

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 29, 2016

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Lalaine Briones
State Prosecution Support Director

Sheila Ross
Director of Capital Litigation

Sharla Jackson
Domestic Violence, Sexual Assault,
and Crimes Against Children
Resource Prosecutor

Gilbert A. Crosby
Sr. Traffic Safety Resource Prosecutor

Joseph L. Stone
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Robert W. Smith, Jr.
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **Search & Seizure; Cellphones**
- **Sex Offender Registry; “Intentional Physical Harm”**
- **Guilty Pleas; Alford**
- **Jury Instructions; Mutual Combat**
- **Record Restrictions; O.C.G.A. § 35-3-37**
- **Right of Self-Representation; Faretta**
- **Habeas Corpus; Ineffective Assistance of Appellate Counsel**
- **Jurors; Removal by Court**

Search & Seizure; Cellphones

Glispie v. State, A15A1281 (11/20/15)

Appellant was convicted of VGCSA, obstruction, and traffic offenses. He contended that the trial court erred in admitting evidence of text messages extracted from one of the cell phones found on him at the scene. Specifically, he argued that the search warrant application for the cell phone failed to provide probable cause sufficient to justify the issuance of the warrant. The Court disagreed.

Here, the Court found that in the affidavit upon which the search warrant was based, the affiant listed his experience and training with narcotic sales and stated that one of the cell phones found on appellant had been “recovered as evidence related to a violation of Georgia’s controlled substance act.” The affiant averred that he had reason to believe that the cell phone contained certain items, namely “[text messages, phone numbers in call history, digital phone book, digital pictures, digital video, voice[] mails, times of phone calls and text messages, which are being possessed in violation of O.C.G.A.

§ 16-13-30(b)[:] Possession of cocaine with intent to distribute.” After detailing the events leading up to appellant’s arrest, including the attempted traffic stop, appellant’s flight, the officers’ interactions with the owner of the vehicle, and appellant’s striking one of the officers during his attempt to escape, the affidavit listed the items found on appellant’s person after a pat-down of his pockets, including the drugs, two cell phones, and cash. The Court found that given the nature of the items in appellant’s possession at the time of his arrest, including a large number of suspected drugs, cash, a residue-laden razor, and two cell phones, the magistrate was authorized to conclude based on practical considerations of everyday life that there was a fair probability that the phone he also possessed would contain evidence of drug sales. Considering the specific evidence in this case and giving the magistrate the requisite substantial deference, the Court concluded that the trial court did not err by denying appellant’s motion to exclude the text messages taken from the cell phone found on him at time of his arrest, notwithstanding that police had no specific knowledge of appellant’s use of the phone.

Appellant also contended that the trial court erred by admitting the text messages taken from his cell phone because they were not properly authenticated. The Court stated that under O.C.G.A. § 24-9-901(a), there are no special rules under Georgia law governing the authentication of electronic documents or communications. Electronic records and e-mails are to be treated the same as ordinary writings for purposes of authentication and admission. As with all authentication issues, the trial court should admit the evidence if a

reasonable jury could find that the evidence is what it is claimed to be. Every form of electronic communication can be “spoofed,” “hacked,” or “forged.” But this does not, and cannot, mean that courts should reject any and all such communications. Indeed, the vast majority of these communications are just as they appear to be — quite authentic. The goal is to supply sufficient, nonhearsay evidence as to the identity of the source such that a reasonable factfinder could conclude that the evidence is what it is claimed to be. Rule 901 only requires a proponent to present sufficient evidence to make out a prima facie case that the proffered evidence is what it purports to be. After meeting the prima facie burden, the evidence may be admitted, and the ultimate question of authenticity is then decided by the jury. Evidence may be authenticated through the testimony of a witness with knowledge.

Here, the Court found, the officer testified that he observed another officer recover and download the text messages taken from the cell phone found on appellant, which messages were then printed out. According to the witness’s testimony, appellant referred to himself in the text messages by his first name at least twice. This evidence established a prima case that the evidence was what it purported to be — text messages between appellant and other individuals. And although the witness testified that the cell phone was actually registered to another individual who had access to and had been using the cell phone, the State presented sufficient evidence to support a finding that the text messages were to and from appellant. Accordingly, the trial court did not abuse its discretion by overruling appellant’s authentication objection.

Appellant also contended that the evidence was inadmissible hearsay and should have been excluded. But the Court stated, premitting whether the text messages constituted hearsay, they were admissible as an admission by a party-opponent under O.C.G.A. § 24-8-801(d)(2)(A).

