Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 3, 2015

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THIS WEEK:

Sex Offender Registration; Homeless Offender

Chestnut v. State, A14A1626 (3/11/15)

Appellant was convicted under former O.C.G.A. § 42-1-12(f)(5) of failing to provide the sheriff 72 hours of advance notification of his change of address. He contended that under *Santos v. State*, 284 Ga. 514 (2008), the evidence was insufficient to support his conviction. The Court agreed and reversed.

The Court found that the undisputed evidence, including both appellant's testimony and the testimony concerning statements appellant made to police immediately following his July 2009 arrest, showed that when first released, appellant went to live with his brother. But when the brother's minor child came to live there, he could no longer live with his brother, and appellant became homeless. Although the record showed that appellant slept at various, non-residential locations, the State presented no evidence to prove that any of these locations had a route or street address that appellant could have provided to authorities. Thus, given the absence of any evidence showing that he had such an address, the State failed to meet its burden of proof under *Santos*.

The State argued that appellant's contentions were a constitutional challenge and that this challenge was waived because appellant failed to raise it before trial. But the Court found, by the time of appellant's arrest and indictment, the Georgia Supreme Court had already decided in *Santos* that former O.C.G.A. § 42-1-12(f)(5) was unconstitutional as applied to those homeless sex offenders who, like appellant, are without a street or route address. Thus, appellant was not challenging the constitutionality of former O.C.G.A. § 42-1-12(f)(5); instead, appellant was claiming that *Santos* required the State to prove that after he became homeless, appellant nevertheless had a street or route address which he failed to register.

Moreover, the Court stated, to the extent that the State was contending that appellant's arguments as to *Santos* should have been raised at some point during the almost five years this case was pending in the trial court, it agreed. *Santos* was the dispositive legal precedent with respect to this prosecution. Yet, despite the fact that *Santos* controls any prosecution of a homeless sex offender under the former O.C.G.A. § 41-1-12(f)(5), and even though *Santos* was decided nine months prior to appellant's arrest and 52 months prior to his trial and conviction, the record showed that neither the State nor defense counsel ever cited that case prior to this appeal. "Most notably, no mention of *Santos* was made in connection with either of the two motions to quash the

indictment, and there was not a proposed jury charge based on *Santos*. In short, the Court noted, no fewer than four prosecutors and two defense lawyers somehow remained unaware of *Santos* until approximately six years after that case was decided. "The failings of both the prosecution and defense counsel, however, cannot and did not relieve the State of its burden of proof under *Santos*; nor do these failings preclude [Appellant] from relying on *Santos* to challenge his conviction."

Commenting on Defendant's Silence; Garza

Turner v. State, A14A1858 (3/11/15)

Appellant was convicted of convicted of burglary, two counts of kidnapping, aggravated assault, armed robbery, and three counts of possession of a firearm during the commission of a crime. The evidence showed that appellant and a co-defendant invaded an occupied apartment and appellant was shot as they were escaping. Appellant sought medical attention and was questioned by an officer at the time. He told the officer that he was just walking down the street when he was hit by a bullet from a passing car. At trial, however, he told a completely different story. On cross-examination, the prosecutor was allowed, over objection, to ask appellant whether he had told this current version of how he got shot to anyone prior to his testimony that day.

Appellant contended that the trial court erred in allowing the prosecution to use his silence against him during his cross examination, in violation of *Doyle v. Ohio*, 426 U. S. 610 (1976) and *Mallory v. State*, 261 Ga. 625, 630 (5) (1991). The Court disagreed, finding the facts of this case distinguishable from *Doyle* and *Mallory*. Here, appellant did not remain silent, but gave his version of events to an officer while he was in the hospital. Because appellant had chosen to speak to the investigating officer, the State could properly impeach him with his prior inconsistent statement.

Appellant also contended that the trial court erred in charging the jury on kidnapping in violation of *Garza v. State*, 284 Ga. 696 (2008). The Court noted that the charge as given was a correct statement of the law at the time of trial, but because *Garza* must be applied retroactively, the given charge was rendered erroneous, and appellant was entitled to a jury instruction consistent with the rule established in *Garza* with respect to satisfaction of the asportation element of kidnapping. Nevertheless, the Court found, after a review of the facts, the Court held that it was highly probable that the trial court's error in not instructing the jury to consider the asportation element of kidnapping using the *Garza* factors did not contribute to the judgment of guilt on the kidnapping charge. Accordingly, the trial court's error was not reversible.

