Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 15, 2015

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THIS WEEK:

Closing Arguments

Lopez-Vasquez v. State, A14A1558 (3/26/15)

Appellant was convicted of trafficking in methamphetamine and possession of methamphetamine. The evidence showed that he was living in a stash house and was receiving monetary help in exchange for guarding the drugs stored in the house. He argued that the trial court erred in restricting his closing arguments. The record showed that the trial court interrupted defense counsel during closing and cautioned him that his argument was potentially confusing to the jury and was "over the line" when he asserted that there was a distinction between giving safe haven to drugs and merely benefitting from the knowledge that someone else in the residence was giving safe haven to the drug. Defense counsel had argued that in the first instance, a party was guilty of a crime, but in the second, he was not. The trial court advised defense counsel that in either case, the party was guilty and could not "take the benefit of ill-gotten goods" and that he should "get away" from that argument. Defense counsel responded that he would "move on for now, but asked to be heard in the matter later. After the charge conference, defense counsel requested that he be allowed to preserve an objection to the trial court's restriction of his argument.

The Court stated that a trial court has discretion to determine the range of proper closing argument. It is not error for a trial court to restrict an argument that misleads or confuses the law. Accordingly, appellant's argument was without merit.

Double Jeopardy; Search & Seizure

Sellers v. State, A14A2197 (3/26/15)

Appellant allegedly fled from the scene of a traffic stop, leading the police on a high speed car chase in which he struck another vehicle, discarded cocaine from his car window, and attempted to bribe a police officer following his apprehension. After pleading guilty in state court to the traffic offense of following too closely, appellant was indicted in superior court on charges of trafficking in cocaine, possession of cocaine with intent to distribute, abandonment of drugs in a public place, bribery, and fleeing or attempting to elude a police officer. Appellant filed a motion in autrefois convict and plea of former jeopardy, contending that all counts of the indictment returned in superior court should be dismissed as a result of his guilty plea in state court. Appellant also filed a motion to suppress the cocaine, contending, among other things, that the traffic stop had been unreasonably prolonged and that the cocaine allegedly discarded from his vehicle

was the tainted fruit of his unlawful detention. The trial court granted the procedural double jeopardy motion as to the attempting to elude charge, but denied it as to the other charges. The trial court also denied the motion to suppress.

Appellant first contended that the trial court erred in denying his motion based on procedural double jeopardy. The Court disagreed. The procedural aspect of double jeopardy under Georgia law is set forth in O.C.G.A. § 16-1-7(b), which requires the State to prosecute crimes in a single prosecution if the crimes 1) arise from the same conduct, 2) are known to the proper prosecuting officer at the time of commencing the prosecution, and 3) are within the jurisdiction of a single court. Here, the Court stated, the focus was on the second prong of the test: knowledge of the proper prosecuting officer, which in this case was the solicitor. Appellant had the burden of affirmatively showing that the state court solicitor *actually knew* of the felony offenses arising out of the same conduct as the traffic offense of driving too closely to which he pled guilty.

The Court concluded that appellant failed to carry his burden under the circumstances of this case. First the Court noted, appellant did not call the solicitor as a witness. Instead, appellant relied on a document entitled "Inmate Charge/Disposition Form" that had been completed by a booking officer at the county detention center. But, citing *Turner v. State*, 238 Ga.App. 438, 438-440 (1999), the Court found that the disposition form in this case, which simply listed felony offenses (including a vaguely worded drug charge that did not make clear the specific drug at issue) and the date appellant was initially detained, failed to demonstrate that the state court solicitor actually knew of the felony offenses arising out of the same conduct as the traffic offense. The Court also rejected the testimony of an attorney who was in the courtroom during the plea in state court. When asked if he had overheard at the plea hearing "any conversation amongst the Court and [appellant] regarding any other situations that he may be facing," the attorney testified, "Yeah, there was some discussion at the bench that [appellant] had bigger problems upstairs was the topic." Because the attorney did not elaborate any further regarding what was discussed at the plea hearing or even mention the state court solicitor, his testimony plainly was insufficient to show that the solicitor actually knew of the other felony offenses arising out of the same conduct as the traffic offense to which appellant pled guilty. Accordingly, appellant failed in his burden to show actual knowledge on the part of the solicitor and consequently, the trial court did not err in denying his procedural double jeopardy motion.