Sex Offender Registry; “Intentional Physical Harm”

State v. Randle, S15G0946 (1/19/16)

The Court granted the State’s petition for certiorari to consider one of the criteria for eligibility for removal from the sex offender

registry, namely, the requirement that the offense that resulted in the offender’s inclusion on the registry involved no “intentional physical harm” to the victim pursuant to O.C.G.A. § 17-10-6.2(c)(1)(D). The crux of the appeal was a dispute of the meaning of the word “harm.” Appellant pled guilty in 1993 to one count of child molestation for touching the penis of a 10 year old. The State argued that appellant’s act of touching the victim’s genitals gave rise to a presumption that the victim had suffered “intentional physical harm” that would preclude his removal from the sex offender registry. The Court disagreed.

Construing the statute in its entirety and the definition of the word “harm,” the Court found that both the legislature and our courts have recognized generally, albeit in a different context, that physical contact, even if uninvited or unwanted, does not necessarily equate to physical harm. Thus, the Court found no reason to believe that the legislature intended to disregard this distinction in the present context. Accordingly, the Court held that that the phrase “intentional physical harm,” as it is used in O.C.G.A. § 17-10-6.2(c)(1)(D), means intentional physical contact that causes actual physical damage, injury, or hurt to the victim.

Guilty Pleas; Alford

McGuyton v. State, S15A1688 (1/19/16)

Appellant appealed from the denial of his motion to withdraw his guilty plea. The record showed that appellant was indicted on multiple charges, including murder. As a result of the State’s filing of a recidivist notice, appellant was facing a mandatory sentence of life without parole if convicted. On the eve of trial, appellant entered negotiated guilty pleas, pursuant to *Alford*, to the separately indicted charges of murder and possession of a firearm by a convicted felon. He was sentenced to life imprisonment with the possibility of parole.

Appellant first contended that the trial court may accept a guilty plea pursuant to *Alford* only if the record reflects the defendant’s plea was premised upon his acknowledgment of the sufficiency of the State’s evidence to convict him. The Court disagreed. Here, although appellant claimed he was not guilty and stated that his main reason for pleading was in order to spare his family from testifying, he acknowledged more than once at his plea

hearing that it was “possible” a jury could convict him based on the State’s evidence. Even so, a defendant’s acknowledgment of the sufficiency of the evidence to convict is not a prerequisite for the trial court to accept a guilty plea. So long as a defendant intelligently concludes that his interests require entry of a guilty plea and the record before the judge contains strong evidence of actual guilt, the trial court may accept a guilty plea. Normally, all that is required in order to meet constitutional muster is for the trial court to find that the record contains strong evidence of actual guilt, and for the accused to enter the plea voluntarily, knowingly, and understandingly of the rights he was waiving by entering the plea.

After sentencing, a defendant may withdraw a guilty plea only to correct a manifest injustice, such as where the defendant was denied effective assistance of counsel, or the plea was entered involuntarily or without an understanding of the nature of the charges. Here, the Court found, from the record, it was apparent that the trial judge who accepted the plea properly concluded that the abundant evidence proffered by the State was sufficient to show appellant’s alleged actions constituted the crimes for which he pleaded guilty. The record showed appellant fully understood the facts and circumstances surrounding the plea. It showed that he made a decision to plead guilty to avoid the possibility of a life sentence without the possibility of parole upon conviction. He also made the decision in order to spare members of his family from the burden of testifying at trial. Accordingly, the Court rejected appellant’s assertion that withdrawal of the pleas was required, in order to avoid a manifest injustice, as a result of insufficient evidence to support acceptance of his guilty plea.

Appellant also contended that the trial court was required to grant the withdrawal of his guilty plea because he was coerced into entering the pleas by his sister, who was to be a witness at trial, and a State’s investigator. Appellant argued the pleas were entered in response to what he called a “surreptitious” conversation he had, outside the presence of counsel, with the investigator and his sister who came together to visit him in jail. During that conversation appellant learned that his mother and sister had been subpoenaed by the State to testify at trial.

