Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 28, 2010

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THIS WEEK:

Speedy Trial

Jakupovic v. State, S10A0532

Appellant appealed from the denial of his motion to dismiss the indictment on constitutional speedy trial grounds. The record showed that appellant was convicted of felony murder, aggravated assault and other crimes in April, 2006. He filed a timely motion for new trial which was granted in February, 2008. He was granted bond and placed on house arrest in May, 2009. His re-trial was scheduled for August, 2009 and his motion to dismiss was filed in October, 2008.

Under the *Barker v. Wingo* analysis, the Court held that where, as here, there is no contention that there was any inordinate delay in ruling on the motion for new trial, the length of the delay in retrying the defendant is measured from the date that the trial court ruled upon the defendant's motion. Since appellant's motion for a new trial was granted on February 7, 2008, and the retrial date was set for August 31, 2009, the delay was over one year, is presumptively prejudicial, and the remaining *Barker* factors must be considered in conjunction with this factor. As to the reasons for the delay, the Court noted that both parties agreed that the delay in bringing the case to trial resulted primarily from overcrowded dockets and changing judge assignments. Such delay weighed minimally against the State. Because appellant never filed a statutory motion for speedy trial and did not assert a constitutional right until October, 2008, this factor was weighed heavily against him. Finally, as to the prejudice prong, appellant contended that two of the State's witnesses had moved back to Mexico. However, the Court noted that these witnesses actually testified against appellant. Moreover, the testimony of these witnesses was preserved in transcripts from the first trial, where the witnesses were subjected to a thorough cross-examination. Thus, in balancing all the factors, the Court held that the trial court did not err in denying appellant's motion to dismiss.

Jury Charges

White v. State, S10A0594

Appellant was convicted of murder, armed robbery and other offenses. He contended that the trial court erred in denying his requested charge on voluntary manslaughter because the trial court instructed the jury on self defense. The evidence showed that the victim had planned to buy marijuana from appellant, but appellant pulled a gun and shot the victim. Thereafter the victim was

found with his pockets empty. The Court held that while jury charges on self defense and voluntary manslaughter are not mutually exclusive; the provocation necessary to support a charge of voluntary manslaughter is different from that which will support a claim of self defense. The distinguishing characteristic between the two claims is whether the accused was so influenced and excited that he reacted passionately rather than simply in an attempt to defend himself. Only where this is shown will a charge on voluntary manslaughter be warranted. Here, appellant asserted that at least slight evidence shows that he was fearful that the victim or his friend had a gun and was about to draw it. But, the Court held, without more, any such evidence did not show the serious provocation and the sudden, violent, and irresistible passion required warranting an instruction on voluntary manslaughter.

Insanity; Bipolar Disorder

Durrence v. State, S10A0608

Appellant was convicted of malice murder but mentally ill. He contended that the trial court erred by placing on him the burden of proving the affirmative defense of insanity. The Court held that under Georgia law, a person is insane, and shall not be guilty of a crime, if at the time of the act, omission, or negligence constituting the crime, the person did not have mental capacity to distinguish between right and wrong in relation to the criminal act or acted because of a delusional compulsion which overmastered his will to resist committing the crime. A defendant claiming insanity has the burden of proving the defense by a preponderance of the evidence. Because Georgia law presumes every person is of sound mind and discretion, criminal trials begin with the rebuttable presumption that the defendant is sane and this presumption is evidence. However, our law also presumes the continued existence of a mental state once it is proved to exist. Therefore, where a defendant previously has been adjudicated insane, introduction into evidence of the insanity order raises a counter-presumption. In such cases, the burden shifts to the State to prove the defendant was sane at the time of the crimes. The counter-presumption does not survive once the defendant is properly released from the hospital or institution, but instead the presumption of sanity is restored.

Here, the record showed that appellant was twice placed in a mental hospital and twice released with a finding of bipolar disorder. Bipolar disorder is a mental illness or mental abnormality but is not the equivalent of legal insanity. Georgia law makes a clear distinction between being insane at the time of the crime and being mentally ill or mentally retarded, each requiring different forms of proof. Because there was no prior adjudication of insanity giving rise to a presumption of insanity, the trial court correctly placed upon appellant the burden of proving by a preponderance of the evidence that he was insane at the time of the crime.

