Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 29, 2010

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THIS WEEK:

Voir Dire

Berry v. State, A09A1839

Appellant was convicted of kidnapping, armed robbery, and aggravated assault. He contended that the trial court erred in not striking a particular prospective juror for cause. The juror stated that she knew the District Attorney as a "friend and a client." She was not further questioned about the nature of her friendship. With regard to the business relationship, she explained that she was a computer consultant and that she had recently advised the district attorney's office regarding a case management system used to keep track of criminal cases. In the course of her work, she dealt personally with employees of the district attorney's office. She had completed one phase of her consulting arrangement and hoped that the second phase would be funded. Nevertheless, she stated that she could be fair and could judge the case on the merits. Appellant, citing *Beam v. State*, 260 Ga. 784, 785 (2) (1991), argued that the juror's relationship with the District Attorney and his office required a conclusion that bias should be automatically implied. The Court disagreed. In *Beam*, the Supreme Court held that it was reversible error for the trial court to fail to strike for cause a prospective juror who was a full-time employee of the district attorney's office that was prosecuting the case. But, the Court found, the rule in *Beam* has not been extended beyond full-time employees of the prosecuting authority. The juror here was only a consultant or contractor to the district attorney's office.

Appellant also argued, citing *Kirkland v. State*, 274 Ga. 778, 780 (2) (2002), that the juror's financial relationship with the district attorney's office required an automatic finding of bias. The Court found that the juror in *Kirkland* was a shareholder of corporation that was a party to the action and as such, could be considered a "party in interest." Here, however, the juror could not be considered a party at interest. Rather, at most, she had an ongoing business relationship with the district attorney's office. The Court declined to apply a per se rule in this instance and held that because of the juror's responses to the questions asked of her, the trial court did not abuse its discretion in not striking her for cause.

Motion to Correct Void Sentence

Jones v. State, A09A2165

Appellant was convicted of numerous charges in 1999. In 2009, he filed a motion to correct a void sentence contending he was wrongly sentenced as a recidivist, that the trial court erred in considering evidence of similar transactions, that the trial court erred by admitting certain other evidence at trial, that the trial court impermissibly participated in the plea negotiations, that the trial court erred

by not setting aside the jury's verdict and that his trial counsel was ineffective. He appealed from the denial of this motion.

The Court held that the motion was well outside the statutory time period during which a court may correct or reduce a sentence pursuant to OCGA § 17-10-1 (f). Once this statutory period expires, a trial court may only modify a void sentence. A sentence is void if the court imposes a punishment that the law does not allow. To support a motion for sentence modification filed outside the statutory time period, therefore, a defendant must demonstrate that the sentence imposed a punishment not allowed by law. Moreover, a direct appeal does not lie from the denial of such a motion unless it raises a colorable claim that the sentence is, in fact, void. Allegations that merely challenge the sentencing procedure or question the fairness of a sentence do not implicate voidness and cannot form the basis for a direct appeal. Here, the Court held, appellant misstated the record by arguing that the trial court sentenced him as a recidivist and improperly considered similar transaction evidence in imposing sentence. Rather, the trial court sentenced him according to the State's recommendation pursuant to the plea negotiations, and there was nothing in the transcript or the final written disposition to indicate that appellant was sentenced as a recidivist or that other offenses not part of the plea negotiations were considered in imposing sentence. The Court further held that the remainder of appellant's contentions did not pertain to his sentence and thus were not properly before the Court for review. It therefore dismissed appellant's appeal.

Venue

Sewell v. State, A09A2250

Appellant was convicted of rape, aggravated sexual battery, sexual assault and aggravated assault. He argued that the State failed to establish venue on the charge of aggravated assault because there was no evidence that the victim was shot in Fulton County. The evidence showed that the victim testified that she drove from Auburn Avenue to what she thought was Peachtree Street where the defendant shot her. She then drove "not too long" until she saw Underground Atlanta and jumped out of the car close to the Five Points Marta Station. OCGA § 17-2-2 (e) provides: "If a crime is committed upon any … vehicle… traveling within this state and it cannot readily be determined in which county the crime was committed, the crime shall be considered as having been committed in any county in which the crime could have been committed through which the … vehicle… has traveled." OCGA § 17-2-2 (h) provides: "If in any case it cannot be determined in what county a crime was committed, it shall be considered to have been committed in any county in which the evidence shows beyond a reasonable doubt that it might have been committed." The Court found that the State established that Auburn Avenue was in Fulton County. Further, there was no dispute that Underground Atlanta and the Five Points Marta Station are also in Fulton County. Although the victim did not know the exact location of the shooting, the logical import of her testimony was that the crime scene itself was in Fulton County The Court therefore concluded that the State met its burden of proving beyond a reasonable doubt that venue of the crime charged was properly in Fulton County.

