Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 3, 2017

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THIS WEEK:

Search and Seizure; Cell Phones

Moran v. State, S17A0967 (10/2/17)

Appellant was convicted of malice murder and related offenses. He contended that the trial court erred in admitting into evidence photographs of text messages on appellant's cell phone. A law enforcement officer testified she obtained the cell phone from appellant's probation officer and took pictures of the text messages.

The Court noted that the record was silent as to how appellant's probation officer came to be in possession of appellant's cell phone and appellant made no proffer that the probation officer's possession of the cell phone was unlawful. Furthermore, the record showed that at the time the crimes occurred and during the investigation, appellant was on probation for a 2006 offense. As a condition of her probated sentence, appellant had executed a Fourth Amendment waiver whereby she agreed to be subject to warrantless searches during the term of her probation. Probationers do not enjoy the "absolute" liberty afforded to other citizens. As such, a probationer may be subject to a warrantless search if there is reasonable suspicion of criminal activity. The degree of individualized suspicion required of a search is a determination of when there is a sufficiently high probability that criminal conduct is occurring to make the intrusion on the individual's privacy interest reasonable. Here, the Court found, at the time authorities were examining appellant's cell phone, there was reasonable suspicion that appellant was involved in a murder. Therefore, under the circumstances, the trial court did not err when it admitted the photographs at issue.

Disorderly Conduct; Suffciency of the Evidence

Freeman v. State, S17A1040 (10/2/17)

Appellant was convicted of disorderly conduct pursuant to OCGA § 16-11-39 (a) (1). The evidence, briefly stated, showed that appellant attended a crowded church service. When the pastor asked school teachers to stand for a special prayer, appellant, who was in the back of the church, stood and flipped-off the pastor. The pastor testified that he felt afraid for his own safety. The pastor then finished the prayer and ended the service. As the congregation was leaving, appellant began yelling about sending children off to the evil public schools and having them raised by Satan.

Appellant contended that OCGA § 16-11-39 (a) (1) is unconstitutional on its face. The statute provides in relevant part that "[a] person commits the offense of disorderly conduct when such person … [a]cts in a violent or tumultuous manner toward another person whereby such person is placed in reasonable fear of the safety of such person's life, limb,

or health." Specifically, he contended that the statute is both unconstitutionally vague in violation of Due Process requirements and overbroad in violation of the First Amendment. The Court disagreed.

The Court found that when properly construed, OCGA § 16-11-39 (a) (1) does not reach any, let alone a substantial amount of, constitutionally protected conduct. A person may only be found guilty of disorderly conduct under OCGA § 16-11-39 (a) (1) based on allegedly tumultuous conduct when he or she "[a]cts in a … tumultuous manner toward another person whereby such person is placed in reasonable fear of the safety of such person's life, limb, or health." The statute on its face contains no prohibition against any particular message being communicated, and it makes clear that the level of "tumultuous" behavior necessary to give rise to a sustainable charge must involve acts that would place another person in reasonable fear for his or her safety. In this sense, it could be argued that the statute applies only to physical "acts" that do not implicate speech at all. However, the Court found, because there are several tumultuous activities that could be used or interpreted as a form of free expression, the scope of OCGA § 16-11-39 (a) (1) must be considered with those possibilities in mind. In this regard, to the extent that there are tumultuous acts that would ostensibly support a disorderly conduct charge under OCGA § 16-11-39 (a) (1) and that could also constitute or involve an expressive act, the expression at issue would still have to be of the kind that would place a person in reasonable fear for his or her "life, limb, or health" before a defendant could be found guilty of disorderly conduct under OCGA § 16-11-39 (a) (1). But, the Court determined, the type of expression that would give rise to such a reasonable fear would not be constitutionally protected; rather, it would have to involve "fighting words" or a "true threat," which are the specific forms of expression that fall outside of the realm of constitutional protection and that could give rise to such reasonable fears. The Court found that this narrow interpretation of OCGA § 16-11-39 (a) (1) is appropriate here. Accordingly, the Court concluded, OCGA § 16-11-39 (a) (1) is not unconstitutionally overbroad, because "the statute only can reach conduct which involves no lawful exercise of a First Amendment right." Specifically, as applied to expressive conduct, the statute only reaches expressive conduct that amounts to "fighting words" or a "true threat."