Appellant also contended that the trial court erred in denying his motion to suppress the cocaine discarded on the side of the road where the police chase occurred. Appellant argued that the officer unreasonably prolonged the duration of the traffic stop after learning that the window tint on appellant's vehicle was within legal limits, and the discarded cocaine was the tainted fruit of that unlawful detention. The Court again disagreed.

The Court stated that even if the officer unreasonably prolonged the traffic stop by continuing to detain appellant after learning that there was no window tint violation, the cocaine that allegedly was discarded after that detention was not "fruit of the poisonous tree" that had to be suppressed.

When examining whether evidence is inadmissible as fruit of an illegal detention, a court must determine whether the evidence was obtained by exploitation of the prior illegality or instead by means sufficiently distinguishable to be purged of the primary taint. And, significantly, a defendant's commission of a new crime in the presence of law enforcement is an intervening act of free will that purges the taint of any prior illegality.

Here, the evidence showed that appellant fled from the traffic stop, engaging the police in a high speed and dangerous car chase in heavy traffic during which he discarded the cocaine from his vehicle. Regardless of the propriety of an officer's basis for the execution of a traffic investigative stop, attempting to flee from such stop is a separate crime altogether, i.e., fleeing or attempting to elude a police officer. Such offense does not require that the investigative stop to be proper. The determination of whether there is a legal basis for an investigative stop does not belong to the detainee, thereby giving him the right to flee if he determines he is being stopped illegally. To hold otherwise could encourage persons to resist the police and create potentially violent and dangerous confrontations. Therefore, the Court concluded, appellant's flight from the traffic stop, even if the duration of the stop was unreasonable, was a new crime, and thus constituted an intervening act that purged the taint flowing from any illegality.

Arson; Indictments

McLeod v. State, S15A0370 (May 11, 2015)

Appellant was convicted of murder, aggravated assault, kidnapping, arson in the first degree and other crimes. The evidence showed that appellant and her co-conspirators murdered two men and then burned their bodies in a vehicle.

The Court found that the evidence to be insufficient to support appellant's arson conviction. The various ways in which arson in the first degree of a vehicle may be committed are set forth in O.C.G.A. § 16-7-60(a)(2) through (5), and appellant contended that her conviction must be reversed on the ground that the indictment was defective because it failed to allege all the required elements of the crime. The Court noted that it was neither alleged in the indictment nor proven at trial that the vehicle was a "structure … designed for use as a dwelling" that was damaged without the consent of the owner or any holder of a security interest, as set forth in subsection (a)(2); that the vehicle was insured against loss or damage by fire or explosive and that it was damaged without the consent of both the insurer and the insured, as set forth in subsection (a)(3); that the vehicle was damaged by fire with the intent to defeat the interests or rights of a spouse or co-owner, as set forth in subsection (a)(4); or that the vehicle was damaged by fire under such circumstances that is was "reasonably foreseeable that human life might be endangered," as set forth in subsection (a)(5). The State conceded that the indictment was defective. Thus, since the evidence at trial did not prove any of the methods in which the crime of arson in the first degree of a vehicle may be committed, the evidence was insufficient to sustain the conviction.

Affirmative Defenses; Judicial Comments

McLean v. State, S15A0308 (May 11, 2015)

Appellant was convicted of the murder of one victim, aggravated assault on another victim and unlawful possession of a firearm

during the commission of a felony. He contended that the trial court erroneously instructed the jury that, by raising an affirmative defense, appellant admitted the charged acts. Specifically, he contended that this was an improper judicial comment under O.C.G.A. § 17-8-57, requiring a new trial. The Court disagreed.

The record showed that the trial court instructed the jury that an affirmative defense "is a defense that admits doing the act that is charged in the bill of indictment, but the affirmative defense seeks to justify, excuse, or mitigate the act. Now, once an affirmative defense is raised by the evidence, the burden is on the State to disprove any affirmative defense beyond a reasonable doubt." The Court found that this instruction is substantially identical to the pattern charge, Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, § 3.00.00 (4th Ed. 2007, updated through January 2015), and it is a correct statement of law. Indeed, to assert an affirmative defense, a defendant must admit the act, or he is not entitled to a charge on that defense.

