Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 10, 2017

THIS WEEK:

Corroboration of Confessions; Plain Error

English v. State, S16A1754 (1/23/17)

Appellant was convicted of murder and first degree arson. The evidence showed that appellant bludgeoned the victim to death in a house and then set the victim and the house on fire. During the investigation, Howell and Carrigg, two friends of appellant, met with appellant at the request of the GBI. That meeting was tape recorded and appellant made numerous admissions and incriminating statements. After appellant was arrested, he was interviewed and gave a Mirandized statement to law enforcement.

Appellant argued that the trial court plainly erred by not instructing the jury regarding the necessity of corroborating evidence for confessions under former O.C.G.A. § 24-3-53. The Court disagreed. First, the Court noted, most of appellant's statements were admissions, not confessions. A mere incriminating statement is made where the accused, though admitting to damaging circumstances, nonetheless attempts to deny responsibility for the crime charged by putting forward exculpatory or legally justifying facts. Thus, in an admission, only one or more facts entering into the criminal act are admitted, while in a confession, the entire criminal act is confessed. And here, the Court found, appellant admitted to law enforcement that he hit the victim over the head with an object multiple times, but he never said he killed the victim or set the house on fire. Appellant instead claimed that he left the home to clean up after the fight and returned to check on the victim before leaving for a party. Consequently, the Court found, appellant admitted only some subordinate fact from which the jury may or may not have inferred guilt, and, therefore, appellant's statements to law enforcement officers were not confessions as to the victim's murder and the arson.

Moreover, the Court found, even if it were to assume, without deciding, that the other statements made to Howell and Carrigg were confessions, appellant could not satisfy the third prong of the plain error test by showing that the error affected the outcome of his trial because there was more than ample corroborating evidence shown. Accordingly, because the corroborating evidence was extensive, the trial court did not plainly error in failing to charge the jury.

Miranda; Custodial Interrogation

State v. Rosas, A15A1324 (1/9/16)

Rosas was indicted for one count of child molestation. The trial court suppressed her statements on the grounds that she had not been informed of her *Miranda* rights. The State appealed and the Court reversed.

The evidence showed that an officer was dispatched to Rosas' house to arrest her pursuant to an outstanding arrest warrant. Upon arriving at the location, the officer saw

Rosas and the alleged victim's mother standing at the front door of the house. The officer approached them and asked Rosas, "Do you know why we are here?" Rosas stated, "I guess I must have touched him," and said that she had gotten into bed with the alleged victim to console him. The officer subsequently arrested Rosas and took her to jail.

The Court stated that pretermitting the issue of whether the officer's question rose to the level of an interrogation, it is clear that Rosas had not been formally arrested or restrained to a degree associated with formal arrest at the time she made the statements. Instead, the evidence showed that the office approached Rosas as she stood at the door of her house, did not tell her she was under arrest, did not place her in handcuffs, and did not indicate that she was not free to leave. While the officer's approach and question may have indicated that Rosas was a criminal suspect, even a clear statement from an officer that the person under interrogation is a prime suspect is not, in itself, dispositive of the custody issue, for some suspects are free to come and go until the police decide to make an arrest. A person is not entitled to *Miranda* warnings as a matter of right, even though that person is a suspect, unless that person has been taken into custody or has been deprived of freedom of action in another significant way. Thus, the Court concluded, because Rosas had not been formally arrested or deprived of her freedom of action in any other significant way when the officer posed a question as she stood near the door of her house, a reasonable person in her situation would not have perceived that she was in custody and therefore a *Miranda* warning was not required. Accordingly, the trial court erred in suppressing her statements on the basis of *Miranda*.

Plea Bargaining; Appellate Jurisdiction

Winfrey v. State, A16A1609 (1/17/17)

Appellant pled guilty to multiple charges of violating the Street Gang Terrorism and Prevention Act. He argued that the trial court improperly participated in the plea negotiations to the extent that his pleas to the charged offenses were rendered involuntary. The State moved to dismiss the appeal, contending that appellant forfeited and waived his right to pursue the appeal because he did not first raise this issue in the trial court by filing a motion to withdraw his plea.

