. Therefore, the Court concluded, Addaquay's claim of ineffective assistance of counsel was without merit.

Miranda; Knowing and Intelligent Waiver

Benton v. State, S17A0754 (10/30/17)

Appellant was convicted of malice murder and other offenses. He contended that his incriminating statements to police should have been suppressed because they were elicited without his full understanding of the *Miranda* warnings. The Court agreed and reversed his convictions.

The evidence showed that appellant was first read the *Miranda* Warning from a card. After reading these warnings, the officer asked, "Do you understand what I just explained to you?" and appellant nodded. The officer then asked appellant how far he went in school and whether he could read, to which appellant replied that he was "kicked out" of school in ninth grade and that he could read, but "not that much." The officer then asked appellant to explain what the officer just read to him, "so we're on the same page," and appellant responded, "I go to court, and I can't answer no questions or ask no questions." The officer said "no," and then tried to explain the substance of the *Miranda* warnings to appellant in simpler terms. But, the Court found, the officer's explanation was nevertheless inadequate because it failed to include three of the four *Miranda* warnings — that anything appellant said could be used against him in court, that he had a right to an attorney's presence, and that if he could not afford an attorney, one would be appointed to represent him. When the officer began to question appellant after explaining his right to remain silent in layman's terms, the officer did not even refer back to his initial reading of the *Miranda* warnings to make sure appellant understood the other components of the warnings.

Therefore, the Court held, the record clearly demonstrated that appellant did not understand the *Miranda* warnings as initially read to him — the interrogating officer concluded that appellant did not understand, and the Court's review of the recorded interview confirmed that conclusion. Because the interrogating officer's subsequent explanation of those warnings was incomplete, the Court found that appellant did not knowingly and intelligently waive his rights under *Miranda*. Accordingly, the trial court erred when it refused to suppress the statements appellant made during the interrogation, and appellant must be granted a new trial.

Sufficiency of the Evidence Conflicts of Interest

Williams v. State, S17A1036 (10/30/17)

Appellant was convicted of malice murder, armed robbery, and a firearm offense. The evidence, briefly stated, showed that appellant pointed a gun at the victim and demanded a gold charm necklace off the victim's neck. The victim grabbed appellant and the two began tussling. Samuels, appellant's co-defendant, then shot the victim in the head. Appellant and Samuels then fled.

Appellant contended that the evidence was insufficient to support his armed robbery conviction. The Court agreed. To prove the "taking" element of armed robbery, the State must show both that the defendant caused the slightest change of location of the property allegedly taken and that complete dominion over the property was transferred at least temporarily from the victim to the defendant. The indictment alleged that appellant took "a chain and charm" from the victim. But, the Court found, the chain was found with the victim's clothing at the hospital, and the necklace's pendant was found on the ground at the shooting site. Because the chain was still with the victim's clothing, there was no evidence that appellant ever moved the chain or exercised control over it. And while the movement of the pendant from the chain around the victim's neck to the ground might satisfy the slight change of location requirement, there was no evidence that appellant ever had complete dominion over the pendant. There also was no evidence that appellant ever successfully grabbed the chain or pendant away from the victim and moved either item himself. Accordingly, the Court reversed appellant's conviction for armed robbery.

Appellant argued that his constitutional right to counsel was violated because his trial counsel was not permitted to withdraw after Samuels, who was represented by an attorney from the same public defender's office, entered a negotiated guilty plea and agreed to testify at appellant's trial. The Court noted that when defense counsel advises the trial court before or at trial that he is laboring under an actual conflict of interest, the court usually must defer to that representation and appoint new counsel for the defendant, as the attorney is in the best position to be aware of conflicting interests and makes the representation as an officer of the court. The trial court may, however, explore the adequacy of the basis of defense counsel's representation regarding a conflict of interest without improperly requiring disclosure of the confidential communications of the client.

