

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 28, 2017

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THIS WEEK:

- **Ineffective Assistance; Motions to Suppress**
- **Sufficiency of the Evidence; Street Gangs**
- **Search & Seizure; Search Warrants**
- **Jury Charges; Prior Bad Acts**
- **Ineffective Assistance of Counsel**

Ineffective Assistance; Motions to Suppress

Miller v. State, A16A2031 (3/6/17)

Appellant was convicted of armed robbery, kidnaping, false imprisonment, and sexual battery. The evidence showed that appellant was caught leaving the scene of the crime when an officer, who was conducting traffic enforcement through the use of a laser device, stopped appellant's car for speeding. Appellant argued that his trial counsel erred by failing to file a particularized motion to suppress evidence that resulted from an allegedly illegal traffic stop because the officer conducting the traffic stop had a lapsed laser certification, and thus, was not authorized to stop appellant.

The Court noted that it is not deciding whether a motion to suppress would have prevailed if its denial were appealed. Rather, the Court stated, it was reviewing a claim of ineffective assistance of counsel. As such, it is compelled to evaluate the reasonableness of trial counsel's actions in choosing not to file a motion to suppress. Thus, the Court noted, strategic choices made after less than complete investigation are reasonable precisely to the extent that reasonable professional judgments

support the limitations on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all circumstances, applying a heavy measure of deference to counsel's judgments.

Here, the Court found, at the hearing on appellant's motion for a new trial, appellant's trial counsel testified that she chose not to file a motion to suppress because she did not feel there were adequate legal grounds to do so. And while she conceded that she could not recall whether she or anyone in her office investigated the arresting officer's laser recertification, her office investigator was "very thorough in keeping track of those issues" because the office handles "a lot of cases . . . that involve those same officers." Therefore, the Court held, trial counsel's reliance on her investigator to flag any issues with respect to the officer's certification was sufficient, even though he did not uncover the alleged lapse, and it did not constitute a failure to make a reasonable investigation that would constitute ineffective assistance of counsel.

Sufficiency of the Evidence; Street Gangs

Morris v. State, A16A1960 (2/21/17)

Appellant was convicted of criminal attempt to commit armed robbery, aggravated assault, aggravated battery, violation of the Georgia Street Gang Terrorism and Prevention Act (three counts), and possession of a firearm during the commission of a felony. The evidence showed that appellant and his

co-defendant went to the home of Ball and his girlfriend, Webb. They feigned interest in purchasing marijuana from Ball and then shot Ball as he returned from retrieving marijuana from a bedroom. The two then looked for items to steal before fleeing the scene.

At trial, the State presented evidence that appellant and his co-defendant were associated with “Sex Money Murder,” a criminal street gang, and “a subset of the Blood criminal street gang.” However, appellants argued, the State failed to establish the necessary nexus between the crimes and participation in a criminal street gang. The Court stated that proof that the commission of the predicate act was intended to further the interests of the gang *is essential* to prove a violation of O.C.G.A. § 16-15-4(a). And, the State must show something more than the mere commission of crime by gang members.

Here, the Court found, the State presented evidence of both appellant and his co-defendant’s association with members of Sex Money Murder; evidence of both appellant and his co-defendant’s public display of symbols and use of language associated with Sex Money Murder; and evidence of Sex Money Murder’s criminal activities. And in order to connect appellant and his co-defendant’s association with Sex Money Murder to the predicate crimes, the State presented evidence that just three days after the incident in question, appellant’s co-defendant—to whom appellant was connected via Facebook—posted a status update that read as follows: “Yall been waiting on a reply . . . keep waiting yall will 3 me when yall 3 me . . . say no more . . . #BLATT #SMM #GunzUP” Testimony by a law-enforcement officer established that the hashtags used at the end of the status update were words or references commonly used by the Sex Money Murder gang. And Webb saw the Facebook post and testified that she commented on it (“He a bitch once again an he aint gone shoot shit dats y da pussy out hiding now. #dem real goons gne cme get da bitch!”) because she believed he was making reference to shooting Ball.