The Court initially addressed the State's motion. The Court stated that a direct appeal is a prescribed means to challenge the guilty plea, but appellate review is limited to only those claims that can be resolved by facts appearing in the record, including the guilty plea transcript and any other evidence properly presented to the trial court, provided such evidence is also included in the record on appeal. Thus, although a defendant who hopes to appeal successfully from a guilty plea is not *required* to first file a motion to withdraw the plea, the possibility of expanding the record on which the appeal will be reviewed, and doing so with assistance of appointed counsel if indigent, should create a strong incentive for defendants to do so. And, the Court found, because it could resolve the issue raised by appellant based on the existing record, appellant's appeal was not subject to dismissal on this basis. Accordingly, the Court denied the State's motion to dismiss.

Turning to the merits, the Court stated that judicial participation in the plea negotiation process is prohibited by Georgia Uniform Superior Court Rule 33.5 (A) and as a constitutional matter when the interjection of the plea court is to such a degree as to render a guilty plea involuntary. Comments by the trial judge that reinforce the unmistakable reality that a defendant who rejects a plea offer and instead opts to go to trial will likely face a greater sentence have been held to unlawfully insert the judge into the plea process. Nevertheless, there is an enormous difference between simply being aware or even being reminded by the State that rejection of a plea proposal *may* result in a greater punishment and being told by the trial judge that a rejection of a plea proposal *will* result in greater punishment in the event of a conviction by a jury.

After quoting the statements of the trial court judge, the Court found that while a "close case", the trial judge's remarks in context showed that she did not improperly interject herself in the negotiation process, nor did her comments render appellant's plea involuntary. The trial judge never explicitly told appellant that he would be facing a longer sentence if he rejected the State's offer and went to trial. Instead, the trial judge correctly pointed out that by rejecting the State's offer, appellant was giving up his opportunity to negotiate the charges on which he might be adjudicated guilty and sentenced and instead his sentence would be based on the jury's verdict. Likewise, the trial judge correctly pointed out that his parole eligibility would not be a factor in her sentencing. These comments, taken in isolation and in sum, did not rise to the level of improper interference by the trial judge in the plea negotiations such that appellant's plea was no longer voluntary.

However, in so holding, the court cautioned that trial judges should be cognizant of and seek to avoid undue and impermissible involvement in the plea negotiation process. Although here, the trial judge did not explicitly tell appellant that he would face a harsher sentence if he went to trial, she strongly suggested that result by referring to a recent sentence she had imposed for gang related charges and confirming her reputation as a judge who sentences harshly. "Under our current precedent, such intimations have been upheld even though they appear to violate the spirit of Rule 33.5 (A) because those general comments did not address how the trial judge would sentence in [appellant]'s particular case. That being said, we do not condone those comments and emphasize that the better practice when allowing the State to put such plea offers on the record would be to undertake that the defendant has been notified of the terms offered, understands the scope of the offer, and is aware of the charges against him and the potential sentence."

Sentencing; Trafficking

Duron v. State, A16A1942 (1/19/17)

Appellant was convicted of trafficking in cocaine in 2010. He was then convicted again in 2011 of trafficking in cocaine and conspiracy to traffic in cocaine. Based on the 2010 conviction, the trial court sentenced appellant to two concurrent life terms to run concurrent with his sentence on the 2010 conviction. Appellant contended that the trial court imposed a void sentence because the maximum sentence permitted for his convictions was 30 years in confinement. The Court disagreed.

Relying on *Gilbert v. State*. 208 Ga. App. 258, 262 (1) (430 SE2d 391) (1993), the Court held that a first conviction for trafficking under O.C.G.A. § 16-13-31 may be used to enhance a second conviction for trafficking pursuant to O.C.G.A. § 16-13-30(d). In fact, the Court

stated, to accept appellant's contention that his more serious conviction under O.C.G.A. § 16-13-31, for a crime which is different only in that it is more serious than those listed in O.C.G.A. § 16-13-30(b), does not constitute a prior conviction so as to trigger the life sentence provisions of O.C.G.A. § 16-13-30(d) is to ignore the intent of the legislature. Clearly, the legislature did not intend that violators of O.C.G.A. § 16-13-31 be exempt from the severe punishment of O.C.G.A. § 16-13-30(d). Accordingly, the Court held, because appellant's prior conviction constituted a violation of O.C.G.A. § 16-13-30(b), the two life sentences were properly imposed.

