Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 31, 2017

THIS WEEK:

Expert Witnesses; Hearsay

Naji v. State, S16A1489, S17A0503 (3/6/17)

Appellants were convicted of murder. The record showed that Dr. Heninger, an associate medical examiner, testified regarding the autopsy of the victim's body. Dr. Heninger did not conduct the autopsy, but he reviewed the report and associated documentation prepared by another medical examiner, Dr. Smith, who was unavailable at the time of trial. Dr. Heninger testified generally about the County Medical Examiner's standard practices and gave his opinion from his review of the file that the cause of death was homicide due to a gunshot wound to the back of the victim's head.

Appellants contended that the testimony of Dr. Heninger violated their right of confrontation. The Court disagreed. The Court noted that the matter was fully explored outside the presence of the jury, after objections by both defense counsel. In the voir dire examination of Dr. Heninger, he testified that he had appeared before in the place of another, unavailable, medical examiner, and that whenever he did so, he reviewed the written report, the photographs of the autopsy, charts, toxicology reports, and other documents associated with the case. He testified that those reports and photographs were kept in the normal course of business of the Medical Examiner's office, that he had access to them, and that he was able to form his own opinion based upon the reports, photographs, and other documents. The trial court further questioned Dr. Heninger and elicited the testimony that in his profession, it is common and accepted practice to rely upon work that is done by others to formulate an opinion. The court also inquired whether either defense counsel had placed Dr.Smith under subpoena; they had not. The trial court ruled that Dr. Heninger was qualified as an expert, and that because it was common practice in his profession to testify based upon reviewing the work of others, he was qualified to give his opinion as an expert even though he did not perform the autopsy. The trial court added, however, that since Dr. Heninger had just been identified, defense counsel were entitled to an opportunity to interview him, and then were entitled to a continuance if they wished to do so, adding that they had already preserved their earlier objections. After consulting with their clients, counsel elected to proceed.

The Court stated that generally, an expert cannot voice an opinion based upon facts not within the expert's personal knowledge or based upon observations or reports not admitted into evidence; however, an expert may give an opinion based upon facts personally observed by the expert and upon data collected by another and personally observed or reviewed by the expert. Here, the expert based his opinion on the facts contained in the autopsy report, including factual data collected by the medical examiner who had performed the autopsy. The expert opinion admitted at trial was not the restatement of

the diagnostic opinion of another expert. And, the Court stated, even when an expert's testimony is based on hearsay, the expert's lack of personal knowledge does not mandate the exclusion of the opinion but merely presents a jury question as to the weight which should be accorded the opinion.

Nevertheless, appellants contended, the testimony was inadmissible under *Bullcoming v. New Mexico*, 564 U. S. 647 (131 SCt 2705, 180 LE2d 610) (2011), But, the Court found, *Bullcoming* was inapplicable to Dr. Heninger's testimony. Here, the State did not seek to admit the autopsy report itself, but rather asked Dr. Heninger his independent, expert opinion regarding the facts contained in that report and associated documents. Moreover, the trial court correctly applied *Bullcoming* when it refused to admit the autopsy photographs into evidence because the witness could not authenticate them. Accordingly, the trial court did not err in admitting Dr. Heninger's testimony.

Continuing Witness Rule; Jury Questions

Rainwater v. State, Sa6A1532 (3/6/17)

Appellant was convicted of felony murder, aggravated assault, and possession of a firearm during the commission of a felony. He argued that the trial court erred in allowing certain State exhibits to go out with the jury in violation of the continuing witness rule. These exhibits, photographic lineup admonition forms, contained handwritten statements by three witnesses, explaining the actions of appellant they witnessed on the day of the murder, and were allowed to go back with the jury with no objection from counsel.

The Court initially noted that because there was no objection, its review was limited to plain error. The Court found that to the extent the photographic lineup admonition forms contained statements beyond the identification of appellant, allowing them to go back with the jury violated the continuing witness rule. But the Court found, appellant failed to make an affirmative showing that the error probably affected the outcome of his trial. Specifically, the Court found, three eyewitnesses placed appellant at the scene. One witness testified that after he heard a gunshot, appellant ran past him holding a gun, and that appellant took a bag from another man, who had been in the victim's apartment, before running into the woods. And two witnesses testified that appellant stood over the victim as the victim screamed for help. Thus, in light of the strong evidence that appellant was a party to the crimes, and trial counsel's cross-examination of one of the witnesses regarding the statements made on the lineup admonition form, there was no plain error.

Appellant also contended that the trial court committed plain error in its response to questions from the jury. During its deliberations, the jury asked the trial court: "Can you be guilty of possession of a firearm during the commission of a felony. . . that involves a firearm if you don't personally have a gun on you . . . or in arm's reach?" The jury also informed the trial court: "We are confused about whether, on page 13 [of the jury charge], paragraphs two and three apply to all charges." These paragraphs referred to the charge on parties to a crime. Specifically, appellant argued that the court failed to answer the first question and the rereading of the charge on parties to a crime placed undue emphasis on a legal principle already before the jury, and was an incorrect statement of law.