However, the Court found, the record did not support his assertion that the investigator, who was not involved in the investigation of these crimes, but was a friend of appellant's sister, brought the plea deal to him. Nor did the evidence show that the jailhouse visit was surreptitious. Instead, the evidence showed defense counsel knew appellant's family wanted to speak with him before trial and that counsel approved the meeting. Specifically, the evidence showed the investigator contacted the State's attorney prior to the meeting and offered to arrange it if approved. Appellant's plea counsel testified at the motion to withdraw hearing that the prosecutor contacted him prior to the meeting and counsel approved it, stating that he knew and trusted this investigator not to question appellant about the evidence in the case but to talk about the possibility of a plea. The investigator's undisputed testimony established that after an hour-long conversation between the three parties at the jail, appellant asked for an hour to think about how he wanted to proceed. Once appellant told the investigator he had decided to enter a plea if certain conditions could be worked out, appellant communicated his decision to his counsel and the plea was negotiated between the prosecutor and plea counsel. Although appellant testified at the withdrawal hearing that he had been coerced, and his motion counsel asserted the plea was the result of intimidation and emotion, at the plea hearing he repeatedly told the court he had not been coerced. Accordingly, he failed to demonstrate coercion or that his decision to enter the plea was not voluntarily made.

Jury Instructions; Mutual Combat

Watson v. State, S15A1683 (1/19/16)

Appellant was convicted of malice murder and possession of a firearm during the commission of a crime for the shooting death of the victim. He contended that the trial court erred by failing to charge on mutual combat. The Court noted that since appellant did not object at trial, its review was limited to whether the failure to give the charge was plain error.

First, the Court found, there was no evidence that the victim ever possessed a deadly weapon during his encounter with appellant;

indeed, appellant admitted that the victim was unarmed. The Court recognized some inconsistency in the case law with regard to whether both alleged combatants are required to have deadly weapons in order for the jury to be charged on mutual combat as there are numerous precedents holding that both combatants must be so armed. Thus, the trial court did not commit plain error in making a decision on a jury instruction issue that was supported by those precedents. Second, the Court found, even assuming that the victim did not need to be similarly armed to engage in mutual combat with the shotgun-wielding appellant, there was simply no evidence that the victim had the mutual intent to engage in a physical fight with appellant. Accordingly, the Court concluded, the trial court did not err, much less plainly err, in failing to give a mutual combat instruction.

Record Restrictions; O.C.G.A. § 35-3-37

Mosely v. Lowe, S15A1722 (1/19/16)

The State nolle prossed charges against Lowe for simple battery in 1996. In 2014, she requested the Solicitor-General (hereinafter the State) to have her criminal history record information on this charge restricted pursuant to O.C.G.A. § 35-3-37 as amended in 2011 and effective on July 1, 2013. The State denied the request. Lowe filed a petition in superior court and the trial court found for Lowe. The State appealed.

The State conceded that under the law as amended, Lowe would be entitled to have her record restricted. But, the State contended, the law did not have retroactive effect and to give it such retroactive effect would be unconstitutional. The Court disagreed.

The Court noted that as a means of addressing criminal history record information predating the effective date of these amendments, the statute expressly provides that "as to arrests occurring before July 1, 2013, an individual may, in writing, request the arresting law enforcement agency to restrict the criminal history record information of an arrest." O.C.G.A. § 35-3-37(n)(1). Such requests are to be assessed against the expanded eligibility criteria of the amended law. Thus, the clear and unambiguous terms of the amended statute provide for its applicability to arrests pre-dating the amendments' July 1, 2013 effective date.

But, the Court noted, even when the General Assembly clearly provides that a law is to be applied retroactively, our Constitution forbids statutes that apply retroactively so as to "injuriously affect the vested rights of citizens." Nevertheless, only rights that are private in nature are capable of vesting so as to implicate the prohibition on retroactive laws. Legislative schemes under which citizens are afforded access to public information generally create public rather than private rights. Accordingly, such schemes may be modified retroactively with no constitutional impediment.

And here, the Court found, the effect of the amendments to O.C.G.A. § 35-3-37 is to expand the right of individuals to restrict access to their criminal history record information and, concomitantly, to limit the right of the general public to gain access to such information. The only right that has been impaired in any way is the public's right to access information. Therefore, the Court held, because such a right is a public right, incapable of vesting in any particular person, the modification of this right poses no constitutional problem. Accordingly, the amended version of O.C.G.A. § 35-3-37 is intended to apply and properly can be applied to Lowe's record restriction request.

Right of Self-Representation; Faretta

Wiggins v. State, S15A1729 (1/19/16)

Appellant was convicted of malice murder. He contended that the trial court's implicit denial, without inquiry or hearing, of his pre-trial request to represent himself was error under *Faretta v. California*, 422 U.S. 806 (1975) and the Constitution. The Court agreed.