The Court stated that criminal intent is a question for the jury, and such intent “may be inferred from that person’s conduct before, during, and after the commission of the crime. And here, in light of the above-referenced Facebook post, its gang-related content, its timing relevant to the incident in question, and Webb’s understanding of the post as

referring to the incident, it could not be said that the State failed to present any evidence from which the jury could infer criminal intent to further the interests of the Sex Money Murder criminal street gang through the attempted robbery and shooting of Ball. Accordingly, the Court sustained appellant’s convictions for violation of the Georgia Street Gang Terrorism and Prevention Act.

Search & Seizure; Search Warrants

Ray v. State, A16A1843 (3/8/17)

Appellant was convicted of four counts of sexual exploitation of children and one count of tampering with evidence. The facts, briefly stated, showed that the GBI was able to obtain downloads of child pornography from a computer that had an internet protocol (IP) address that was associated with a house owned by Dvorak, who lived there with her three children. A search warrant was obtained and executed while Dvorak and her children were present. After questioning Dvorak and her children, and after examining all of their computers and digital devices, GBI Agent Jackson confirmed that there was no evidence of child pornography at Dvorak’s residence. Nor was there any evidence that there had been any attempt to access child pornography on any of their computers or digital devices. Dvorak told Agent Jackson that appellant was her next door neighbor; she had given appellant the password to her router; and that appellant would often park his pickup truck in her driveway and sit there for hours using her internet, and that he had recently done so in the days preceding the issuance of the search warrant for her residence.

Based on this information, the GBI obtained a search warrant for appellant’s home. As Agent Jackson was executing the warrant, another agent initiated a traffic stop on appellant’s truck. The agent observed a laptop in the truck and a search warrant was subsequently obtained for the truck. The pornography was found on the laptop.

Appellant contended that the trial court erred in denying his motion to suppress the two search warrants, arguing that the information presented provided insufficient probable cause to support them. The Court disagreed. Initially, the Court noted that this case created an ambiguity as to whether Dvorak

should be deemed a “concerned citizen” or an “informant.” But, in light of the facts, the Court determined that the distinction did not make a difference. Thus, the Court found, face-to-face communication between an informant and a law enforcement officer is inherently more reliable than information from an anonymous source because the officer receiving the information had the opportunity to observe the informant’s demeanor and perceived credibility. Furthermore, when a person observes certain activity and then later learns that such activity is relevant to a criminal investigation and immediately reports it *in person* directly to a law enforcement officer, the Court found no reason why that person cannot be deemed a concerned citizen. Moreover, the Court found, Dvorak’s information that appellant used her internet service while sitting in his truck in her driveway during the relevant timeframe was corroborated when a GBI agent observed the laptop computer in appellant’s truck during a traffic stop. Thus, the Court concluded, under the totality of the circumstances, the information supplied by Dvorak was reliable.

Nevertheless, appellant contended, the information provided by Dvorak was insufficient to establish probable cause to believe that he was in possession of child pornography. Specifically, he contended, there were other possible explanations for his use of Dvorak’s internet service, that Dvorak never stated that she observed him searching for or downloading child pornography, and that other neighbors may have accessed her internet service. But, the Court stated, appellant’s attempt to equate the standard required for probable cause for a search warrant with the standard required for conviction was incorrect. And here, the Court found, the information given by Dvorak and the other information gathered during the investigation showed that the GBI detected child pornography being distributed from Dvorak’s IP address, that no evidence of child pornography was located during the search of Dvorak’s residence, computers, and digital devices, and that appellant accessed her password-protected internet service during the timeframe when the GBI detected the distribution of child pornography through Dvorak’s IP address. According, the Court concluded, given the totality of the circumstances, the magistrate had a substantial basis for concluding that probable cause existed to issue the search warrants.

Jury Charges; Prior Bad Acts

Aguilar v. State, A16A1893 (3/7/17)

Appellant was convicted of one count of cruelty to a child in the first degree (Count 9) and two counts of sexual battery as lesser-included charges of aggravated child molestation. However, appellant was acquitted of two counts of rape, three counts of incest, two counts of aggravated child molestation, aggravated sodomy, and a separate count of cruelty to a child in the first degree. The victim was appellant's daughter.