Right to Counsel of Choice; Continuances

Alwi v. State, A14A2167 (3/11/15)

Appellant was convicted of rape, armed robbery, kidnapping with bodily injury and other felonies. He contended that the trial court erred in denying his existing counsel's motion to withdraw and his proposed new counsel's motion for a continuance. The Court disagreed.

The record showed that appellant was indicted on September 12, 2012, and his trial counsel filed an entry of appearance on September 24, 2012. Appellant's counsel filed a motion to withdraw as counsel on March 18, 2013, the morning his case was scheduled for trial, asserting that she and appellant had "a conflict of irreconcilable differences as to how to proceed in this case"; that counsel had received information from the State as late as two days earlier, March 16, 2013; and that counsel had not been paid to continue the case. After the case was called, the trial court denied appellant's request for an 8-week continuance to seek new counsel, but moved the case to second on the calendar, thus granting him a two-day continuance. When the case was called again in two days, defense counsel informed the court that she and appellant were still at an impasse; however, appellant had been able to obtain new counsel, who was seeking a two-week continuance. In response, the trial court noted that appellant's counsel had announced "ready" for trial one week or so before informing the court of the impasse, that the court was in the last week of its criminal trial calendar, and that the next calendar would be months away. Therefore, the trial court found the delay was one of trial strategy and gave appellant the options of proceeding with old counsel; proceeding with new counsel; or proceeding pro se. Appellant opted for old counsel.

The Court stated that the essential aim of the Sixth Amendment is to guarantee an effective advocate for each criminal defendant rather than to ensure that a defendant will inexorably be represented by the lawyer whom he prefers. Accordingly, a trial court must balance the defendant's constitutional right to the counsel of his choosing against the need to maintain the highest standards of professional responsibility, the public's confidence in the integrity of the judicial process and the orderly administration of justice. Here, the trial court engaged in such a balancing test. Weighing the fact that appellant and his trial counsel, who was prepared for trial, disagreed regarding trial strategy against what the court determined was an undue delay in trying the case, the trial court chose to deny a continuance that would allow new counsel time to prepare. Thus, because the trial court's ruling was not a clear and manifest abuse of discretion, the Court found no error and affirmed appellant's convictions.

Tampering with Evidence; Sentencing

Haynes v. State, A14A2255 (3/11/15)

Appellant was convicted of tampering with evidence and financial transaction card fraud, but acquitted of felony murder, burglary, aggravated assault, armed robbery and possession of a knife during the commission of a crime. The indictment charged in one count that appellant and his co-defendant committed the offense of tampering with evidence in violation of O.C.G.A. § 16-10-94(c). He contended that the trial court erred by giving him a felony rather than a misdemeanor sentence on the tampering charge. The Court agreed.

The Court noted that this subsection authorizes a felony sentence only when the tampering is done in the case against another person. Citing *Hampton v. State*, 289 Ga. 621 (2011), the Court noted that the indictment accused appellant and his alleged accomplice of tampering "with the intent to prevent the apprehension of each said accused." Because "each said accused" could mean either of the accused, the jury could have found appellant guilty of tampering to prevent his

own apprehension (a misdemeanor) or the apprehension of his alleged accomplice (a felony). Neither the verdict form nor the jury charge required any further specificity. Therefore, appellant must be given the benefit of the doubt in construing this ambiguous verdict. Accordingly, appellant's felony tampering sentence was vacated and remanded for re-sentencing.

Jury Charges; Due Process

Hill v. Williams, S14A1352 (3/27/15)

Appellant appealed from the denial of his petition for habeas corpus. The record showed that appellant was convicted in 1998 of statutory rape as a lesser included offense of forcible rape, aggravated child molestation, child molestation and enticing a child for indecent purposes, all relating to A. G., the 14 year old victim. In *Stuart v. State*, 318 Ga.App. 839 (2012), the Court of Appeals held that statutory rape is never included in forcible rape, overturning *Hill v. State*, 295 Ga.App. 360 (2008), the case which affirmed appellant's conviction. Appellant thereafter filed a habeas petition alleging that he was denied due process at the time of trial because he did not have fair notice that he could be convicted of the statutory rape because his indictment did not expressly charge him with that crime and, as shown by *Stuart*, the statutory rape could not be included in the forcible rape of A. G. with which he was expressly charged. Appellant further argued that he was prejudiced as a result, being unable to adjust his defense to meet a charge of which he had no notice. The habeas court denied the petition and the Supreme Court affirmed.