Here, the Court noted, appellant's trial counsel did not represent that he was laboring under a conflict of interest. In his written motion to withdraw, counsel said only that his office represented both appellant and Samuels and that Samuels had pled guilty and was expected to testify at trial against appellant. He then explained that a proposed State Bar formal advisory opinion had indicated that conflicts of interest were to be imputed to lawyers in a circuit public defender's office like they were to lawyers in a law firm. But, the Court stated, the fact that attorneys from one public defender's office were representing appellant and Samuels was not sufficient, standing alone, to demonstrate an impermissible conflict of interest. Indeed, the advisory opinion expressly states that such lawyers are not automatically disqualified; rather, the trial court must determine if, because of the imputed joint representation, an impermissible conflict of interest exists and cannot be waived or otherwise overcome. In other words, the imputed conflict rule does not become relevant or applicable until after an impermissible conflict of interest has been found to exist— or, in this context, has been represented to exist by counsel without contrary findings by the trial court.

And here, the Court found, not only did appellant's counsel not represent to the court before trial that a conflict of interest existed that could adversely affect his representation, counsel's conduct during the trial demonstrated that there was no actual conflict of interest that adversely affected his representation of appellant. Nothing in the record indicated that appellant's counsel bypassed any meritorious defenses, that Samuels's plea bargain was negotiated at the expense of appellant, or that counsel's ability to cross-examine Samuels was constrained in any way. In fact, appellant's counsel conducted a vigorous cross-examination, highlighting Samuels's past convictions and inconsistent statements to the police. Under these circumstances, the Court concluded, appellant failed to establish a successful ineffective assistance of counsel claim.

Character Evidence; Rules 404 and 405

Timmons v. State, S17A1149 (11/30/17)

Appellant was convicted of felony murder, aggravated assault, and aggravated battery, in connection with the shooting death of Spears. The record showed that during its case-in-chief, the State was permitted to introduce evidence of posts appellant had made on Facebook ("the Facebook evidence") as evidence of his allegedly violent character and behavior in conformity therewith. The posts were on appellant's Facebook page, were not part of any conversation with another person on Facebook, and did not refer to Spears or any other individual. The posts used racially charged terms, expressed that appellant was not afraid to die or go to jail, referred to shooting or killing someone, asserted that if someone "play[ed]" with him "ya family missing ya," and included the text "#lifeshortdontmakeitshorter." The trial court determined that because appellant was claiming self-defense, whether Spears had a propensity for violence was an issue necessarily "pertinent" to the case. Thus, by virtue of the fact that appellant claimed self-defense, the State would be allowed under OCGA § 24-4-404 (a) (2) to show appellant's own character for violence, and could do so by introducing appellant's Facebook posts demonstrating that "character."

The Court noted that OCGA § 24-4-404 deals with whether character evidence is to be admitted, and OCGA § 24-4-405 deals with the methods by which character may be proved. Thus, OCGA § 24-4-404 (a) provides that evidence of a person's character is generally not admissible, except in the circumstances set forth in subsections (a) (1), (a) (2), and (a) (3). And, if evidence of a person's character or a trait of character is to be admitted for the purpose of proving action in conformity therewith on a particular occasion under OCGA § 24-4-404 (a), it is required by OCGA § 24-4-405 (a) that proof of such "character or a trait of character … be made by testimony as to reputation or by testimony in the form of an opinion."

The State contended that appellant, through cross-examination, introduced "evidence of a pertinent trait of character of the alleged victim of the crime" (i.e., Spears's violent character) within the meaning of OCGA § 24-4-404 (a) (2), and that this fact entitled the State to offer "evidence of the same trait of character of the accused" under OCGA § 24-4-404 (a) (1). But, the Court stated, OCGA § 24-4-405 requires that proof of a pertinent character trait of an alleged victim "shall be made by testimony as to reputation or by testimony in the form of an opinion." The Facebook evidence was not such "testimony as to reputation or … testimony in the form of an opinion." Thus, even if, through cross-examination, appellant elicited testimony touching upon Spears's character, it was not evidence of the victim's character within the meaning of OCGA § 24-4-404 (a) (2), and not "evidence of a trait of character [i.e., violence] of the alleged victim of the crime … offered by [the] accused and admitted under [OCGA § 24-4-404 (a) (2)]." Accordingly, the Court held, it did not open the door to evidence of the same trait of character of the accused [i.e., violence] offered by the prosecution" under OCGA § 24-4-404 (a) (1).