However, the Court found, based on this limited interpretation of the statute, the evidence was insufficient to support his conviction. A raised middle finger, by itself, does not, without more, amount to fighting words or a true threat. And here, the Court found, appellant raised his middle finger as a form of protest, and there was no evidence that he engaged in additional threatening conduct that would have elevated his raised middle finger to the level of conveying "fighting words" or a "true threat." And, because appellant's actions did not amount to such fighting words or a true threat, the pastor could not have been placed in "reasonable fear of the safety of [his] life, limb, or health" consistent with the parameters of OCGA § 16-11-39 (a) (1). Accordingly, appellant's conviction was reversed.

Proffered Evidence; Plain Error

Williams v. State, S17A0764 (10/2/17)

Appellant was convicted of the malice murder of Dawson, his wife, and other offenses. The evidence showed that she was severely beaten, but died as a result of strangulation. The medical examiner testified that he did not think drugs played any role in Dawson's death given that drugs were present in her system in only "low or therapeutic" levels, no evidence of drug overdose (like foam in the mouth) was present, and there was clear evidence that she had been beaten and strangled. Appellant proffered the testimony of a GBI forensic toxicologist regarding the drugs found in Dawson's system. The court refused to allow the testimony, ruling that her testimony probably was not relevant and, even if it were, its probative value was substantially outweighed by unfair prejudice, confusion of the issues, and misleading the jury.

Appellant argued that the evidence was relevant to, and probative of, his defense theory that he applied an amount of force to Dawson's neck that was not lethal but for an intervening variable, such as physiological effects of a drug in Dawson's system. But, the Court noted, appellant did not preserve any such argument for ordinary appellate review. Where an appellant challenges the admission of evidence, the Court is concerned with the sufficiency of the appellant's objection; here, however, where the appellant challenges the exclusion of evidence, the Court is concerned with the sufficiency of the showing that the appellant, as proponent of the evidence, made at trial. OCGA § 24-1-103 (a) (2) provides that "[e]rror shall not be predicated upon a ruling which … excludes evidence unless a substantial right of the party is affected and … the substance of the evidence was made known to the court by an offer of proof or was apparent from the context within which questions were asked." This provision does not require a formal offer of proof in every instance, as it expressly states that error also may be preserved if the substance of the evidence is apparent from the record. But the rule also requires that the reason for offering the evidence in question be apparent to the trial court. And here, the Court found, the record did not show that the trial court was alerted that appellant sought to introduce testimony to show that any of the drugs taken by Dawson would make someone more susceptible to asphyxiation by choking. The toxicologist said no such thing in her proffered testimony. Although appellant elicited testimony from other witnesses that it was possible to accidentally kill someone by pressing on their neck, he did not tell the trial court that he wanted to introduce the toxicology evidence for the purpose of showing that drugs in Dawson's system would have made her more vulnerable to such an "accident." Appellant instead argued to the trial court that the drugs could have explained Dawson's injuries in that they would have made her both "clumsy" and "drowsy" and "explosive, hyperactive" — a basis for admission of the evidence that he disclaimed on appeal, stating in his brief that "the alleged victim's behavior was irrelevant" given that he did not claim self-defense. Accordingly, the Court found that its review of this alleged error was limited to whether there was plain error pursuant to OCGA § 24-1-103 (d).