The Court noted that for purposes of this case, it would accept that *Hill* was decided incorrectly; that *Stuar*t was right to overrule *Hill*; that statutory rape is never an offense included in forcible rape; and that the court in which *Hill* was convicted was wrong to instruct the jury to the contrary. But, this showed only a misapplication of the statutory law concerning lesser included offenses; it failed to make out the constitutional claim that appellant asserted.

The Court stated that the question was not whether the particular forcible rape count of the indictment gave appellant notice of statutory rape, but rather, whether the indictment as a whole did so. Due process requires that an indictment put the defendant on notice of the crimes with which he is charged and against which he must defend. Thus, under Georgia law, a defendant is on notice of the crime charged (named) in the indictment or accusation and (1) lesser crimes which are included in the crime charged as a matter of law and (2) other lesser crimes which are shown by the facts alleged to show how the crime charged was committed. Here, the Court found, the facts essential to the statutory rape of A. G. were alleged in the indictment, and the statutory rape properly could have been included in two counts of the indictment as a matter of fact. Therefore, the indictment afforded appellant constitutionally adequate notice that he could be convicted at trial of the statutory rape of A. G.

Moreover, the Court found, appellant failed to show prejudice. The principal line of defense urged by appellant at trial was that he did not have sexual relations of any kind with A. G., forced or unforced, and her account to the contrary was fabricated and belied by the absence of corroborating physical evidence. Had the jury accepted that defense, it would have been effective against all of the crimes with which appellant was expressly charged and the statutory rape of which he was convicted, and appellant failed to point to anything different that his lawyer could, would, or should have done to meet the statutory rape charge. Consequently, he failed to show any prejudice sufficient to make out his claim in habeas of a substantial denial of due process.

Involuntary Statements; Fruits of the Poisonous Tree Doctrine

State v. Chulpayev, S14A1375; S14X1376 (3/27/15)

Appellant was charged with murder and related offenses. In a lengthy Justice Nahmias-authored opinion, the Court found that the record showed the victim was killed in a vehicle rented to him by appellant, the owner of a car-rental business. Appellant was also working as a CI for an FBI agent in a drug case involving the victim. The FBI agent was very protective of appellant and the local police allowed the FBI agent to initially take the lead in the murder investigation. Appellant gave statements to the police in July 2012, Oct. 2012 and April 2013. Between the Oct. and April statements, the police executed a search warrant on the vehicle in which appellant was shot. Evidence from this search led to other evidence used to obtain additional search warrants. Appellant was arrested in April of 2013 and his last statement was made two hours after his arrest.

Appellant filed a motion to suppress all three statements. The trial court found that appellant's statements in the July and October 2012 interviews were involuntary and inadmissible under O.C.G.A. § 24-8-824. The court also found, however, that because five months passed between the October 2012 and April 2013 interviews, "[a]ny possible taint was clearly eradicated" as to the April interview because appellant had been Mirandized. The State appealed and appellant cross-appealed.

The State argued that the July and Oct. statements were not involuntary under O.C.G.A. § 24-8-824. The Court disagreed. Under this statute (former § 24-3-50) a statement is voluntary if it was not induced "by the slightest hope of benefit or remotest fear of injury." Here, the Court found that the evidence amply supported the trial court's finding that appellant only talked to the police after the FBI agent told him repeatedly that if he gave a statement, he would not face murder charges, he would not be in trouble, and nothing would happen to him. Thus, appellant's statements were induced by the hope of benefit in violation of the statute. Moreover, the Court held, to the extent that *McMahon v. State*, 308 Ga.App. 292 (2011), holds that there is a distinction under the statute between full "confessions" and mere "incriminatory statements" it is overruled.