Nevertheless, appellant argued, the trial court went on to charge the jury that "[Appellant] *has raised the affirmative defenses* of justification for what is commonly known as self-defense and accident." (Emphasis supplied). Appellant contended that the latter charge — when considered together with the earlier pattern charge on affirmative defenses — amounted to an instruction that he had admitted doing the charged acts. To the contrary, appellant asserted, he did not admit the act because there was some evidence that he did not cause the gun to fire and because this possibility was argued to the jury. But, the Court found, although that may have been an alternative defense theory, appellant requested charges on self-defense and accident and argued those affirmative defenses to the jury, and the trial court charged on them immediately following the instruction about which appellant contended was error. The existence of an alternative defense does not change the fact that the defendant admits the charged act for purposes of raising and presenting his affirmative defense, even if he denies it for other purposes. Consequently, it would not have been error for the trial court to directly tell the jury that appellant admitted the shooting for purposes of his defenses of justification and accident. If a defendant does pursue alternative defense theories that are both supported by the evidence, the trial court may fully charge on each theory. Accordingly, the Court concluded, the charge as given did not violate O.C.G.A. § 17-8-57.

Dying Declarations

Hager v. State, S15A0450 (May 11, 2015)

Appellant was convicted of malice murder and other related crimes. The evidence showed that the victim was found shot in the middle of the street. Before he died, he made statements that identified appellant as the shooter. These statements were admitted at trial as dying declarations under former O.C.G.A. § 24-3-6, which provided: "Declarations by any person in the article of death, who is conscious of his condition, as to the cause of his death and the person who killed him, shall be admissible in evidence in a prosecution for the homicide."

Appellant did not dispute that the statements the victim made to those who testified about them at trial qualified as dying declarations under former O.C.G.A. § 24-3-6. Appellant also acknowledged that the testimony reciting the victim's dying declarations was admitted without objection. Nevertheless, appellant attempted to draw a distinction between the dying declarations statute, which stated that such declarations "shall be admissible in evidence" in a homicide prosecution, and the types of evidence admissible pursuant to the former O.C.G.A. § 24-3-2. Pursuant to the terms of O.C.G.A. § 24-3-2: "When, in a legal investigation, information, conversations, letters and replies, and similar evidence are facts to explain conduct and ascertain motives, they shall be admitted in evidence not as hearsay but as original evidence." According to appellant, even though the victim's dying declarations were admissible, they remained hearsay because the dying declarations statute did not specify they are not hearsay and that they are admissible as original evidence, unlike the examples of evidence set forth in O.C.G.A. § 24-3-2. Consequently, appellant argued, the victim's dying declarations lacked probative value and should not have been considered in the analysis of whether the evidence against him was sufficient to affirm his convictions.

The Court found appellant's arguments "to be tortured logic." It is well-settled that a statement which qualifies as a dying declaration pursuant to the parameters set forth in former O.C.G.A. § 24-3-6 is admissible as an exception to hearsay. As such, the evidence is not simply admissible, though not probative of the issue of guilt; it is admissible as an exception to hearsay for the jury to weigh and consider as evidence of guilt. The dying declaration of the victim is frequently cited as part of the trial evidence considered by the Court in determining whether the evidence was constitutionally sufficient to authorize the trier of fact to find the defendant guilty pursuant to the familiar standard set forth in *Jackson v. Virginia*. Accordingly, the Court found, the testimony regarding the victim's dying declarations was properly included in its determination of whether the sufficiency of the evidence, as a whole, to support the convictions.

Law of the Case Doctrine; Ineffective Assistance of Counsel

Buckner v. Barrow, S15A0093 (5/11/15)

Appellant was convicted of VGCSA and his conviction was affirmed on appeal. *Buckner v. State*, 321 Ga.App. 715 (2013). One enumeration of error rejected by the Court of Appeals was on the ground that appellant abandoned it by his failure to make any meaningful legal argument in his appellate brief in support of that claim. Appellant thereafter filed a petition for a writ of habeas corpus, alleging that he was denied the effective assistance of counsel on appeal when his appellate counsel failed to make a legal argument sufficient to preserve this claim of error. The habeas court denied his petition, finding that the appellate brief "clearly reflects that appellate counsel provided a legal argument," and for that reason, appellate counsel was not ineffective.

