Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 25, 2016

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THIS WEEK:

Transcripts; Due Process

Sheard v. State, S16A1291 (11/7/16)

Appellant was convicted of murder in September, 1998. After his conviction, trial counsel filed a timely motion for new trial. However, no action was taken on the motion until 2004. At that time, appellate counsel discovered that portions of the trial transcript were missing, and, during the subsequent years, the State, trial court, and court reporter attempted to locate it. Though some portions were recovered, the entire transcript was never located. The transcript failed to reflect the proceedings of a Saturday session, during which the jury heard closing arguments and the charge of the court before retiring to deliberate. In its May 2014 order denying appellant's motion for new trial, the trial court found — based on its own recollection of the 1998 trial and its standard practice — that the closing arguments of the parties were unremarkable, that the transcript of the charge conference established that the jury was adequately and appropriately charged, that testimony recounting a number of questions from the jury was not credible and was, in fact, unlikely, and that it was unlikely the jury was given an *Allen* charge but, if one were to have been given, it would have been a pattern charge.

The Court stated that a person convicted of a crime has a right to appeal and a right to a transcript of the trial for use on appeal. In all felony cases in this State, "the transcript of evidence and proceedings shall be reported and prepared by a court reporter," O.C.G.A. § 5-6-41(a), and "it is *the duty of the state* to file the transcript after a guilty verdict has been returned in a felony case." (Emphasis supplied). A defendant is entitled to have that transcript accurately reflect his trial, and the failure of the State to file a correct transcript, through no fault of the appellant, effectively deprives the defendant of his right to appeal. Nevertheless, the mere fact that a portion of a transcript is missing does not automatically entitle a defendant to a new trial; there must be shown harm resulting from the deletion. However, where the missing transcript prevents adequate review of the trial, a new trial is warranted.

The Court found that a new trial was warranted for three reasons. First, and most obviously, the age of the appeal raised the specter of due process concerns, and supported appellant's argument for a new trial. Despite nearly two decades, the State was unable to complete the transcript, during which time the court reporter responsible for the trial died, appellant was appointed multiple attorneys for his appeal, and memories have undoubtedly faded. Though the trial court made findings concerning appellant's trial,

those findings were reached more than 15 years after appellant's trial and without the benefit of any trial notes (which, the trial court acknowledged, were also missing). Second, while certain portions of a trial, such as voir dire and opening statements, need not be transcribed in non-death cases, the jury charge — which was missing here — is a crucial portion of trial in which jurors are instructed on the applicable law, on how to evaluate the evidence, and on how to deliberate and reach a verdict, and appellant alleged harm as a result of the missing transcripts. Third, and finally, the Court was concerned that forcing appellate counsel — who was not involved in the original trial — to divine error without the aid of a transcript was not only fruitless but also hindered counsel's ability to adequately and zealously represent appellant on appeal.

Insanity; Sufficiency of the Evidence

Buford v. State, S16A1353 (11/7/16)

Following a bench trial, the court found appellant guilty but mentally ill for the shooting death of the victim. The evidence showed that appellant's daughter's boyfriend and the victim drove up to appellant's house and the boyfriend honked his horn to let the daughter know he was there to pick her up. Appellant came out of the house with a shot gun and shot into the vehicle, killing the victim, a man whom appellant had never met. Appellant asserted voices had told him to "do it." Dr. Sebastian conducted a forensic examination of appellant and concluded, in part, that appellant was schizophrenic.

Appellant contended that the trial court erred in failing to find him not guilty by reason of insanity. The Court noted that in Georgia, a defendant is presumed to be sane and, as such, a defendant asserting an insanity defense has the burden to prove by a preponderance of the evidence that he was insane at the time the crime was committed. Also, there are two theories through which a defendant may establish insanity. He may prove that, at the time of the acts alleged, he "did not have [the] mental capacity to distinguish between right and wrong" pursuant to O.C.G.A. § 16-3-2 and/or he was suffering from "a delusional compulsion as to such act which overmastered his will to resist committing the crime" pursuant to O.C.G.A. § 16-3-3. When a delusional compulsion is the basis of an insanity defense, the delusion must be one that, if it had been true, would have justified the defendant's actions. And here, the Court found, appellant could not articulate the particulars of any delusion from which he was suffering that would have justified his actions and so he could not establish insanity pursuant to O.C.G.A. § 16-3-3. Thus, the main issue the trial court was tasked with deciding was whether appellant had the mental capacity to distinguish right from wrong.