Hearsay; Ineffective Assistance of Counsel

Entwisle v. State, A16A1782 (2/1/17)

Appellant was convicted of first degree burglary, second degree burglary, criminal trespass, two counts of theft by taking, theft by receiving, computer invasion of privacy, and possession of a firearm by a convicted felon. The transcript showed that the victim testified that after the burglary of her home she learned from Carbonite, an online backup system she had installed on the laptop that was stolen from her home, that someone had used her computer to access her Quicken files, which contained financial information regarding her bank and credit card accounts, and she immediately contacted her bank and credit card companies as a result. Appellant argued that this testimony constituted inadmissible hearsay and contended that his counsel provided ineffective assistance by failing to object to it. The Court agreed.

The State argued that the testimony was not hearsay, but was instead admissible to explain the victim's subsequent conduct in contacting her bank and credit card companies and to show how the investigator identified appellant as a potential suspect in the burglary. The Court noted that pursuant to former O.C.G.A. § 24-3-2, when, in a legal investigation, the conduct and motives of the actor are matters concerning which the truth must be found (i.e., are relevant to the issues on trial), then information, conversations, letters and replies, and similar evidence known to the actor are admissible to explain the actor's conduct. But, this Code section was not carried over into the new Evidence Code. And, the Court found, the victim's statement about what she learned from Carbonite was introduced to prove that appellant used her computer to access her financial information and therefore constituted hearsay.

In analyzing defense counsel's performance under *Strickland v. Washington*, the Court noted that although the decision of whether to interpose certain objections is generally a matter of trial strategy and tactics, trial counsel provided no reason for failing to object to the victim's hearsay testimony about someone using her computer to access her financial information. Furthermore, the Court found, it could not identify any reason why a reasonable attorney would have decided not to object to the hearsay testimony that provided the only evidentiary basis for the conviction of computer invasion of privacy. As a result, trial counsel was deficient for failing to object to the victim's hearsay testimony.

The Court also found that the prejudice from trial counsel's deficiency was clear. The victim's hearsay testimony was the only evidence offered to prove the elements of the computer invasion of privacy offense. Had this evidence been excluded, there would not have been sufficient evidence to convict appellant of the offense. Thus, but for counsel's performance, more than a reasonable probability existed that the outcome of the trial would have been different, and this amounted to ineffective assistance of counsel. Accordingly, the Court reversed the trial court's denial of appellant's motion for a new trial with respect to the criminal invasion of privacy conviction.

Child Hearsay; Sexual Battery

Laster v. State, A16A1801 (1/24/17)

Appellant was convicted of child molestation and sexual battery. He argued that the trial court erred in overruling his objection to three witnesses, all of whom testified before the victim and relayed statements the victim made to them regarding appellant's abuse. Appellant contended that the collective testimony bolstered the victim's testimony before her credibility had been challenged. The Court disagreed.

The Court stated that generally, unless a witness's veracity has affirmatively been placed in issue, the witness's prior consistent statement is pure hearsay evidence, which cannot be admitted merely to corroborate the witness, or to bolster the witness's credibility in the eyes of the jury. However, O.C.G.A. § 24-3-16 (2012), the Child Hearsay Statute in effect at the time of trial, created an exception and provided that so long as certain conditions were met, a statement made by a child describing any act of sexual contact was admissible in evidence by the person to whom the statement was made. Thus, the law actually contemplated testimony from both the child and those witnessing the child's later reaction, even if the hearsay may be "bolstering." And here, the Court concluded, because appellant did not contend that the statutory requirements were not met, and the order of witnesses is irrelevant to the question of the admissibility of child-hearsay evidence, the trial court did not err in allowing the child hearsay testimony.

Appellant also argued that the trial court erred by instructing the jury, in regard to the offense of sexual battery, that a child under the age of 16 lacks the legal capacity to consent to sexual conduct. The Court was "constrained to agree." Although the charge was a correct statement of the law at the time it was given, following trial, the Supreme Court in *Watson v. State*, 297 Ga. 718, 720 (2015) determined that it is erroneous for a trial court to instruct a jury that an underage victim is not capable of consenting to contact constituting sexual battery. The Court also found that because this case was in the appellate "pipeline" at the time *Watson* was decided, it must govern.

Therefore, the Court stated, it was left only with whether the error was harmless. The Court held that the charge as given effectively relieved the State of its burden to prove lack of consent, an essential element of the crime of sexual battery. As such, the Court could not say, under the particular facts of this case, that it was highly probable the erroneous instruction did not contribute to the jury's verdict. Accordingly, the Court reversed appellant's sexual battery conviction.