The evidence showed that appellant's defense counsel suffered a heart attack three months before trial and appellant believed his counsel blamed him for causing it. On September 2, appellant sent a letter to the trial court explaining his situation and stating: "What I am asking for is a chance to come before the court. I am more than ready to defend myself. . . . I cannot allow [defense counsel] to represent me. Please let me know what steps I need to take to get this case to trial." The trial court forwarded appellant's correspondence to defense counsel and included with it a letter suggesting that "[g]iven the nature of [appellant's] letter, it may be prudent to set

this matter down for a hearing in front of [the court] at your earliest convenience.” A month later, with no hearing having been held, appellant sent a letter to the clerk asking “what [he] needed to do to get this hearing before [the judge].” The judge’s law clerk responded to this letter, informing appellant that if he desired “to obtain any kind of legal relief,” he had to “go through the proper channels” and that a copy of appellant’s “informal request to dismiss [the] attorney ... from this case” had been forwarded to the prosecuting attorney and defense counsel, “for their review and consideration.” No further action was taken by the trial court regarding appellant’s request to proceed pro se, thereby leaving counsel in the case. After a one day bench trial, appellant was found guilty of all charges.

The trial court found that appellant made an unequivocal desire to dismiss his counsel, but because he did not renew his request at the time of trial, the court found it reasonable to assume that he no longer wanted to represent himself. The Court found that the trial court erred in two respects. First, by proceeding to trial without holding a *Faretta* hearing, the trial court gave no consideration to its responsibilities following appellant’s assertion of his constitutional right. When a defendant asserts the right to self-representation, it is the responsibility of the trial judge to ensure that the decision to dismiss counsel and proceed pro se has been knowingly and intelligently made and that the defendant has made the choice to proceed without the benefit of counsel with “eyes open.”

Second, the trial court’s finding that appellant failed to re-assert his right to self-representation at the start of trial was insufficient, by itself, to establish a proper waiver. A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege, and the determination of whether there has been a valid waiver depends on the circumstances of each case. Here, although appellant initially was appointed counsel, he later unequivocally expressed his desire to proceed without the benefit of counsel’s experience and training. Regardless of the soundness of this decision, appellant clearly asserted his right to represent himself, and he was constitutionally entitled to do so as long as his decision was made knowingly and intelligently. Appellant’s request to proceed pro se was virtually ignored by both the trial

court and counsel prior to trial, and relying only on appellant’s silence at the start of trial, the trial court “assumed” appellant had waived his previously asserted right. Under these circumstances, and especially because there was no affirmative evidence that appellant wavered or equivocated in his desire to proceed pro se, the Court found that appellant’s mere silence was insufficient to establish a knowing and intelligent waiver of his already invoked right to self-representation. Accordingly, appellant’s conviction was reversed.

Habeas Corpus; Ineffective Assistance of Appellate Counsel

Garland v. State, S15A1562 (1/19/16)

Garland was convicted of sexual battery involving a child and sentenced to serve one year imprisonment followed by four years of probation. On appeal, he was represented by different counsel who filed a motion for new trial contending that trial counsel was ineffective on several grounds, including an allegation that he unreasonably failed to investigate Garland’s mental health status and failed to raise Garland’s mental condition as an issue at trial despite knowing that Garland was under the care of a psychiatrist and had been prescribed anti-psychotic medication. Prior to the hearing on his motion for new trial, Garland, who already had served the incarceration portion of his sentence, was re-incarcerated on a probation violation. In order to secure Garland’s release from confinement, appellate counsel reached an agreement with the State which required him to withdraw the motion for new trial, and in exchange, Garland would be returned to probation to be served in his home state of Texas. Garland did not execute a written agreement to withdraw his motion for new trial or to waive his post-conviction review rights and he was not informed by the judge presiding over his probation revocation hearing that he was waiving his post-conviction rights in exchange for a return to probation. In fact, the Court found, there was no evidence that the judge overseeing the hearing was made aware of appellate counsel’s agreement with the State. Nevertheless, Garland’s motion for new trial was withdrawn by appellate counsel, and on the same day, the court entered an order revoking Garland’s probation, releasing him

from custody, and reinstating his probation with special conditions, one of which was that he establish residency in Texas and serve his probation there.