The Court stated that the mere fact that a person is schizophrenic or suffers from a psychosis does not mean he meets the test of insanity requiring a verdict of not guilty on the basis of insanity. The trial court, sitting as the trier of fact, is not compelled to accept the testimony of the defendant's psychologist, but is authorized to find proof of the defendant's criminal intent based upon the testimony of the experts and evidence presented, as well as the words, conduct, demeanor, motive and other circumstances connected with the defendant's acts.

The Court found that the record showed that one expert, Dr. Gunnin, who examine appellant, was uncertain as to whether appellant knew right from wrong and Dr. Sebastian believed, somewhat equivocally, appellant did not know right from wrong. Both experts agreed, however, that appellant was suffering from a mental impairment at the time of the crimes. In these circumstances, appellant did not prove he was legally insane by a preponderance of the evidence and the trial court was not required to accept Dr. Sebastian's opinion over the opinion of Dr. Gunnin. Thus, the evidence was sufficient to support the trial court's verdict finding appellant guilty but mentally ill.

Text Messages as Hearsay; Search & Seizure

Glispie v. State, S16G0583 (11/7/16)

In *Glispie v. State*, 335 Ga.App. 177 (779 SE2d 767) (2015), the Court of Appeals affirmed appellant's convictions for VGCSA and certain driving offenses. The Court granted certiorari to consider the following two questions: (1) Did the Court of Appeals err in concluding that text messages sent to the cell phone found in appellant's possession were admissible as party admissions? (2) Did the Court of Appeals err in concluding that the trial court did not err in denying appellant's motion in limine to exclude the text messages?

As to the first question, appellant contended that all of the text messages from his cell phone constituted inadmissible hearsay. In its opinion, the Court of Appeals held that "[p]retermitting whether the text messages constituted hearsay, they were admissible as an admission by a party-opponent." The Court found this holding to be only half accurate. O.C.G.A. § 24-8-801(d)(2)(A) provides that "[a]dmissions shall not be excluded by the hearsay rule. An admission is a statement offered against a party which is … *[t]he party's own statement*." (Emphasis supplied.) Therefore, the outgoing text messages on the cell phone may be considered appellant's own statements, as the facts of this case indicate that he sent the messages. The incoming text messages, however, are not statements by appellant. As such, they do not fall under this hearsay exception.

Nevertheless, the Court found, assuming that the incoming messages were, in fact, hearsay, any error in their admission was ultimately harmless in light of the other evidence against appellant. Here, appellant had an assortment of drugs and drug paraphernalia in his pocket at the time that he was arrested. Officers familiar with the drug trade testified that the amount of crack cocaine, the drugs' packaging, possession of more than one cell phone, possession of cash in small denominations, and absence of a device to ingest crack with were all consistent with an intent to sell or distribute, without reference to any text messages. Furthermore, admissible outgoing messages from appellant's phone indicated that he had "real good sh-t" to sell, and one outgoing message simply stated "Molly???????" Given the strongly incriminating and cumulative nature of this admissible evidence, the Court found it highly probable that the admission of the incoming text messages, even if considered to be hearsay, did not contribute to the verdict.

Appellant next contended that the Court of Appeals erred in affirming the trial court's denial of his motion in limine to exclude the text messages because the search warrant application for his cell phone failed to provide probable cause sufficient to justify issuing the warrant. More specifically, appellant argued the warrant application failed to

show whether appellant or anyone else had used the cell phones, whether drug-related communications ever occurred, or whether any such communications would be on the cell phones, and, thus, there was not probable cause to issue the warrant.

The Court disagreed. Here, the magistrate had a substantial basis for concluding that probable cause existed to issue the search warrant for appellant's cell phone. The warrant application was written by a police officer with over eight years of experience, whose duties, in part, included investigating narcotics crimes. The officer stated he had reason to believe the cell phone contained information related to a violation of O.C.G.A. § 16-13-30(b) in light of the various circumstances listed in the warrant application, including descriptions of a man matching appellant's description fleeing after a traffic stop, appellant's physical resistance to arrest, and appellant's arrest. More importantly, the warrant application stated that police recovered a large amount of crack cocaine, some capsules containing a white powdery substance, $165 in small cash denominations, two cell phones, and a "razor blade with white powdery residue" from appellant's possession as part of a lawful search incident to arrest. The test for probable cause is not a hypertechnical one to be employed by legal technicians, but is based on the factual and practical considerations of everyday life on which reasonable and prudent men act. Thus, the Court found, in light of the facts and circumstances detailed in the search warrant application, it was reasonable for the magistrate to infer that the cell phones in appellant's possession at the time of his arrest were used as communicative devices with third parties for drug deals. Accordingly, there was a legally sufficient basis for the magistrate to issue a search warrant for the cell phones in appellant's possession.