Appellant first contended that the trial court committed plain error by failing to instruct the jury that lack of consent was an element of sexual battery. The Court agreed, relying on *Watson v. State*, 297 Ga. 718 (2015). The Court found that the trial court's instruction, that "[a] person commits sexual battery when that person intentionally makes physical contact with the anus or buttocks of a child under the age of 16," wholly failed to charge the essential element of the crime of sexual battery—lack of consent to the touching. Moreover, because this crime was a lesser-included charge to the indicted crimes of aggravated child molestation, the trial court's earlier reading of the indictment did not save this instruction as to this essential element.

Nevertheless, the State contended, under *Shepherd v. State*, 217 Ga. App. 893 (1995) (physical precedent only), this was invited error because appellant requested the lesser included charge and because defense counsel responded "no" to the trial court's inquiry as to whether "consent was an issue." The Court found that *Shepherd* was inapplicable because with regard to an under-16-year-old victim, courts in this State did not require the State to prove lack of consent as an element of the crime of sexual battery prior to the Supreme Court's decision in *Watson*. Accordingly, because the instruction as given constituted plain error, the Court reversed the judgment as it related to the two counts of sexual battery.

Appellant also contended that the trial court erred in admitting the State's evidence of prior bad acts regarding his relationship with the victim's mother. The record showed that appellant testified at trial, denying any allegation of sexual conduct with the victim. On cross-examination, appellant admitted that he met the victim's mother when he was 24 and she was 14, but he testified that

he believed she was 18. The couple became sexually active, and he testified that he learned she was 14 only after she became pregnant with the victim's oldest brother. This evidence was admitted without objection. At the close of the case, the State moved for leave from the court to argue motive and intent based on evidence presented about appellant's and the mother's relationship.

Appellant contended that the trial court erred by allowing the State to argue to the jury that this evidence constituted a prior act of child molestation because it was not admissible as to the cruelty to children charge. But, the Court noted, he presented no citation of authority to support this contention. The indicted crime in Count 9 was predicated upon intentional sexual abuse resulting in mental and physical suffering, and therefore, for the same reason that the prior act would be admissible as to the other eight charges, the evidence would also be relevant to Count 9 under O.C.G.A. § 24-4-414(a).

Next, appellant contended that the trial court erred by denying his request for a continuance after granting the motion to allow the State to present the evidence. But, the Court found, the State notified appellant prior to trial that it intended to present similar transaction evidence vis-a-vis his relationships with the victim's mother, and although it initially denied the State's motion, the court concluded that it would leave the matter open for later argument during trial. Accordingly, the Court concluded, there was no surprise to appellant, nor did he proffer any factual evidence in opposition to the similar transaction that he was prevented from presenting based solely on the denial of the continuance.

Ineffective Assistance of Counsel

Tran v. State, A16A1654 (3/8/17)

Appellant was convicted of two counts of armed robbery and one count each of aggravated sexual battery and possession of a firearm during the commission of a felony. The facts, briefly stated, showed that two Asian men entered a club, wearing surgical masks and carrying guns. A female manager was sexually assaulted. The robbers took cash, a debit card and bottles of alcohol. After the men left, a male manager saw a silver Acura with tinted

windows pulling out of a parking space. The license plate was obscured. No witness saw the men's faces clearly. Approximately 24 minutes later, an officer saw an Acura matching the BOLO and driving erratically. The vehicle pulled into a parking lot in response to the officer's blue lights, but as soon as the officer stopped his vehicle, the passenger got out of the Acura and ran. The passenger was never found. The driver, appellant, was arrested and items matching the stolen bottles of alcohol and a gun were found in the vehicle.

At trial, appellant testified he is Vietnamese and that he went for a late dinner with friends and then they decided to go to the club. He left the restaurant by himself, drove to the club, and waited outside his car for his friends to arrive. While he was waiting, a man he did not recognize pointed a gun at him and told him to get in the car and drive. The man was wearing a mask and was carrying a box and some bags that he put into appellant's car. Appellant drove where he was told to go and, approximately three to four minutes later, he saw a police vehicle behind him with its blue lights illuminated. At that point, he stopped the car. The man took a couple of bills from the car's glove compartment that had appellant's address on them and told him not to say anything about the incident or he would kill him.