Five years later, while still on probation, Garland filed a petition for habeas corpus. The habeas court determined that appellate counsel performed deficiently by: (1) entering into the agreement with the State without Garland’s consent; (2) withdrawing the motion for new trial knowing that Garland might not have been competent to make a knowing and voluntary waiver of post-conviction review; and (3) failing to investigate Garland’s mental health. With regard to prejudice, the habeas court determined Garland’s mental condition should have been offered as a defense at trial or as an issue of his competency to stand trial, that there was a reasonable probability that the existence of his condition caused him actual prejudice and undermined confidence in the outcome of the trial, that the issues raised on motion for new trial related to trial counsel’s failure to investigate Garland’s mental health were meritorious and should not have been withdrawn, and that there was a reasonable probability that appellate counsel’s withdrawal of the meritorious claims undermined confidence in the outcome of the motion for new trial proceeding. In essence, the habeas court concluded that appellate counsel, by ineffectiveness, waived Garland’s right to claim ineffective assistance of trial counsel. The State appealed from the habeas court’s grant of relief.

The Court affirmed. First, the Court noted, the State conceded that appellate counsel’s performance was deficient. Thus, the Court stated, it must address the State’s contention that despite this deficient performance, there was no prejudice to Garland. Specifically, the State argued that the habeas court erred by failing to find a reasonable probability that Garland would have received a more favorable outcome on *direct appeal* but for appellate counsel’s deficient performance. But, the Court stated, the deficiencies upon which the habeas court’s ruling was based all occurred during the motion for new trial proceeding and it was the outcome of that proceeding that was the proper focus of the habeas court’s prejudice analysis. Contrary to the State’s argument, therefore, the habeas court was not required to consider the prejudicial effect of appellate counsel’s errors on the subsequently

filed direct appeal. Instead, the pertinent question before the habeas court was whether there was a reasonable probability that but for appellate counsel's deficient performance on motion for new trial, the outcome of the motion for new trial proceeding would have been different. And here, the Court found, reasonable appellate counsel in these circumstances would have discussed the agreement with Garland and withdrawn the motion for new trial only with his consent after fully disclosing that withdrawal of the motion for new trial would effectively waive any post-conviction claim Garland may have had regarding trial counsel's performance, including trial counsel's failure to undertake even the slightest mental health evaluation. Thus, the habeas court did not err when it concluded that Garland was prejudiced by appellate counsel's failure to inform Garland of the agreement with the State and his failure to obtain Garland's consent to the withdrawal of the motion for new trial.

In so holding, the Court rejected the State's argument that the habeas court erred by failing to address the question of whether Garland's "trial was likely tainted by a specific error or omission of a constitutional dimension necessitating a retrial." Instead, the Court stated, it was beyond dispute that a defendant who receives ineffective assistance of counsel has been denied a right of "constitutional dimension." Accordingly, the Court also rejected the State's suggestion that despite being denied his constitutional right to effective legal counsel, Garland was not entitled to habeas relief "because he almost certainly is going to be found guilty" if he is tried again.

Jurors; Removal by Court

Smith v. State, S15A1703 (1/19/16)

Appellant was convicted of murder and other related crimes. He contended that the trial court erred in removing a juror. The Court disagreed.

The record showed that the juror was an insurance agent and during voir dire, defense counsel asked the juror if they knew each other. The juror didn't think so, but defense counsel informed the juror that he had policies with the juror's agency. The juror stated that the fact he had a business relationship with defense counsel would

not affect his impartiality. However, on the fourth day of trial and after the State's closing arguments, the juror twice approached a deputy and told the deputy that he had developed "a concern about being able to vote against a customer of his agency," and he told the deputy that, "while he didn't know [the lawyer,] people in his office did." The parties all agreed that the judge should individually question the juror. When asked about his concerns, the juror responded that he "didn't think it would be fair for me to be on this trial because of the conflict." The juror told the court that he had not discussed the matter with anyone in his office, but he admitted that he had looked up defense counsel in his company's files to "verify" that the lawyer was a customer. The court informed the juror that such conduct violated its instruction not to do any independent research about the parties or their lawyers. The judge then question the juror about his impartiality and the juror said that he would try to do his best and try his best to keep his business relationship with defense counsel out of his mind. Over defense counsel's objections, he removed the juror and replaced him with the first alternate.

The Court found that there was no error. First, the juror violated the trial court's instruction not to conduct independent research on the parties, and that violation alone provided a sufficient basis for the court to remove the juror. Second, the fact that the juror twice approached the deputy with concerns about his business relationship with defense counsel supported a finding that the juror was not, in fact, able to remain impartial. Moreover, the juror's numerous equivocal responses that he would "try" or would "do [his] very best" to put the relationship with defense counsel out of his mind also supported the trial court's conclusion about the juror's ability to be impartial. Accordingly, the Court held, the trial court had two sound reasons for removing the juror, either of which would have been sufficient to support its decision. As a result, the trial court did not abuse its discretion in removing the juror.