The Court found that even if it were to assume that the trial court's exclusion of the toxicologist's testimony was an "obvious" error (notwithstanding the lack of evidence connecting the testimony about Dawson's drug use to the cause of her death), appellant could not obtain reversal on this basis because he failed to show that the error affected his substantial rights. In order to make that showing, an appellant must show that there is a reasonable probability that, but for the evidence's exclusion at trial, the outcome would have been more favorable to him. This requirement is

similar to the showing of prejudice required to prevail on an ineffective assistance of counsel claim. Given that appellant offered no evidence to support his theory that Dawson died because drugs in her system made her more susceptible to asphyxiation, he could not show that there was a reasonable probability that, if the proffered testimony about drugs in Dawson's system had been admitted, the outcome of the trial would have been more favorable to him. Accordingly, there was no plain error in failing to admit this evidence.

Jury Instructions; Motions for Continuance

Hampton v. State, S17A0984 (10/2/17)

Appellant was convicted of malice murder and related charges. During its deliberations, the jury asked the trial court whether it "need[ed] to vote unanimous on guilty or not guilty on a specific charge?" After a discussion with the prosecutor and defense counsel, the trial court instructed the jury, "You must reach a verdict on each charge. And whatever your verdict is, it must be unanimous." Appellant contended that instructing the jury that it had to "reach a verdict on each charge" was impermissibly coercive. But the Court noted, appellant did not object at the time, so its review was limited to whether the statement amounted to plain error.

The Court concluded that, even assuming that the trial court clearly erred in telling the jury that it had to reach a verdict on each count and that appellant did not affirmatively waive this claim, appellant's claim regarding the charge failed the third step of the plain-error analysis. To prevail on this step, appellant has the burden to make an affirmative showing that the error probably affected the outcome of the trial. In this regard, if the jury question amounted to an announcement that the jury was deadlocked, appellant could perhaps carry his burden and prevail on this claim. Here, however, the jury question can easily be read as asking whether a unanimous vote is required on a charge and not as saying that the jury was deadlocked on a specific charge. A jury that is not deadlocked is less susceptible to coercion than a deadlocked jury. And, because appellant did not reliably show that the jury was deadlocked in this case and because the evidence against appellant was strong, with four people who knew him well identifying him as the shooter, the Court found that he failed to show the prejudice necessary to carry his burden on the third prong of the plain-error test.

Appellant also contended that the trial court erred in not continuing the case after his trial counsel announced he was not ready on the first day of trial due to appellant's lack of cooperation and in denying the motion for continuance that trial counsel made later in the same day. The Court disagreed.

The record showed that after the State announced that it was ready to proceed on the morning of trial, trial counsel said that "my announcement is the same as it was at the calendar call. I have to announce not ready due to my client not cooperating with me in preparing a defense." The trial court then said, "[w]e will go forward today with the jury trial." During jury selection later that same day, trial counsel moved for a continuance, saying that appellant had just told him of a potential witness of whom trial counsel was not previously aware. The trial court denied this motion.

The Court stated that even treating trial counsel's announcement of not ready as a motion for a continuance, the trial court did not abuse its discretion in denying either that motion or the one trial counsel made later that day. A refusal to grant a continuance will not be disturbed by appellate courts unless it clearly appears that the judge abused his discretion in this regard. Here, when trial counsel said that he was not ready to proceed with the trial, he had been representing appellant for five months. He did not, however, offer any explanation as to the state of his preparation, simply stating the conclusion that he was not ready to proceed because appellant would not cooperate. Moreover, when trial counsel later moved for a continuance as a result of appellant informing him of the potential witness, he did not say what evidence this witness might offer, and the prosecutor stated to the court that trial counsel had told him that appellant would not share with trial counsel what knowledge the witness had about the case. Additionally, with regard to the potential new witness, the trial court told trial counsel that the court would "work with [him] in any way" it could during the trial "to help [him] secure that witness." Finally, there was also evidence that appellant not only failed to cooperate with trial counsel, but also failed to cooperate with his previous counsel, and a trial court does not abuse its discretion in denying a motion for a continuance when the motion is based on the ground that trial counsel did not have the benefit of the defendant's cooperation until shortly before trial. Thus, the Court concluded, for all of these reasons, the trial court did not abuse its discretion in not continuing the case.