Appellant further testified that when the man got out of his car and ran, he was in shock and "so scared" because four or five years earlier he had been robbed at his business, a pool hall, in Clayton County. Appellant testified that he reported that incident to the police and was subpoenaed to appear in court, but before he was scheduled to appear, someone placed a note on his car telling him not to show up for court. Appellant told the police about the note, but they did not do anything. After that happened, he purchased a gun.

Appellant argued that his trial counsel provided ineffective assistance in numerous ways during his trial. The Court agreed. First, appellant contended that trial counsel was ineffective for failing to object to questions that commented on his right to remain silent and his right to counsel. The Court found that the prosecutor's questioning of appellant on cross-examination definitely and repeatedly commented on both and normally, the failure to object would be deficient performance. But here, trial counsel opened the door to allow

the State to pursue this line of questioning by asking appellant on direct examination whether his prior encounter with the police had “anything to do with why you may not have said anything to the police at this point?”

Second, appellant contended that trial counsel was deficient for failing to object to hearsay when the State called a Clayton County officer on rebuttal. The Clayton County officer testified that he checked with the City of Riverdale and they did not have any record in their database of appellant being a crime victim and that they had specifically checked the only Clayton County pool hall within the city limits and found no history of appellant being a victim there. The Court found that under O.C.G.A. § 24-8-803(10), such testimony may be admissible as an exception to the hearsay rule to show the absence of a public record or entry. But, the State failed to lay a proper foundation for the testimony so trial counsel rendered deficient performance.

Next, appellant argued that his trial counsel was ineffective for failing to object to questions from the State that improperly impeached his testimony. The transcript showed that the prosecutor asked appellant, “would it surprise you that we had a Clayton County investigator run your name, and your name as listed here, Nam Nhu Tran, appears nowhere in any crime report ever in Clayton County; does that surprise you?” And later, the prosecutor commented during appellant’s cross-examination that “we can’t find a record” of his interaction with the court system. The Court stated that “A witness may be impeached by disproving the facts testified to by the witness.” O.C.G.A. § 24-6-621. And if an accused in a criminal proceeding chooses to testify, he or she shall be sworn as any other witness and, with certain exceptions, may be examined and cross-examined as any other witness. However, it is improper to confront or attempt to impeach a witness with facts that are not within his personal knowledge. Thus, the prosecutor’s impeachment of appellant with a search performed by a Clayton County investigator of which appellant had no knowledge was improper. And trial counsel’s failure to object to the improper questioning constituted deficient performance.

Next, appellant contended that trial counsel was ineffective when he opened the door to damaging testimony that directly contradicted appellant’s testimony. Again

the Court agreed. The Court found that trial counsel’s questioning of the lead detective allowed the prosecutor to elicit testimony that the detective understood that appellant was going to tell him who was in the car with him that night and also provide details about the crime that was committed. The detective further testified that he got the impression that appellant was familiar with the person who was in the car with him. The Court further found that to the extent trial counsel may have pursued this line of questioning based upon trial strategy, it was not a reasonable decision a competent attorney would have made when the defense theory was that appellant was a victim and did not know the man who pointed a gun at him and forced him to drive.

Finally, the Court addressed the prejudice prong of the *Strickland* test. The Court stated as follows: “Here, ...the jury heard the prosecutor essentially testify that [appellant] would not need an attorney if he was an innocent bystander and then question [appellant] at length about why he never gave the police information that would have cleared him of these charges. Trial counsel’s errors introduced evidence into the record that directly contradicted [appellant]’s trial testimony and allowed the admission of other evidence that further challenged [appellant]’s credibility, the combined effect of which was to severely undercut the defense’s case. And all of this occurred in a case where the evidence of guilt was not overwhelming.” Thus, the Court found prejudice and reversed appellant’s convictions.