In fact, the Court stated, "[t]o be clear, the relevant Code sections show that we must reject the specific argument that the State made, and that the trial court accepted, i.e., that, as [appellant] raised self-defense, it would necessarily be an issue in the case whether Spears had a violent "character or a trait of character" for violence under OCGA § 24-4-404 (a), and thus, the very fact that [appellant] raised the defense meant that the State could introduce evidence to show [appellant]'s general character for violence, under the guise of admissibility pursuant to OCGA § 24-4-404 (a) (1) and (2)." Under OCGA § 24-4-404 (a), the accused may certainly open the door to the State's introduction of character evidence — evidence of his own character, or that of the victim — but it must be by the strictures of that Code subsection, which did not occur here. Thus, the Court held, the trial court erred in denying appellant's objection to the introduction of the Facebook evidence.

Nevertheless, the Court found, considering the evidence presented at trial, and weighing it as it believed that reasonable jurors would have done, the erroneous admission of the Facebook evidence did not contribute to the jury's verdicts. Accordingly, because the error was harmless, a new trial was not authorized.

Records Restriction; First Offender Status

Austin v. State, A17A1151 (10/5/17)

Appellant is a dentist. In 2009, he entered a negotiated plea under Alford to six misdemeanor counts of theft by taking in connection with alleged fraudulent billing of the state's Medicaid program. He was sentenced as a first offender to 5 years on probation. In June 2012, he was discharged and released from probation under the First Offender Act.

On July 13, 2016, he filed a petition to seal his records pursuant to OCGA § 42-8-62.1 (d). He contended that news about his theft plea surfaced after he had been selected as a delegate to represent the state at a certain political party convention. In his petition, appellant further asserted that "[t]he public dissemination of this information has caused and continues to cause personal and professional damage to Defendant-Petitioner, by interfering with his ability to practice dentistry and creating a negative public image through media publication." The same judge who had accepted appellant's plea denied the petition, concluding that appellant's "profession is one of such public trust, that his interest in having these documents sealed is far outweighed by the public's interest in having the records available." The court also ordered the clerk of court to, in accordance with the law, "stamp all documents in this case, as well as any in the future" with a specified notation of discharge and exoneration, and a statement that the "defendant shall not be considered to have a criminal conviction."

Appellant contended that the court's ruling was contrary to public policy, recent amendments to pertinent statutes, and the primary purpose of OCGA § 42-8-62.1, and it "create[s] a legal absurdity" when his own interest in restricting access to the record outweighs the interest of the professional licensing board, which board, he claimed, is precluded by statute from considering applicants' misdemeanor conviction records obtained from the GCIC.

First, the Court stated, even assuming the professional licensing board is precluded by statute from considering appellant's first offender misdemeanor record in its determination to issue or revoke his dentistry license, it does not mean that the lower court's judgment "create[s] a legal absurdity" on the basis that his own interest in restricting access to the record outweighs the interest of the professional licensing board. The interests of the professional licensing board do not control the trial court's determination whether to seal records of the clerk's office, in the public interest.

Second, OCGA § 42-8-62.1 (d) pertinently requires a court to order the sealing of all criminal documents and records that are in the custody of the clerk of court, if the court finds "by a preponderance of the evidence" that the defendant has been exonerated of guilt and discharged from a first offender sentence and "[t]he harm otherwise resulting to the privacy of the individual outweighs the public interest in the criminal history record information being publicly available." Medicaid is a federal-state program under which the federal government provides financial assistance to states to enable them to provide medical care to needy individuals and Medicaid patients receive treatment funded by public money." (Emphasis supplied.) Appellant pled guilty to six counts of "knowingly and willfully, and with the intent of depriving the State of Georgia Medicaid program of funds, … caus[ing] to be submitted a false claim to the Medicaid program" to receive payment for services he did not perform. Moreover, the Court noted, the indictment reflected that each count involved a different patient and was committed on a different day, over a span of about five years. The trial court expressly stated in its order that it had "applied the [requisite] balancing test … to determine whether the records of the above-styled case should be sealed." Appellant's plea of guilty to repeated violations of public trust in connection with his dental profession authorized the trial court to be inclined by the superior weight of evidence toward allowing the record to be available to the public rather than ordering that the record be sealed. Accordingly, the Court concluded, the trial court did not err.

