

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 5, 2016

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THIS WEEK:

- **Interpreters; Motions for New Trial**
- **Juveniles; Miranda**
- **Jury Instructions; Involuntary Manslaughter**

Interpreters; Motions for New Trial

State v. Tunkara, S15A1715 (2/1/16)

Tunkara was convicted of malice murder, felony murder, aggravated assault, and possession of a knife during the commission of a felony. Subsequently, he filed a motion for new trial, contending that his court-appointed interpreter inadequately translated the proceedings to him. After a hearing, the trial court granted Tunkara's motion, finding that Tunkara was not able to understand what was happening at his trial.

The State appealed, contending that the trial court applied an incorrect standard of review and abused its discretion by granting a new trial pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21. Specifically, the State argued that the trial court abused its discretion because the trial court made no finding that the verdict at trial was strongly against the weight of the evidence against Tunkara and, in fact, the evidence actually supported Tunkara's conviction. In other words, the State argued that the trial court did not make appropriate findings to support, and the evidence did not allow, the grant of a new trial under the general grounds reviewable under O.C.G.A. §§ 5-5-20 and 5-5-21.

The Court noted that the trial judge made a factual finding that Tunkara did not understand what was transpiring during the

trial. Based on this fact and "principles of justice and equity," the trial judge granted Tunkara's motion for new trial, relying on O.C.G.A. §§ 5-5-20 and 5-5-21. These two statutes apply to considerations about the weight of the evidence- the general grounds. Here, however, it was largely undisputed that the trial court's ruling was premised on a special ground—the inadequacy of the interpreter. As such, the trial court's discretion was more squarely under O.C.G.A. § 5-5-25. That statute provides: "In all motions for a new trial on other grounds not provided for in this Code, the presiding judge must exercise a sound legal discretion in granting or refusing the same according to the provisions of the common law and practice of the courts." The inadequacy of an interpreter is one of the "other grounds not provided for in this Code." Accordingly, the Court found, this statutory provision authorized the trial court to grant a new trial on this ground in this matter. Therefore, although the trial court mistakenly cited the wrong statutory provisions in its order, the record showed that trial court employed its broad discretion to grant a new trial after a full hearing and the consideration of evidence. Thus, the Court affirmed under the right-for-any-reason.

Juveniles; Miranda

State v. Lee, S15A1502 (2/1/16)

Lee was charged with murder and related crimes. The State appealed the trial court's order suppressing Lee's custodial statement. Specifically, the State contended that the trial court erred in concluding that Lee, who was 15 years old at the time of his statement, did not knowingly and intelligently waive his

rights before speaking with investigators while in police custody. The Court disagreed.

The evidence showed that after Lee had been questioned as a witness in the early afternoon, he was questioned again, but this time as a suspect. The second interview began at approximately 11:00 p.m. and Lee's mother was present. The video showed that the second interview began with Lee sitting hunched over, holding his shirt over much of his face; his mother was seated nearby. One of the officers opened the interview by presenting a waiver form and asking Lee to read it aloud. Lee's mother took the form, began reading it, and then stated that Lee would need a lawyer before making any statement. Lee remained seated with his shirt over his face and gave no response of any kind. Without any further attempt to get a response from Lee, the officers began relating to Lee's mother various details of the shooting, at which point both Lee and his mother began sobbing and wailing. Lee buried his face in his hands and sobbed uncontrollably for a lengthy period, at times practically hyperventilating, and crying for his "Daddy." Throughout the approximately hour-long recording, Lee continued crying, intermittently wailing, and holding his head in his hands. At no time did the officers revisit the subject of Lee's rights or his desire to waive them; rather, the officers simply persisted in making comments and asking questions about the shooting until Lee finally, with encouragement from his distressed mother, and in between bouts of sobbing, began to answer them.