HGN Testing; Harper

Spencer v. State, S16G1751 (10/02/17)

Appellant was convicted of DUI (less safe) and her conviction was affirmed in Spencer v. State, 337 Ga. App. 360 (2016). The Court granted certiorari to consider whether the Court of Appeals erred in holding that the trial court properly admitted a police officer's testimony correlating the results of a horizontal gaze nystagmus ("HGN") test with a numeric blood alcohol content or "BAC". At trial, the arresting officer was allowed to testify that appellant exhibited four out of six clues on the HGN and that this "indicates an alcohol concentration equal to or greater than a .08."

The Court stated that it is generally accepted that the HGN test has reached a state of verifiable certainty in the scientific community and is admissible as a basis upon which an officer can determine that a driver was impaired by alcohol. And here, the Court of Appeals relied upon its prior holding in Parker v. State, 307 Ga. App. 61, 64 (2) (2010), that "a score of four out of six clues on an HGN test constitutes evidence of impairment." (Emphasis supplied). But whether the HGN test may properly be used as evidence that a driver is impaired by alcohol is not the same question as whether the HGN test has been established as an indicator of either a specific number or a numeric range of blood alcohol content.

The Court concluded that the evidence presented by the State was admitted without a sufficient foundation having been laid under Harper v. State, 249 Ga. 519 (292 SE2d 389) (1982), Specifically, the evidence was insufficient to establish the scientific validity or reliability of any correlation between a particular number of clues on an HGN test and a numeric blood alcohol content, whether a specific percentage or "equal to or greater than" a specific percentage. The trial court therefore abused its discretion in admitting this evidence. And, in light of the repeated questioning regarding the offending evidence, as well as testimony that appellant was not stopped for unsafe or erratic driving, that the officer acknowledged

on cross-examination that appellant did not exhibit many of the usual signs of intoxication, that appellant had had recent surgery, and that she presented evidence that she was not less safe to drive, the Court could not say error was harmless. Therefore, the Court reversed appellant's DUI conviction.

Impeachment Evidence; Coconspirator Statements

Davis v. State, S17A0949 (10/02/17)

Appellant was convicted of malice murder, attempted armed robbery and other crimes. The evidence showed that appellant, Gibson, White and Harris attempted to rob a tattoo parlor and during the course of the crimes, shot the store owner and an employee. Appellant contended that the trial court abused its discretion in permitting the State to cross-examine his mother and sister, who were his alibi witnesses, about prior altercations with his family and consequent interventions by police. He argued that such questioning improperly put his character at issue to his prejudice, and that the resulting testimony was inadmissible under Rule 404 (b), and if not improper under Rule 404 (b), then inadmissible Rule 403. The Court disagreed.

First, the Court noted, in objecting to the cross-examination, appellant did not invoke the provisions of either Rule 404 (b) or Rule 403 regarding alleged other acts and thus, his argument could only be considered for plain error. Second, under a plain error review, his argument failed. The purpose of the cross-examination was not to introduce into evidence other acts or transactions involving appellant for the uses outlined in Rule 404 (b). In fact, the Court stated, the incidents briefly described in cross-examination were not similar to the crimes on trial; rather, they were examples of family violence involving or known by appellant's mother and/or sister. The cross-examinations of the mother and sister were for the purpose of impeaching their testimony about appellant's whereabouts at the time of the crimes on trial and demonstrating their motives for offering alibi testimony, i.e., that they feared violent reprisal from appellant. While Rule 404 (b) is applicable to impeachment evidence, the rule did not prevent the cross-examination at issue. The fact that the evidence may have incidentally placed appellant's character in issue did not proscribe it. And regarding Rule 403, the Court held that given the strength of this evidence, it could not be said that the danger of unfair prejudice substantially outweighed the value of the sought impeachment evidence.