The Court found, and the Warden conceded, that the habeas court was not permitted to find that appellate counsel made legal arguments sufficient to preserve a claim of error on appeal when the Court of Appeals already had found otherwise. Under the law of the case doctrine, if an issue is raised and resolved on direct appeal from a criminal conviction, the habeas court is bound by the appellate ruling and cannot reexamine it, even if it appears erroneous, and even if the

erroneous ruling was that a claim of error had not been preserved for review. Thus, the Court vacated the decision of the habeas court. However, in so doing, the Court did not decide whether appellant's contention of ineffective assistance has merit. Instead, on remand, the habeas court must reconsider appellant's assertion in a way that is consistent with the earlier determination by the Court of Appeals that appellate counsel did, in fact, fail to make legal argument sufficient to preserve the claim of error.

Jury Instructions; Justification

Dugger v. State, S15A0578 (May 11, 2015)

Appellant was convicted of felony murder and armed robbery. The evidence showed that he went to the home of the victim who was selling crack from the victim's back porch. Appellant pulled a gun and took valuables from the victim. The victim told appellant he had more in the house, but attempted to shut the door on appellant after the victim entered the house. Appellant reached his gun inside and shot the victim. Appellant argued that he shot the victim in self- defense.

Appellant contended that the trial court erred by instructing the jury to return separate verdicts on malice murder and felony murder because Count 1 of the indictment alleged only felony murder. Count 1 of the indictment alleged that appellant "did unlawfully and with malice aforethought and while in the commission of the felony aggravated assault cause the death of [the victim], a human being, by shooting him with a handgun, a deadly weapon, contrary to the laws of said State …." The longstanding rule in Georgia is that an indictment may take the form of a single count which contains alternative allegations as to the various ways in which the crime may have been committed. This rule applies to charging malice murder and felony murder in a single count. Here, the Court found, Count 1 clearly alleged the elements of both malice murder and felony murder. Thus, there was no error in the trial court's instruction.

Appellant also argued that the trial court erred by giving incomplete instructions on justification. Appellant first contended that the court erred by denying his request to charge the jury that "threats accompanied by menaces" may, in some instances, be sufficient to arouse the fears of a reasonable man that his life is in danger. Specifically, appellant argued that this instruction was necessary for the jury to understand that the reasonableness of his fear for his life must be determined from the position of a reasonable person standing in appellant's shoes. But, the Court found, the trial court's instructions on justification substantially covered this legal principle because it instructed the jury that "[t]he fact that a person's conduct is justified is a defense to prosecution for any crime based on that conduct," and gave the full pattern charge on "Justification; Use of Force in Defense of Self or Others." Appellant asserted that the court was also required to instruct the jury that it had a duty to acquit if it found that his actions were justified. However, the Court found, because the instructions the court gave adequately covered justification and the State's burden of proof, the court did not err in failing to specifically charge the jury that it would be their duty to acquit the defendant if they believed he was justified in committing the killing. In fact, the instruction appellant requested was not only unnecessary, but could have misled the jury to conclude that its duty to acquit was limited by a defense of justification, when in fact the jury must acquit whenever the State failed to make out its complete case.

Appellant also contended that the trial court erred by not instructing the jury under O.C.G.A. § 16-3-20(6) that the defense of justification can be claimed "in all other instances which stand upon the same footing of reason and justice as those enumerated [in the Code]." Appellant argued that this instruction was required to "fairly present to the jury the law on his theory of the case and his defense of justification," citing *Nelson v. State*, 213 Ga.App. 641, 643 (1994).

The Court noted *Nelson* explains that the General Assembly included the final subsection in § 16-3-20 to allow the defense of justification in circumstances unparticularized by the legislature but instead left to the jury, with the limitation that it be of the same quality as the enumerated instances. In other words, an instruction under § 16-3-20(6) is appropriate only if the defendant's conduct is not encompassed by one of the specifically enumerated circumstances for claiming a defense of justification, but still might be justified because it stands upon the same footing of reason and justice as those enumerated. Here, appellant claimed that he shot the victim in self-defense, which is a well-established and expressly enumerated justification defense and one on which the court adequately instructed the jury. Appellant offered no other theory of justification. Accordingly, the trial court properly declined to give appellant's requested instruction on § 16-3-20(6).