Statements; Miranda

Stallings v. State, A17A1116 (10/12/17)

Appellant was convicted of armed robbery and aggravated assault. The evidence showed that appellant made a pre-Mirandized statement to law enforcement and then shortly thereafter, gave a second statement after *Miranda* warnings were given to her. Prior to trial, appellant unsuccessfully moved to have both statements suppressed.

Appellant contended that the trial court erred in not suppressing her two statements. The Court noted that the trial court stated in its order denying her motion for new trial that "[appellant] offers no evidence that she was in custody, or the functional equivalent, when she drove herself to the police station." However, the Court found, there was no evidence presented at the motion to suppress hearing or at trial indicating that appellant drove herself. Rather, the testimony indicated that appellant was taken to the police station by law enforcement officers. Thus, it appeared, the trial court's determinations that appellant was not in custody when she made her pre-*Miranda* statement, and that the statement was voluntary, were based at least partly on a material factual finding that was clearly erroneous. Therefore, the Court vacated the trial court's order denying appellant's motion for new trial, and remanded for the court to make new findings of fact, and conclusions of law based thereon, as to the voluntariness of appellant's statements. In so holding, the Court reminded the trial court of the preference that a trial court's findings with regard to the administration and waiver of *Miranda* rights take the form prescribed in *Berry v. State*, 254 Ga. 101, 104 (1), n. 6 (1985).

Sentencing; Recidivists

Henry v. State, A17A0999 (10/13/17)

Appellant was convicted of two counts of aggravated child molestation, two counts of aggravated sodomy, and one count of child molestation. He filed a motion to vacate a void sentence, which the trial court denied.

Appellant first contended that the trial court improperly sentenced him to consecutive life sentences without parole on the two counts of aggravated sodomy. The Court noted that under normal sentencing, a trial court may not impose a sentence of life imprisonment without the possibility of parole unless the State sought the death penalty in the case. However, because under OCGA § 16-6-2 (b), the maximum punishment for aggravated sodomy is life in prison, and OCGA § 17-10-7 (a) required that the trial court sentence appellant — a four-time recidivist — to the maximum sentence, OCGA § 17-10-7 (c) required that appellant — a four-time recidivist — actually serve the maximum sentence without the possibility of parole. According, the trial court properly sentence him on these two convictions.

Appellant next contended that the trial court improperly sentenced him to a 20-year sentence of imprisonment for the child molestation count because the trial court was required to sentence him to a split sentence with at least one year of probation included in each individual sentence. The trial court failed to do this, and the State conceded that appellnat's argument was correct. Accordingly, the Court held that the trial court erred by

denying the motion to correct a void sentence, and remanded for resentencing.

Right of Counsel; Waivers

Martin-Argaw v. State, A17A1107 (10/13/17)

Appellant was convicted of three counts of criminal attempt to commit murder following a trial at which he represented himself. The evidence showed that he tried to hire a "hit man" to kill his then-wife, her adult son and a family friend. He argued that he was entitled to a new trial because the trial court "failed to inform him of the specific dangers of proceeding without counsel." The Court agreed.

The record, briefly stated, showed that appellant was not a native English speaker and participated in court in both English and with the help of an interpreter, in his native language of Amharic. Between appellant's arrest in 2006 and his trial in 2014, three different attorneys represented him. During this time appellant repeatedly complained about his counsel and asked the trial court to appoint him new counsel. By 2011, a third attorney represented appellant and the trial court denied his request to appoint yet another replacement attorney. Later that year, the trial court agreed to allow the third attorney to withdraw and let appellant hire a new attorney himself, but the trial court informed appellant that she would reappoint the third attorney if he did not hire someone. However, the record did not show appellant hired a new attorney.

At a May, 2013 calendar call, appellant had not found another attorney and stated he could not afford one. The court gave him the choice between representing himself or continuing with his third lawyer. Appellant chose self-representation. At a December 2013 calendar call, the court again asked him to rethink his choice and urged him repeatedly to "take advantage of a court-appointed attorney to represent you in this matter." Subsequently, appellant filed a motion to proceed pro se, in which he represented that he was "well aware of the risks and dangers of proceeding pro se" and requested that the trial court "find him, knowingly and intelligently, freely and voluntarily making the decision to represent himself and forgo legal counsel in the case." The trial court granted the motion in an order stating that she had "review[ed] the file and consider[ed] th[e] request[.]" In accordance with that order, appellant's third appointed attorney acted as standby counsel at trial.