The Court then addressed appellant's contention that the trial court erred in finding that his April statement was not suppressible as fruit of the poisonous tree. The Court found that the trial court was correct, but for the wrong reason. The Court first found that contrary to the trial court's conclusions, appellant's April statement were the fruits of his July and Oct. statements, which the trial court properly held were involuntary and inadmissible under § 24-8-824. Specifically, the Court found, all the evidence obtained before the April arrest and statements were derived from the information obtained from the involuntary July and Oct. statements.

Thus, the post-arrest statements would be inadmissible *if* the fact that the prior statements were obtained in violation of the statute mandates that their fruits must also be suppressed.

But, the Court found, after reviewing the common law and 150-year history of § 24-8-824, the Court found that it does not. Moreover, the Court stated, it could not find any case holding that the fruits of a confession that is inadmissible under O.C.G.A. § 24-8-824 (or its predecessors) must be excluded from evidence. And the Court found, to the extent that *Pitchford v. State*, 294 Ga. 230, 235-236 (2013) and *Taylor v. State*, 274 Ga. 269, (2001), appear to indicate that the fruits of statements obtained in violation of § 24-8-824 must be suppressed, they are disapproved.

Nevertheless, statutory and constitutional voluntariness standards differ and while proof that a confession was induced by a hope of benefit in violation of the statute is significant proof that due process was also infringed, the court must consider that factor among the totality of the circumstances. Here, the Court noted, the trial court did not distinctly rule on appellant's constitutional claim that his statements were involuntary. Therefore, the trial court's judgment with respect to appellant's April 2013 statements was vacated and remanded with direction for the court to decide whether any of his statements were obtained in violation of his constitutional rights and whether, as a result, the April 2013 statements must be suppressed.

Justification Defense; Heard v. State

Woodard v. State, S14A1532 (3/27/15)

Appellant was convicted of the malice murder of two police officers. The evidence showed that appellant, a convicted felon, shot the officers as they attempted to arrest him. Appellant contended at trial that he was justified in resisting his arrest because the officers were beating him and he feared for his life.

He argued that the trial court erred in instructing the jury that "a person is not justified in using force if that person . . . is attempting to commit, is committing, or is fleeing after the commission or attempted commission of a felony." The Court disagreed. The Court found that this was the pattern instruction and recites nearly verbatim the language of O.C.G.A. § 16-3-21(b)(2). Thus, "[o]ne would think that a trial court could not err in instructing the jury using the language of the applicable statutory law."

Nevertheless, appellant argued, the instruction was not proper under *Heard v. State*, 261 Ga. 262 (1991) in which it was held that O.C.G.A. § 16-3-21(b)(2) should apply only "where it makes sense to do so, for example, to a burglar or robber who kills someone while fleeing," and not to a defendant who killed someone while committing the felony of possessing a firearm as a convicted felon. Specifically, appellant argued that it does not make sense to apply § 16-3-21(b)(2) in this case either, because the felony that he was found guilty of committing when he shot and killed the officers was again possession of a firearm by a convicted felon, which he argued is a "status" felony that had no nexus to the officers' use of force against him. Again the Court disagreed.

First, the Court noted, appellant did not make this objection at trial and in fact, requested that the trial court give the pattern charge including that language tracking O.C.G.A. § 16-3-21(b)(2). The Court stated that whether a defendant's request that the trial court give a jury instruction is properly held to affirmatively waive all alleged errors regarding language included in or omitted from the instruction, or only errors regarding language that the record shows the defendant included or omitted after considering the controlling law, is an open question. And, the Court has not squarely addressed this question with respect to review under O.C.G.A. § 17-8-58, although it has recognized the possibility that our cases applying the "invited error" concept broadly to preclude review of requested jury instructions, if decided before or without reference to the enactment of § 17-8-58, may not remain viable. However, the Court stated, it need not address the issue here because appellant's counsel, the prosecutor, and the trial court specifically discussed *Heard* and its application to this case. The court ultimately decided to leave in the flight language and declined to give the additional charge and appellant's counsel, despite their awareness and discussion of *Heard*, did not withdraw the request that the court give the full self-defense pattern instruction. Under these circumstances, the Court concluded, appellant clearly invited the error that he alleged based on *Heard* and affirmatively waived appellate review of that error.