Brady; Giglio

McGothlin v. State, A16A0944 (10/25/16)

Appellant was convicted of enticing a child for indecent purposes and child molestation but acquitted of aggravated child molestation. Appellant argued that he was entitled to a new trial because the State failed to disclose an agreement that police made with Kinney, one of the jailhouse informants who testified against him. Kinney asserted at trial that the State had not promised him anything or made any deals in exchange for his testimony. At the new trial hearing, however, appellant offered evidence that, after testifying, Kinney received a sentence reduction pursuant to a consent decree that referenced a pre-trial promise by police officers to help Kinney secure the reduction.

The Court stated that pursuant to *Brady v. Maryland* and *Giglio v. United States*, the State must disclose material evidence that is favorable to a defendant, including impeachment evidence that could be used to show bias or interest on the part of witnesses called by the State. The State is under a duty to reveal any agreement, even an informal one, with a witness concerning criminal charges pending against that witness, and a failure to disclose such an agreement constitutes a violation of the due process requirements.

Pretermitting whether a duty to disclose existed here, the Court found that appellant could not establish a reasonable probability that the trial result would have been different had the deal with Kinney been revealed. Such evidence might have provided fodder for cross-examining and impeaching Kinney's testimony. But much of that testimony described appellant's alleged admission that he had engaged in oral sex with the six-year-old victim, evidence that related to the aggravated child molestation charge, for which he was acquitted. Even without evidence of the deal, therefore, jurors rejected a significant portion of Kinney's testimony. Moreover, although Kinney testified about the child molestation allegation for which appellant was convicted, asserting at trial that appellant had admitted touching the victim's "private parts," the State presented significant other evidence regarding this allegation. Furthermore, appellant intimated to the lead detective that he might have done "what [the victim] said." Given this evidence, appellant could not demonstrate a reasonable probability that the verdict would have been different had the State disclosed the alleged deal with Kinney, a witness whom jurors apparently had already found lacking in credibility.

Bailiffs; Juror Misconduct

Hill-Blount v. State, A16A1697 (10/26/16)

Appellant was convicted of armed robbery and possession of a firearm during the commission of a crime. Appellant argued that during jury deliberations the court bailiff improperly communicated with a juror. According to appellant, the bailiff's comment to the juror intimated that "there was a criminal history but it was not then 'available' to the jury." The Court disagreed.

The State conceded that it was improper for the bailiff to answer the juror's question about appellant's criminal history. However, the Court found, appellant's trial counsel waived any claim of error by not voicing an objection when he was made aware of the improper communication. Furthermore, even had trial counsel preserved the matter for appeal, appellant failed to show that the improper communication was prejudicial. The bailiff's statement did not involve extrajudicial information, discussion of the facts or legal issues in the case, or improper conduct by the jurors themselves.

Nevertheless, appellant argued, the statement implied that he had a criminal background. But, the Court stated, it did not read the bailiff's innocuous statement to imply that appellant possessed a criminal record. When asked if he could get the jury a copy of appellant's criminal history, the bailiff responded, "that was not available, we didn't have anything on him, nothing to go back to the jury." If anything, the Court found, the communication reflected that appellant had no criminal history, which was information favorable to the defendant. In addition, the trial judge instructed the jury that any past history would be irrelevant to its consideration in this case. Thus, there was no basis for a reversal on this ground.

Appellant also contended that the trial court erred in removing the same juror after deliberations had begun. The Court again disagreed. Here, the Court noted, the trial court instructed the jury not to "go looking for other information," but to decide the case solely on the testimony and the exhibits admitted into evidence. Nonetheless, the following morning, the juror brought to the jury room a dictionary and a number of religious materials, and he refused to stop reading and talking about his outside material despite admonishments from the foreman. After the foreman brought the disruptive juror's conduct to the trial court's attention, the trial court spoke with the juror, who explained that he wanted to find out what "intent" meant. Contrary to appellant's assertion, the trial court did not excuse the juror "based solely on his use of a dictionary to

look up a single word." The trial court listened to the foreperson's and juror's statements and excused the juror after determining that the juror refused to decide the case solely on the evidence and the law charged by the trial court. Accordingly, the trial judge properly exercised his discretion in replacing this juror with the alternate.