Motion to Withdraw Guilty Plea

Stockton v. State, A09A2326

Appellant appealed from the denial of his motion to withdraw his guilty plea to armed robbery and theft by taking. In his motion, he contended that he received ineffective assistance of counsel because his lawyer failed to investigate his mental competence before he pled guilty. The trial court denied the motion without a hearing. The Court reversed and remanded for a hearing on the motion. In so holding, the Court found that this was not a case in which a defendant sought to appeal from a guilty plea, but rather an order denying a motion to withdraw a guilty plea. Therefore, the State was incorrect in its argument that appellant's sole remedy was habeas corpus.

Guilty Pleas; Appeals

Carleton v. State, A09A1736

Appellant plead guilty to numerous sex offenses. He then timely filed a notice of appeal. Thereafter, he was appointed new counsel who moved to withdraw his guilty plea alleging ineffective assistance of counsel. The trial court found that it had no jurisdiction to consider appellant's motion to withdraw his guilty plea, and he could not file a direct appeal of his guilty plea on the ground of ineffective assistance of trial counsel when the record contained only the transcript of the plea hearing. The Court agreed. First, appellant's filing of a notice of appeal divested the trial court of jurisdiction to alter a judgment while the appeal of that judgment was pending. Second, appellant's motion was filed after expiration of the term of court in which his guilty plea was entered. The Court held that when the term of court has expired in which a defendant was sentenced pursuant to a guilty plea, the trial court lacks jurisdiction to allow the withdrawal of the plea. In such instances, the only available means for an appellant to withdraw his guilty plea is through habeas corpus proceedings. Finally, the Court held, appellant's claim of ineffective assistance of counsel cannot be directly appealed for the same reason. A defendant who seeks to appeal a guilty plea on the ground of ineffective assistance of counsel must develop those issues in a post-plea hearing and may not file a direct appeal if the only evidence in the record is the transcript of the guilty plea hearing. The proper remedy is to move to withdraw the plea or, if the term of court in which the plea was entered has expired, to petition for a writ of habeas corpus.

Videotape, Identification Testimony

Strickland v. State, A09A1757

Appellant was convicted of distribution of cocaine. He argued that the trial court erred in failing to sustain his objection to lay opinion testimony of a deputy sheriff identifying him on a surveillance videotape. The evidence showed that appellant sold cocaine to a C.I. and that this transaction was videotaped. The Court stated that a lay witness who is neither a witness or victim of a crime, but who has viewed a surveillance videotape of the commission of a crime, is permitted to give his or her opinion of the identity of a person depicted on the videotape if there is some basis for concluding that the witness is more likely to correctly identify the defendant from the photograph than is the jury. This criterion is fulfilled where the witness is familiar with the defendant's appearance around the time the surveillance photograph was taken and

the defendant's appearance has changed prior to trial. It is improper, however, "to allow a witness to testify as to the identity of a person in a video . . . when such opinion evidence tends only to establish a fact which average jurors could decide thinking for themselves and drawing their own conclusions." Here, the deputy testified that he had met appellant on several occasions, conversing with him on the street. The officer identified appellant in court and indicated that at the time of the sale, appellant wore his hair long in dread locks, contrary to his appearance at trial. The Court held that the deputy was in a unique position to recognize appellant given his familiarity with appellant's personal appearance before and at the time of the offense. Accordingly, the trial court did not abuse its discretion in admitting his identification opinion testimony.

Right of Confrontation; Lab Results

Carolina v. State, A09A2053

Appellant was convicted of trafficking in cocaine and possession of marijuana with intent to distribute. He argued that the trial court erred by admitting the cocaine into evidence because the lab technician who tested the substance did not testify at trial and the testimony by a state crime lab supervisor concerning the results of the testing was thus inadmissible hearsay that violated his Sixth Amendment right to confront the witnesses against him. This issue was decided adversely to appellant's position in *Dunn v. State*, 292 Ga. App. 667 (2008). However, appellant argued that the recent United States Supreme Court case of *Melendez-Diaz v. Massachusetts* , __U.S.__ ,129 SC 2527, 174 LE2d 314 (2009) supported his position. The Court found that in *Melendez-Diaz*, the Supreme Court determined that a sworn certificate (affidavit) of a state crime laboratory analyst admitted into evidence to prove material seized by police was contraband was "testimonial" in nature and thus violated the defendant's Sixth Amendment rights when the analyst who wrote the report did not testify in person at trial. Our state Supreme Court had already found similarly in *Miller v. State*, 266 Ga. 850 (1996). Also, the Court noted, *Melendez-Diaz* specifically did not decide the issue presented here - whether the technician or chemist who actually performed the tests must testify at trial. The Court therefore again rejected the contention that the expert's testimony was inadmissible hearsay that ran afoul of appellant's rights under the confrontation clause.