Second, the Court found, the decision in *Heard* was a stark departure from settled law and takes the untenable position that the Court should apply statutes only when it seems fair and sensible to it to do so. "The better course is simply to overrule *Heard* now, before it becomes any more entrenched. Accordingly, we hereby overrule *Heard* and restore the law to its pre-*Heard* condition." Accordingly, the trial court did not err in instructing the jury in the words of O.C.G.A. § 16-3-21(b)(2).

Double Jeopardy; Frivolous Motions

Harvey v. State, S14A1646 (3/27/15)

Appellant was charged with murder. The first day of trial, the prosecutor moved in limine to prevent the defense from mentioning appellant's police interview unless and until appellant testified. Specifically, the prosecutor stated the State had no intention of using the statement in its case and that the interview consisted of mostly self-serving hearsay statements by appellant. The court granted the motion, stating "I will instruct the parties not to go into any statements, any contents of her statements to the police until such time [as the defendant testifies]." The next day, defense counsel stated in his opening statement that the police arrested appellant as a "rush to judgment" and then said: "My client, on being interviewed by the police was very cooperative with the police. She submitted herself to several hours of interview." The prosecutor objected. The defense counsel stated that he understood the order to be that he could not go into the substance of the interview, but not that he could not mention the fact of the interview or his client's cooperation. The State requested a mistrial and the defense argued a curative instruction would suffice. The court granted the mistrial, finding that there was a violation of its order on the motion in limine and that a curative instruction was an insufficient remedy.

Appellant thereafter filed a plea in bar on double jeopardy grounds. The trial court, after a lengthy hearing, denied the motion. The denial was the basis of this appeal. However, the trial court ruled that the motion was frivolous and allowed the retrial

while this appeal was pending. Appellant was subsequently convicted.

Appellant contended that the trial court erred in denying her plea in bar because her defense counsel did not violate the court's pretrial ruling on the State's motion in limine and that giving the jury a curative instruction would have been sufficient to remove any harm. The Court disagreed. Trial courts may declare a mistrial over the defendant's objection, without barring retrial, whenever, in their opinion, taking all the circumstances into consideration, there is a manifest necessity for doing so. The "manifest necessity" standard cannot be interpreted literally, and a mistrial is appropriate when there is a "high degree" of necessity. Nevertheless, whether the required degree of necessity for a mistrial has been shown is a matter best judged by the trial court. And here, the Court found, the trial court did not abuse its discretion in granting the mistrial.

Appellant also argued that the trial court erred in concluding that defense counsel violated the court's ruling on the State's motion in limine because that ruling did not bar reference to the existence of her police interview as opposed to its specific contents. However, the Court found, after the trial court's oral ruling on the motion in limine was viewed in its full context, the court did not abuse its discretion in concluding that its pretrial decision was understood by the court and by the parties as prohibiting any mention of appellant's police interview in defense counsel's opening statement. In addition, even if the pretrial ruling was imprecise and the violation of the ruling was not the most blatant, the trial court could decide that evidence that was unlikely to be admitted and prejudicial to the State had been placed before the jury during opening statements. Under these circumstances, the court had discretion to decide that it was better to start over with a new trial instead of waiting to see if the disputed evidence came in after days of testimony and having to declare a mistrial then if the evidence was never admitted.

Next, appellant argued that the trial court erred in determining that a curative instruction would be insufficient to cure any harm to the State. But here, the Court found, if appellant elected not to testify after the State concluded its case-in-chief, the jury would be left to wonder why they never heard the hours-long interview that defense counsel had referenced at the outset of the trial, during which appellant was allegedly "very cooperative with the police." This scenario would be particularly damaging to the State, which had the burden to prove appellant's guilt to the jury beyond a reasonable doubt. It was not unreasonable in this situation for the trial court to conclude that it could not "un-ring that bell" simply by instructing the jury to disregard defense counsel's reference. Indeed, by explaining or implying that the interview was inadmissible, the court could have raised the inference that the police rather than defense counsel had done something wrong, thereby reinforcing the theme of defense counsel's opening that the police had conducted an improper investigation.