Probation Revocations; Subpoenas Duces Tecum

In Re Whittle, A16A1371 (10/26/16)

In August, 2013, White pled guilty to two felony theft charges and was sentenced to 10 years' probation. But on June 4, 2015, the State filed a petition to revoke White's probation, alleging that he had violated the terms of his probation by, inter alia, "being charged with the new offense of [t]heft by conversion (2 cts.) by the Columbia County Sheriff's [Department] on or about 3/20/2015." As a result, White was ordered to show cause why his probation should not be revoked or modified. On October 29, 2015, White served Whittle with a subpoena for the production of evidence in preparation for his probation-revocation hearing. Specifically, he sought "[a]ny and all incident reports, written witness statements, arrest reports, investigation notes, documents, etc. connected with [his] arrest by the Columbia County Sheriff's Office on or about March 20, 2015, or connected with the Sheriff's Office charging [him] with theft by conversion on or about the same date. Documents include any written agreements between Mr. White [and the alleged victims]." The trial court denied the Sheriff's motion to quash the subpoena and the Court granted interlocutory review.

The Court stated that O.C.G.A. § 24-13-23 permits subpoenas for the production of evidence, which a trial court may, upon written motion, (1) quash or modify if the subpoena is unreasonable and oppressive, or (2) condition denial of the motion "upon the advancement by the person [on] whose behalf the subpoena is issued of the reasonable cost of producing the evidence." Moreover, O.C.G.A. § 24-13-20 provides that Article 2 of Chapter 13 to Title 24 applies to "all civil proceedings and, insofar as consistent with the Constitution, all criminal proceedings." And the subpoena power is, of course, contained within Georgia's Evidence Code, which is entirely separate from Georgia's Criminal Procedure Code. Finally, Georgia's Criminal Procedure Code contains provisions for reciprocal discovery, which are applicable to "all criminal cases in which at least one felony offense is charged," as well as the discovery provisions applicable to misdemeanor cases.

Thus, the Court found, the power to subpoena evidence and the requirements of reciprocal discovery are entirely separate matters within the Georgia Code, just as a criminal prosecution and a probation revocation proceeding based on the same occurrence have nothing to do with each other. Nevertheless, the Sheriff argued, permitting probationers to subpoena investigative files for purposes of probation-revocation hearings (1) provides probationers with greater rights of discovery than people merely indicted for a crime; (2) allows probationers to bypass non-party and witness protections afforded by the reciprocal-discovery statute; (3) places an undue burden upon sheriff's offices and police departments; (4) removes the scope of proper criminal discovery from the hands of attorneys, who are better able to manage such requests; (5) materially prejudices co-defendants who do not have similar early access to discovery materials; and (6) greatly prejudices district attorney offices by permitting a probationer to "opt out" of reciprocal discovery by obtaining investigative files directly from sheriff's offices. But, the Court stated, even if it was inclined to agree with the Sheriff on all of these points, it is not at liberty to graft his policy concerns onto statutory text that is plain and unambiguous. "If [the Sheriff]'s policy arguments are ultimately to prevail, he must make them to our General Assembly, not this Court. Judges are charged with 'interpreting the law in accordance with the original and/or plain meaning of the text at issue (and all that the text fairly implies), as well as with faithfully following the precedents established by higher courts.' And both our constitutional system of government and the law of this State 'prohibit the judicial branch from amending a statute by interpreting its language so as to change the otherwise plain and unambiguous provisions.'"

And here, the Court found, nothing in the plain language of the relevant statutes prohibits a probationer from obtaining the file at issue by way of a subpoena duces tecum in anticipation of a probation-revocation hearing. Thus, so long as White met his initial burden of showing that the documents sought were relevant (which the trial court determined he did), and so long as the trial court did not deem the subpoena unreasonable and oppressive (which it did not), the court did not abuse its discretion by denying the Sheriff's motion to quash.

Closing Arguments; Rape Shield Statute

Orengo v. State, A16A1171 (10/27/16)

In 2009, appellant was convicted of rape, false imprisonment, sexual battery, and battery; he was acquitted of aggravated sodomy. The court granted him a new trial on the rape charge. In 2012, he was retried for rape and convicted. Appellant appealed his convictions from both trials.

Appellant argued that the trial court erred by permitting the State to shift the burden of proof by arguing during closing that appellant should have performed DNA testing of the victim's clothing and admitted the results at trial. The Court disagreed.