The Court stated that although the trial court said that it was going to answer the second question, the recharge to the jury also answered the first question - whether appellant could be found guilty of possession of a firearm even if he did not physically possess the weapon. Appellant also argued that the recharge unnecessarily emphasized the principle of party to a crime. But, the Court stated, where the jury requests further instructions upon a particular phase of the case, the court in its discretion may recharge them in full, or only upon the point or points requested.

Nevertheless, the Court found, the court's recharge contained an error. In an inadvertent slip of the tongue, the court omitted the word "not" from the end of the pattern charge: ". . . even though the person alleged to have directly committed the crime has been prosecuted or convicted," rather than ". . . even though the person alleged to have directly committed the crime has *not* been prosecuted or convicted." (Emphasis supplied.). However, this error did not clearly mislead or confuse the jury. And, immediately after this omission, the court correctly recited the remainder of the pattern charge: " . . ., has been convicted of a different crime or degree of crime, is not amenable to justice, or has been acquitted." Thus, the Court concluded, the court's recharge, taken as a whole, and considering the court's initial charge on these principles which contained no omissions and which the jury had with it during deliberations, did not constitute plain error requiring reversal.

Search & Seizure

Toole v. State, A16A1491 (3/10/17)

Appellant was accused of VGCSA and violating OCGA § 40-6-40 (b) for failing to drive on the right side of the roadway and OCGA § 40-5-121 for driving with a suspended license. He contended that the trial court erred in denying his motion to suppress. Specifically, that the arresting officer lacked reasonable, articulable suspicion to justify a traffic stop of his vehicle.

The Court stated that for a traffic stop to be valid, an officer must identify specific and articulable facts that provide a reasonable suspicion that the individual being stopped is engaged in criminal activity. This suspicion need not meet the standard of probable cause, but must be more than mere caprice or a hunch or an inclination. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing. However, a police officer is not required to know with certainty that each element of a particular crime could be established.

Here, the Court found, the officer testified that appellant's car was traveling below the posted speed limit in the left passing lane, even when it was not "overtaking and passing another vehicle" and not "preparing for a left turn at an intersection or into a private road or driveway." From these facts, the officer formed the belief that appellant had violated OCGA § 40-6-40 (b). Under these facts and circumstances of this case as testified to by the officer and applying the proper standard of review, the Court held that the officer identified specific and articulable facts supporting a reasonable suspicion that appellant had violated OCGA § 40-6-40 (b). Moreover, the Court noted, the trial court found that while no violation of OCGA § 40-6-40 (b) occurred, the trial court also found "no evidence that [the officer's] beliefs were anything but bona fide."

In so holding, the Court distinguished *State v. Parke*, 304 Ga. App. 124, 127 (2010) and *State v. Whelchel*, 269 Ga. App. 314, 316

(2004) cited by appellant. In both of these cases, the appeals were from the *granting* of the defendants' motion to suppress and dealt with violations of OCGA § 40-6-184, not OCGA § 40-6-40. But, the Court stated, it must construe the facts to uphold the trial court's judgment and consequently, applying the appropriate standard of review, the Court could not say under these circumstances that the trial court erred in denying appellant's motion to suppress.

Mallory; Failure to Come Forward

Lawton v. State, A16A2089 (3/9/17)

Appellant was convicted of one count of rape, and multiple counts of aggravated sodomy, aggravated child molestation, and child molestation. He argued that the trial court erred by allowing the State to present evidence of his failure to come forward to the police, in violation of rule set out in *Mallory*. The Court disagreed.

The transcript showed that the investigating officer called appellant on the phone and asked him to come in and speak with her because his name came up in an investigation. Appellant asked if the matter involved a sexual assault, but she responded that she does not discuss cases over the phone. He agreed to meet her on April 11, 2012. The officer testified that on April 11, the victims' mother called the officer and related that appellant had called her, telling her that the officer had told appellant to call the mother to ask about the investigation. The officer testified that this was not true and that she called appellant, explaining that the investigation had to do with the mistreatment of the mother's children. The officer testified that appellant said he would still make the appointment the next day. However, appellant was a no-show and when the officer called him, appellant said he was at work and would call her later. When appellant did not call her the next day, she called him and the two agreed to me on April 16. Appellant again failed to show up for the meeting and he was arrested in Florida four days later.

The Court stated that assuming the continued viability of *Mallory*, the statements did not fall within its rule. Appellant actually spoke with the officer and agreed to meet with her. In spite of his agreement, he failed to appear at the meetings. The officer's testimony was limited to noting the inconsistences between appellant's statements and his behavior, which does not violate *Mallory*. Furthermore, evidence of appellant's flight to Florida was admissible. Accordingly, the Court affirmed his convictions.