Sufficiency of the Evidence; Corroboration of Accomplice Testimony

Taylor v. State, S15A0612, S15A0613 (May 11, 2015)

Taylor and Bessent were found guilty for the felony murder of Michael Key and Phyllis Frazier, the aggravated assault of Roney Wilson and Meagan Molix, conspiracy to commit armed robbery, and conspiracy to possess cocaine. The evidence showed that Robert Brown (a co-defendant of Bessent and Taylor) and Taylor were in Jacksonville, Florida. At some point, Taylor told Brown that Bessent "needed to get something up in Georgia," which Brown understood to be a trip to purchase drugs. Brown agreed to drive Taylor, Bessent, and Joseph Stuckey from Florida to Kingsland, Georgia. According to Brown, Bessent used Stuckey's cell phone to make calls to Michael Key, the dealer, and told Brown, who was driving the vehicle, how to get to Key's apartment. Phone records later obtained by police proved that phone calls were made from Stuckey's cell phone to Key's cell phone, including one shortly before the shootings in Key's apartment. At the apartment complex, again according to Brown, Bessent, Taylor, and Stuckey, who had an AK-47 assault rifle with him, went inside. After a few minutes, Brown, who stayed in the car, heard shots fired, and he then saw Bessent, Stuckey, and Taylor run out of the apartment. At that point, a pickup truck had pulled up next to Brown's vehicle in the parking lot, and Brown testified that, when Stuckey saw the truck, Stuckey began shooting at it. Jermaine Banks, who was in the truck, testified that, when he and Jamie Riddle pulled into the parking lot, Banks heard gunshots and then noticed someone running down from Key's apartment with a gun. Banks then saw two other individuals run down from Key's apartment.

Meagan Molix was roommates with Key, Frazier, and Wilson. At trial, Molix identified Taylor, but, on cross-examination, she expressed considerable uncertainty about the identification. Medical personnel and law enforcement officers were dispatched to the apartment. Two different types of shell casings were discovered inside the apartment, but only Wolf brand casings suitable for an AK-47 were found outside. One unused Wolf brand bullet was later found in Stuckey's home. Brown testified that, after the shooting, he drove back to Jacksonville and dropped Bessent, Taylor, and Stuckey off at Stuckey's house. Shajuana Jones, Stuckey's girlfriend at the time of the shooting, testified that, on the evening in question, she witnessed Stuckey being dropped off with Taylor. She also saw Bessent move into the front seat from the back at the same time.

In addition to this evidence, certain lyrics from a rap song written by Taylor in his jail cell were admitted. These lyrics stated: "[M]E AND STUCKEY GOT THE CHOPPAS, ANY REASON WE SPRAYIN', AND THAT'S WHEN A LOT OF SH-T CHANGE; AND [M]E AND LIL STUCKEY HAD ANGER BUILT UP IN US. NOW ME, HIM, CODEFENDANTS." There was evidence presented that "choppa" is a street term referring to an AK47 rifle.

Both Taylor and Bessent argued that the evidence was insufficient to support the verdict because Brown's testimony was never corroborated and there was no other evidence that they participated in the crimes. Under former O.C.G.A. § 24-4-8, "[in] felony cases where the only witness is an accomplice, the testimony of a single witness shall not be sufficient. Nevertheless, corroborating circumstances may dispense with the necessity for the testimony of a second witness …" Furthermore, sufficient corroborating evidence may be circumstantial, it may be slight, and it need not of itself be sufficient to warrant a conviction of the crime charged. It must, however, be independent of the accomplice testimony and must directly connect the defendant with the crime, or lead to the inference that he is guilty. Slight evidence from an extraneous source identifying the accused as a participant in the criminal act is sufficient corroboration of the accomplice to support a verdict. Corroboration of only the chronology and details of the crimes is not sufficient, and there must be some independent evidence tending to show that the defendant himself was a participant in the crimes.