The prosecutor stated as follows: "[J]ust like [the defense] brought [expert witness] Dr. Loring in here, they could have found out … if the defendant's DNA was on those jeans. Let's be clear, we should have gotten the jeans tested. She is absolutely correct about that. But if you really want to know whose DNA it is, you're really saying I didn't rape this woman; my DNA is not going to be on those jeans. Why not? Why are [sic] you getting expert witnesses. … Why not test it? Because that's not in their interest." The Court stated that a prosecutor may argue that the defendant has not rebutted or explained the State's evidence. It is also permissible for a prosecutor, in closing argument, to urge the jury to draw reasonable deductions from a defendant's failure to produce purportedly favorable witnesses. Here, the prosecutor's comments were made immediately after defense counsel's comments regarding the State's failure to conduct DNA testing of the victim's clothing. And the prosecutor contemporaneously emphasized that the State bore the burden of proof and that it never shifted to the defense, which was reiterated by the trial court when it instructed the jury. Under these circumstances, the Court found no basis for reversal.

Appellant also argued that the trial court erred by admitting evidence regarding the

victim's recent sexual activity in violation of the rape shield statute. The record showed that during direct examination, the prosecutor asked the victim, "Around the time of the rape, of the assault that Saturday, had you had sex with anybody — "Defense counsel objected that the question violated the rape shield statute, and the trial court overruled the objection. The prosecutor then asked whether the victim "had sex with anyone" within a few days of the assault, and the victim replied, "No."

The Court stated that the rape shield statute excludes evidence of past sexual behavior of the alleged victim of a rape or other sex crime. It is intended to protect the complaining witness from intrusive inquiries into her history of sexual activity with persons other than the defendant, inquiries which could only be intended to support the inference that the victim consented to intercourse with the defendant. Exceptions to the law have been made, however, when evidence of the victim's sexual activity is relevant to an issue other than consent.

Here, the Court found, the victim's testimony about her sexual activity in the few days around the alleged rape was relevant to exclude the possibility that the sperm found on swabs of her vagina the day after the rape belonged to someone other than appellant. And, the rape shield statute cannot be invoked by a defendant to prevent a victim from offering otherwise relevant evidence. Therefore, the Court concluded, under these circumstances, the trial court did not abuse its discretion in admitting the victim's testimony.

Serious Injury by Vehicle; Sufficiency of the Evidence

Fitzpatrick v. State, A16A1336 (10/27/16)

Appellant was convicted of serious injury by vehicle, but acquitted of DUI (less safe). He argued that because the jury acquitted him of driving under the influence, the State failed to prove an essential element of the crime of serious injury by motor vehicle "as indicted." The Court disagreed.

The Court noted that the indictment for the count of serious injury by motor vehicle provided that appellant rendered one of the victim's knees useless "*through a violation* of Driving Under the Influence, as alleged in Count 2 of this indictment[.]" (Emphasis supplied). This language tracked the language of O.C.G.A. § 40-6-394, which provides in pertinent part that a person may be convicted of serious injury by vehicle for rendering a member of the victim's body useless "*through the violation* of Code Section … 40-6-391 [driving under the influence.]" (Emphasis supplied).

Citing *Leachman v. State*, 286 Ga.App. 708, 708-709 (2007), the Court stated that Georgia's serious injury by vehicle statute does not require, as an essential element of the offense, that a defendant be charged with or convicted of the predicate offense. Rather, the language in the serious injury by vehicle statute, O.C.G.A. § 40-6-394, stating "through the violation of" means that the State bears the burden of establishing a causal connection between the defendant's violation of the driving under the influence statute, O.C.G.A. § 40-6-391 and the victim's serious injury. And here, the State met its burden of establishing a causal connection between the defendant's violation of O.C.G.A. § 40-6-391 and the serious injury by vehicle which included appellant's admission that he was driving the car and that he had been drinking in the car. Thus, the evidence was sufficient to support his conviction.

Motions for New Trial; General Grounds

McGil v. State, A16A1225 (10/27/16)

Appellant was convicted of armed robbery and other related crimes. He argued that the verdict was against the great weight of evidence and contrary to the principals of equity and justice. Specifically, he contended that there was no independent evidence of the robbery aside from the testimony of the victim, who acted suspiciously by failing to contact the police at the scene of the crime.

The Court noted that at the motion for new trial, the trial court stated that this enumeration "is the same as number one, insufficient evidence. I find that there was." The Court stated that with regard to the trial court's analysis of insufficient evidence, the trial court rightly found that credibility questions were for the jury. This is a legal determination that the evidence was sufficient under the standards of *Jackson v. Virginia*." However, although the court's colloquy denying the motion for new trial was thorough as to all other aspects of the motion, there simply was no evidence that the trial court exercised discretion, weighed the evidence, and determined as the "thirteenth juror" whether the verdict was against the great weight of the evidence or offended the principles of justice and equity. To the contrary, the record showed that the trial court simply reapplied the *Jackson* standard. Accordingly, the Court vacated the judgment and remanded the case to the trial court for consideration of the motion for new trial under the appropriate discretionary standard.