Jury Charges; Spoliation

Sachtjen v. State, A16A1863 (3/9/17)

Appellant was convicted of DUI (less safe) and reckless driving. A camera in the officer's patrol car recorded appellant's arrest. The video recording included some audio portions recorded by the officer's body microphone, but this audio failed, for reasons the officer did not know, when he and appellant returned to the patrol car. Citing civil cases, appellant argued that the trial court erred when it refused to charge the jury that the absence of some audio portions of a video recording of the incident entitled him to a presumption that the missing parts of the recording would have been favorable to the defense.

The Court stated that a refusal to give a requested jury charge is not error unless the request is entirely correct and accurate; is adjusted to the pleadings, law, and evidence; and is not otherwise covered in the general charge. The Court noted that appellant failed to cite any arguably relevant provisions of the procedures governing discovery in criminal proceedings, OCGA § 17-16-1 et seq., concerning any failure to produce existing written or recorded statements for use by the defense. Here, the State produced the evidence it had, including the videotape of appellant's arrest, and there was no evidence that the State failed to preserve or produce any evidence that previously existed in the case. Because this record did not support the giving of any charge as to any failure to preserve evidence that never came into existence, the trial court did not abuse its discretion in failing to give appellant's requested charge.

Furthermore, the Court stated, it has not seen any Georgia law suggesting that a spoliation presumption could apply to criminal proceedings, and appellant failed to explain how any other legal authority dictates or suggests the result for which he argued. Therefore, in the absence of any Georgia law to the effect that a trial court might be required to charge a jury deliberating on criminal charges as to any spoliation presumption, appellant failed to show that the trial court abused its discretion when it denied his request so to charge the jury.

Habitual Impaired Driving; Notice Requirements

Clinton v. State, A16A1606 (3/9/17)

Appellant was convicted of habitually impaired driving and other traffic infractions. The evidence showed that appellant was initially stopped for a window tint violation. At trial, appellant stipulated to driving under the influence (DUI) on February 18, 2011, March 8, 2012, and September 15, 2012. These facts included that on September 17, 2012, appellant signed an "official notice of revocation/suspension" advising him that his license was being revoked or suspended "upon conviction for" offenses including DUI and driving with a suspended license for a period "[to] be determined by [the Department] for the term authorized by law." The form did not indicate, however, that appellant's license was being suspended because he was a habitual violator. The same form ordered appellant to surrender his license, but appellant had not brought it to court. On the same day, September 17, 2012, appellant pled guilty to all three DUI charges. Although the State showed that the Georgia Department of Driver Services had attempted to notify appellant of his status as a habitual violator in October 2012, appellant produced a May 2014 letter from the Department showing that it had not so notified him.

Appellant contended that the evidence was insufficient to convict him of habitually impaired driving. The Court agreed. The Court noted that on their face, the three subsections of OCGA § 40-5-58 respectively (a) define the category of the "habitual violator," (b) require notice to such a person "that his or her driver's license has been revoked by operation of law," and (c) set out the elements and penalties for the offenses of misdemeanor and felony driving by "[a]ny person declared to be a habitual violator." Specifically, subsection (a) defines a "habitual violator" as "any person who has been arrested and convicted . . . three or more times within a five-year period" of traffic offenses including DUI. And subsection (b) mandates that when the Department's records "disclose that any person is a habitual violator," the Department "shall forthwith *notify* such person" that his or her license has been revoked "by operation of law and that it

shall be unlawful for such habitual violator to operate a motor vehicle" in Georgia. (Emphasis supplied.) Thus, the essence of the offense of driving while an habitual violator is driving after being notified that one may not do so.

The State argued that appellant was notified because he acknowledged the suspension of his license. But, the Court found, this argument seeks to avoid the plain terms of OCGA § 40-5-58 (b) and ignores the statute's often-repeated distinction between license revocation, which occurs "by operation of law," and notice of a person's status as a "habitual violator," which notification enables the State to prosecute that person when later found to be driving a vehicle in Georgia. OCGA § 40-5-58 (b), (c). Thus, the Court concluded, when a driver qualifies as an "habitual violator" under OCGA § 40-5-58 (a), the State must show that it provided notice to the driver of his status as such before it can obtain a conviction for either the misdemeanor of driving while a habitual violator or the felony of "habitual impaired driving." OCGA § 40-5-58 (c) (1), (2). Accordingly, because the State conceded that it failed to notify appellant of his status as an "habitual violator" as required by OCGA § 40-5-58 (b), the Court reversed appellant's conviction for the felony of "habitual impaired driving" as defined in OCGA § 40-5-58 (c) (2).