First, the Court found that Brown's testimony that Taylor participated in the crimes was corroborated both by Molix's identification of Taylor at trial as well as the rap lyrics Taylor composed in his jail cell which referenced the use of an AK-47 that resulted in becoming Stuckey's co-defendant. Although Taylor accurately pointed out the equivocal nature of Molix's identification testimony, the weight to be given to this equivocal testimony was a matter for the jury to decide. The evidence, therefore, was sufficient to enable a rational trier of fact to conclude beyond a reasonable doubt that Taylor was guilty of the crimes for which he was convicted.

However, the Court found, Brown's testimony that Bessent participated in the crimes was corroborated only by Jones's testimony that she saw Bessent in Brown's vehicle with Stuckey and Taylor on the evening after the murder. This evidence did nothing to indicate that Bessent actually participated in the crimes. At best, it merely showed that Bessent was with his co-defendants in Florida after the crime was committed. As a result, Brown's testimony was not sufficiently corroborated with regard to Bessent, and the evidence was insufficient to enable the jury to find Bessent guilty of the crimes for which he was convicted. The fact that a number of phone calls were made from Stuckey's phone prior to the murders does not change this result, as there was no evidence corroborating Brown's testimony that Bessent actually made these phone calls using Stuckey's phone. The Court therefore reversed Bessent's convictions.

Search & Seizure; Inevitable Discovery

State v. Kaulbach, A14A1492 (3/27/15)

Kaulbach and Caudle were charged with seven counts of theft by receiving, criminal use of an altered identification mark and other crimes. They moved to suppress the results of two search warrants. The evidence showed that neighbors of the two defendants complained to law enforcement officers that they believed they saw items stolen from them and others on the defendants' property. Before the detective who obtained the warrants arrived on the scene, an officer went onto the defendants' property, looked inside a boat and found a tackle box that a neighbor said was stolen from him and thought he saw on the property. The officer opened the tackle box, found information showing it to belong to the neighbor, and returned the tackle box to the neighbor. The boat was within the curtilage and the officer did not have consent, a warrant or exigent circumstances to justify his intrusion onto the defendants' property.

In granting the motion to suppress, the trial court stated that it could not separate the evidence seized as a result of the warrant from the illegal intrusion into the defendants' property and that the detective's testimony was contradictory, specifically whether the detective observed from the neighbors' property, a missing hull plate on an allegedly stolen jonboat on the defendants' property. The State appealed and the Court reversed.

The Court stated that there was sufficient evidence in the affidavits and that none of this evidence was related to the illegal search and seizure of the tackle box or the officers' illegal examination of the boat that occurred before the detective arrived. The trial court's finding that it could not separate the information used to obtain the search warrant from any observations made by officers while illegally on the defendants' property was therefore clearly erroneous, as none of the evidence outlined in the affidavits were related to any observations by the officers. Excluding consideration of whether the detective observed that the Hull Identification Number was missing or not, the pertinent information came from two neighbors in addition to the detective's comparison of the jonboat in the defendants' yard to the reportedly stolen jonboat pictured in a neighborhood email. Because the non-confidential hearsay informants were the victims of the crimes, there was no requirement that their reliability be further corroborated in order to show that probable cause existed. A concerned citizen informant has preferred status insofar as testing the credibility of the informant's information. Accordingly, the trial court erred in granting the motion to dismiss.

Furthermore, the Court found, the trial court erred in suppressing evidence of the illegally-seized tackle box because it would have been discovered inevitably. The admission of the evidence seized in violation of the Fourth Amendment hinges upon whether it qualifies as evidence that would

inevitably have been discovered. The State must demonstrate a reasonable probability that the evidence would have been discovered by lawful means, which were already possessed by the police and being actively pursued before the illegal conduct occurred. An investigation that took place before the illegal seizure and yielded information that would serve as the basis for a search warrant could be the "lawful means" that would have led to the inevitable discovery of the illegally seized evidence.

Here, the detective who obtained the search warrant possessed information about the allegedly stolen boat and other stolen items, he was actively pursuing an investigation of that information, and that information provided probable cause to authorize a search of the boat which would have yielded the tackle box. Accordingly, the trial court also erred in suppressing evidence of the tackle box that would have been inevitably discovered as part of the lawful investigation and execution of the search warrant.