Finally, appellant contended that the trial court erred in finding that her double jeopardy plea was frivolous and therefore allowing her retrial to proceed despite her notice of appeal from the order denying her plea. The Court stated that where a defendant files a notice of appeal challenging the denial of a plea in bar that the trial court finds to be frivolous or dilatory, the defendant may be retried, convicted, and sentenced despite the pendency of the defendant's appeal. Furthermore, the Court noted, appellant did not file a motion in the Supreme Court to stay her retrial pending its decision in this appeal of the denial of her plea in bar based on double jeopardy. And, if a defendant fails to obtain an appellate stay of a trial court's ruling that her double jeopardy claim is frivolous, and she is then retried and convicted, the only real question is whether her double jeopardy claim is meritorious. If so, she is entitled to a reversal of her conviction; the harm of enduring the retrial cannot be eradicated. And if her double jeopardy claim is not meritorious, even if it was not entirely frivolous, then she properly faced a retrial; "requiring a third trial due to an erroneous ruling as to frivolousness would be a bizarre remedy to cure a double-jeopardy-related error." Accordingly, appellant failure to obtain an appellate stay of her retrial to allow review before the retrial occurred of her challenge to the trial court's ruling that her double jeopardy plea was frivolous rendered that issue irrelevant. The only question was whether appellant's plea in bar was properly denied and the Court found, it was.

Stalking; Definition of "Contact"

Chan v. Ellis, S14A1652 (3/27/15)

Appellant Chan has a website on which he and others published commentary critical of copyright enforcement practices that they consider predatory. Ellis is a poet, and her efforts to enforce the copyright in her poetry drew the ire of appellant and his fellow commentators. On his website, they published nearly 2,000 posts about Ellis, many of which were mean-spirited, some of which were distasteful and crude, and some of which publicized information about Ellis that she would prefer not to be so public. At least one post was written in the style of an open letter to Ellis, referring to her in the second person, and threatening to publicize additional information about Ellis and her family if she continued to employ the practices of which appellant and the other commentators disapproved. Ellis obtained injunctive relief under the Georgia stalking law, O.C.G.A. § 16-5-90 et seq. because the electronic publication of the posts was a violation of O.C.G.A. § 16-5-90(a)(1), which forbids one to "contact" another for certain purposes without the consent of the other.

Appellant contended that the evidence did not show that the publication of posts about Ellis on his website amounts to the sort of "contact" that is forbidden by O.C.G.A. § 16-5-90(a)(1). The Court agreed and reversed. O.C.G.A. § 16-5-90(a)(1) provides that "[a] person commits the offense of stalking when he or she . . . contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person." For purposes of the statute, one "contacts another person" when he "communicates with another person" through any medium, including an electronic medium. That a communication is about a particular person does not mean necessarily that it is directed to that person.

Here, the Court found, the record showed that appellant and others posted a lot of commentary to his website about Ellis, but it failed for the most part to show that the commentary was directed specifically to Ellis as opposed to the public. As written, most of the posts appeared to speak to the public, not to Ellis in particular, even if they were about her. And there was no evidence that appellant

did anything to cause these posts to be delivered to Ellis or otherwise brought to her attention, notwithstanding that he may have reasonably anticipated that she might come across the posts, just as any member of the internet-using public might. The publication of commentary directed only to the public generally does not amount to "contact," as that term is used in O.C.G.A. § 16-5-90(a)(1), and most of the posts about Ellis quite clearly cannot form the basis for a finding that appellant contacted Ellis.

Nevertheless, the Court noted, a few of the posts came closer to "contact," including, the open letter to Ellis, which appellant may actually have intended as a communication to her. But, the Court found, their publication still does not amount to stalking. Even assuming, arguendo, that appellant "contacted" Ellis by the publication of any posts, the evidence failed to show that such contact was "without [her] consent." Appellant did not sent a message to Ellis by electronic mail, linked commentary to her social media account, or posted commentary on her website. To the contrary, the commentary about which Ellis complained was posted on appellant's website, and Ellis learned of that commentary. Thus, it arguably was communicated to her only as a result of her choice to discover the content of appellant's website. The evidence showed that Ellis visited the website herself and it appears she registered herself as an authorized commentator on the website and she had others visit the website and report back to her about the commentary published there. Generally speaking, our stalking law forbids speech only to the extent that it is directed to an unwilling listener, and even if Ellis did not like what she heard, she cannot be fairly characterized as an unwilling listener. Accordingly, Ellis failed to prove that appellant "contacted" her without her consent, and the trial court erred when it concluded that appellant had stalked Ellis.