The Court found that the video recording reflected clearly that Lee himself never once expressed any affirmative understanding of his rights or desire to waive them. To the contrary, 15-year-old Lee, who by that time had been at the police station for approximately ten hours, was extremely distraught and appeared to have had minimal capacity to understand what little the investigators attempted to communicate regarding his rights. Lee did not sign the waiver form, nor even look at it, and he engaged in no discussion with the officers, or his mother, regarding his rights. While Lee's mother indicated that she understood her son's rights, the Court found that her understanding was of little consequence given that Lee could not rely on his mother to waive his rights. Accordingly, the Court held that the trial court properly concluded, based on the totality of the circumstances, that Lee

did not knowingly and intelligently waive his rights before giving his custodial statement.

Jury Instructions; Involuntary Manslaughter

Seabolt v. Norris, S15A1692 (2/1/16)

Norris was convicted of murder, aggravated assault, and possession of a firearm during the commission of a felony, but acquitted of felony murder and voluntary manslaughter and involuntary manslaughter as lesser included offenses of felony murder. The evidence showed that Norris' father was shot in the back of the head. Norris, who was 15 years old, confessed to her brother and to police that, after an argument with her father, she took a pistol and shot him in the back of the head at close range. At trial, however, she testified that she did not shoot him at all. Expert medical testimony showed that the victim died as the result of a contact range gunshot to the back of his head. Norris filed a petition for habeas corpus alleging ineffective assistance of counsel because of the failure to raise jury charge issues on direct appeal. The habeas court granted her petition regarding the trial court's failure to give jury instructions on accident and involuntary manslaughter. The Warden appealed.

The Court stated that if an affirmative defense is raised by the evidence, including the defendant's own statements, the trial court must present the affirmative defense to the jury as part of the case in its charge, even absent a request. Here, the affirmative defense of accident was raised by the evidence, in that, in her voluntary statement to police which was admitted into evidence, Norris contended that she had accidentally shot her father, because she did not know that the gun was loaded at the time that she picked it up and was "playing with [it]" near the back of her father's head. In light of this evidence, the trial court's refusal to charge the law of accident, when specifically requested to do so, was error. Furthermore, the Court stated, it makes no difference that Norris completely changed her story at trial, claiming that the statement that she had given to police was entirely false, and that she had not shot her father at all. This testimony did nothing to alter the fact that evidence was also presented to the jury in the form of Norris' properly admitted statement to police that the shooting may have occurred

by accident. It was for the jury to decide whether it would believe any of all of Norris' statement to police or any of her testimony at trial, and the trial court was required to give the jury a charge on accident in order to allow them to fully consider this issue.

The Court also found that the habeas court properly granted relief on the failure to give the properly requested charge on involuntary manslaughter. A person commits the offense of involuntary manslaughter in the commission of an unlawful act when he causes the death of another human being without any intention to do so by the commission of an unlawful act other than a felony. In this regard, a person may be found guilty of misdemeanor reckless conduct when he or she causes bodily harm to, or endangers the bodily safety of, another person by consciously disregarding a substantial and unjustifiable risk that his or her act or omission will cause harm or endanger the safety of the other person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation. Here, Norris was not necessarily engaged in the felony of aggravated assault if she was playing with the gun or even pointing it at the back of her father's head, ostensibly without his knowledge. Based on Norris' statement to police that she did not even know that the gun was loaded when she pointed it at the back of her father's head, the jury could have reasonably concluded that Norris acted in a manner that amounted to reckless conduct, but did not act with the requisite malice to support a finding of guilt for murder or commit an underlying felony to support conviction for felony murder, at the time that the fatal shot was fired. The trial court therefore should have given the requested charge on involuntary manslaughter as a lesser included offense of malice murder, and not just as a lesser included offense of felony murder, and erred by failing to do so.

Moreover, the trial court's failure to charge on involuntary manslaughter as a lesser included offense of malice murder was prejudicial, as the evidence presented at trial was not overwhelming. Because appellate counsel likely would have prevailed on this issue that he should have raised but did not raise on appeal, the habeas court properly granted relief to Norris on her claim of ineffective assistance of appellate counsel on this ground.