The Court noted that the trial court did not articulate on the record an express finding that appellant knowingly and voluntarily waived his right to counsel. Such a finding, while preferable, is not required when the record as a whole demonstrates a defendant's knowing waiver. However, the Court found, on a whole, the record did not demonstrate appellant's knowing waiver. The colloquy at the May 2013 calendar call did not show that appellant was made aware of the dangers of representing himself; the trial court merely informed appellant that he would be required to abide by evidentiary and procedural rules without the court's assistance. At the December 2013 calendar call, the trial court asked appellant to reconsider his decision but provided no additional information to him. Although the trial court expressed her concern about appellant's legal knowledge at the motion hearing, she did not try to make him aware of the dangers and disadvantages he faced proceeding pro se at trial due to his ignorance of basic criminal law concepts. And the trial court's order granting appellant's motion to proceed pro se failed to provide details about the information actually provided to him. Therefore, the Court concluded, the State failed to satisfy its burden of demonstrating on the record that appellant was made aware of the dangers of representing himself. Finally, the Court found that the constitutional error was not harmless.

The Court noted that while the use of a properly concealed shock device will never be so inherently prejudicial as to pose an unacceptable threat to the defendant's right to a fair trial, the analysis should not end there if the defendant claims that the shock device also violated his Sixth Amendment right to counsel or his due-process-based right to be present at trial. In such situations, the defendant must show that the use of the shock device prejudiced his due process rights or interfered with his right to counsel. And here, the Court found, neither appellant nor his counsel raised any complaints during the course of the trial that the shock belt was interfering with appellant's ability to assist in his own defense, other than counsel's initial objection that he thought the shock belt made appellant nervous. Appellant also did not testify at the hearing on his motion for new trial, and there was no other evidence presented at that hearing as to how the shock belt affected him. Accordingly, the Court held, because the record was devoid of any evidence of harm or prejudice to appellant from the use of the shock belt, he could not establish that he was deprived of a fair trial on this ground. In addition, based on the facts and circumstances of this case, including evidence that appellant had threatened the victim and his children, the Court found no abuse of discretion in the trial court's overruling of appellant's objection to the use of the shock device.

Appellant similarly argued that the trial court violated his Sixth Amendment right to a fair trial and Fourteenth Amendment right to due process by allowing an extra metal detector to be placed outside the entrance to appellant's courtroom in view of the jury. The Court noted that as with the shock belt, the use of this security measure was within the trial court's discretion. However, appellant contended, the trial court failed to exercise discretion, and instead, he argued, the court merely deferred to the sheriff's office, which in turn deferred to the prosecution, in placing the extra metal detector outside of the courtroom.

Quoting *Holbrook v. Flynn*, 475 U. S. 560, 569 (106 SCt 1340, 89 LE2d 525) (1986), the Court stated that while shackling and prison clothes are unmistakable indications of the need to separate a defendant from the community at large, the presence of guards at a defendant's trial need not be interpreted as a sign that he is particularly dangerous or culpable. Jurors may just as easily believe that the officers are there to guard against disruptions emanating from outside the courtroom or to ensure that tense courtroom exchanges do not erupt into violence. Indeed, it is entirely possible that jurors will not infer anything at all from the presence of the guards.

Finding no cases in Georgia specifically addressing the use of extra metal detectors, the Court looked to other jurisdictions and found that the reasoning in *Holbrook* applies equally to such devices because, unlike personal restraints, they do not indicate that the defendant himself presents any particular danger. Thus, the Court concluded, when asserting that a security measure outside the courtroom violates his constitutional right to a fair trial, the defendant must show prejudice or harm resulting from the security measure. And here, the Court held, appellant failed to show that the use of the extra metal detector

prejudiced his right to a fair trial. Accordingly, the trial court did not abuse its discretion in overruling appellant's objection to the extra metal detector.