Appellant also argued that the trial court erred by permitting, over objection, Harris's then girlfriend to testify that White told her that appellant was the shooter. Specifically, he contended that there was no conspiracy or concealment phase of a conspiracy at the time the statement was made. The Court again disagreed.

The Court found ample evidence of a conspiracy among appellant and his three coindictees to go to the tattoo shop to commit a robbery, including a concealment phase. The four men discussed committing the robbery just prior to the shootings, and each member had a role in it. Gibson was the lookout, appellant and White were the armed robbers, and Harris provided the transportation to the crime scene and was the getaway driver. All four men left the scene together, and appellant and the declarant White discussed the fatal incident after its occurrence. White's statement to Harris's girlfriend was made when only Harris had been arrested, and was in conjunction with other statements attempting to communicate to Harris through his girlfriend that the group would be looking out for him; therefore, the statement was actually made in an attempt to keep the members of the conspiracy united, thus preserving or furthering it.

Hearsay; Business Records

Carter v. State, S17A1126 (10/02/17)

Appellant was convicted of malice murder and other related crimes. The evidence showed that after the victim was found dead, Lott, who had been arrested for armed robbery and other crimes unrelated to the murder, agreed to wear a secret recording device in order to obtain a statement from appellant. As agreed, Lott later recorded a conversation he had with appellant and a third party, Walker. In the recorded conversation, appellant recounts detailed events of the murder. Lott, but not Walker, testified at trial and the recording and transcript of it was admitted into evidence.

Appellant argued that the trial court erred in admitting Walker's portion of the recorded conversation because the State failed to demonstrate that Walker's portion of the recorded conversation was relevant. Specifically, he suggested that because the jury was instructed to "ignore" Walker's portion of the conversation, Walker's statements were necessarily irrelevant. However, the Court found, this argument was both premised on an incorrect assessment of the trial court's instruction and illogical. Though the trial court instructed the jury not to consider Walker's portion of the conversation "as evidence of guilt of the accused" or "for the truth of the matter asserted," the jury was not instructed to ignore Walker's statements. Likewise, simply because the jury was instructed not to consider the substance of Walker's statements it does not follow that his portion was irrelevant; Walker's comments were necessary to provide context and clarity to appellant's responses, and the conversation as a whole was very relevant to the primary issue before the jury, namely appellant's guilt.

Appellant also argued that Walker's portion of the conversation was inadmissible hearsay and that the admission of Walker's portion of the conversation ran afoul of the Confrontation Clause. The Court disagreed. First, Walker's portion of the conversation was not offered to prove the truth of the matter asserted. Instead, the State adduced Walker's statements to provide the jury with a complete, coherent conversation and to give context to appellant's inculpatory statements; the import of Walker's portion of the conversation was not derived from its substance or accuracy but, instead, from appellant's responses thereto. Accordingly, the trial court correctly ruled that Walker's portion of the conversation did not amount to hearsay. Second, the Court stated, even assuming that Walker's recorded statements were testimonial, an assumption that was highly questionable, there was no confrontation clause violation where, like here, the out-of-court statements are used for purposes other than establishing the truth of the matter asserted. Accordingly, this argument was without merit.

Finally, appellant argued that the trial court also erred in admitting a 45-second recorded telephone call that was initiated by appellant while he was in pretrial detention; the recorded telephone call captured appellant's voice and laughter, and it was admitted under the business-record exception to the hearsay

rule through the testimony of Lt. James, an assistant jail commander. Appellant argued that the recording was inadmissible hearsay that did not fall within the business-record exception. However, the Court found, the recording was admitted to allow the jury to compare the laughter and voice on the telephone recording with the Lott recording, and, thus, it was not offered to prove the truth of the matter asserted. Accordingly, the Court held, the recorded telephone conversation was not hearsay, and, as such, it was immaterial whether the conversation fell within the business-record exception. Consequently, appellant's argument that the recording was inadmissible hearsay was without merit.