Jurisdiction; OCGA § 16-1-7 (a)

Williams v. State, S10A0467

Appellant was convicted of murder and armed robbery in 1997. In 2009, he filed a motion to vacate a void sentence claiming that the convictions merged under OCGA § 16-1-7 (a) and therefore his sentence was void. Under *Harper v. State*, 286 Ga. 216, 217 (2009), "a petition to vacate or modify a judgment of conviction [is] not an appropriate remedy in a criminal case." The Court stated that the jurisdictional question in this case was "whether a claim that a conviction merged under OCGA § 16-1-7 (a) is a claim challenging the *conviction* or the resulting *sentence* as void. If the former, this Court is without jurisdiction under *Harper*. If the latter, this Court would have jurisdiction because the denial of a petition to correct a sentence on the ground that the original sentence was void is appealable as a matter of right."

OCGA § 16-1-7 (a) provides, in pertinent part: "[w]hen the same conduct of an accused may establish the commission of more than one crime, the accused may be prosecuted for each crime. He may not, however, be convicted of more than one crime if . . . [o]ne crime is included in the other." The Court held that OCGA § 16-1-7 (a) renders illegal a *conviction* for a crime that should have merged and a claim that a charge should have merged under OCGA § 16-1-7 is a specific attack on the conviction. Although the determination that the conviction is void requires that the sentence also is set aside, as would be the case when a conviction is declared void for any reason, this fact does not alter the fundamental nature of the challenge to the conviction itself. In contrast, a challenge to a void *sentence* presupposes that the trial court was authorized to sentence the defendant but the sentence imposed was not allowed by law.

"In several prior cases, this Court has considered appeals involving merger claims raised in a motion to vacate a sentence and/or vacate a conviction as void or pleadings of a similar nature. … These cases did not focus, however, on the distinction between challenges to convictions and challenges to sentences, which *Harper* holds is the dispositive question in determining our jurisdiction over appeals from such motions. Based on our decision in *Harper*, we now overrule those cases to the extent they may be read as allowing a direct appeal from the denial of a merger claim." Therefore, since appellant's claim of failure to merge under OCGA § 16-1-7 (a) was a challenge to his criminal conviction and a motion to correct illegal sentence or conviction is not an appropriate remedy to attack a conviction in a criminal case, his appeal was dismissed.

Dying Declarations; Crawford

Sanford v. State, S10A0148

Appellant was convicted of malice murder, and related felonies. He contended that the trial court erred in allowing the responding officer to testify as to what the victim stated when the officer found her. The evidence showed that the officer found the victim lying on the floor with a gunshot wound, holding a pillow to the wound and in extreme stress. The victim told the officer that appellant shot her and that she was trying to break up with appellant and "transition" to another boyfriend. Appellant first argued that the statements were not admissible as a dying declaration because the victim did not die until hours later. The Court disagreed. The testimony introduced as dying declarations need not contain any statement by the deceased to the effect that she was conscious of impending death at the time the declarations were made, but only that she was conscious of her condition. Such was the case here.

Appellant next argued that a dying declaration is limited to the cause of the person's death and the identity of the killer, and that testimony about the motive for the killing is not permitted. Again, the Court disagreed.

The Court held that dying declarations are admissible to prove any relevant fact embraced in the res gestae of the killing.

Finally, appellant argued that the statements were inadmissible under *Crawford v. Washington*. The Court held that only a statement that is testimonial will cause the declarant to be a witness for the purpose of the Confrontation Clause; a statement is nontestimonial, even when made during police interrogation, when the circumstances objectively indicate that the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency. Here, the officer responded to the emergency situation, found the fatally wounded victim, and asked her what happened in order to assess the exigencies. He also wanted to keep the victim talking in order to keep her from losing consciousness before emergency responders arrived. Therefore, the Court held, the Confrontation Clause was not implicated.

Judicial Comment; Venue

State v. Anderson, S09G1523

The Court granted certiorari to address whether the Court of Appeals erred in reversing the convictions of Anderson after the trial court commented concerning whether venue had been established. Here, the trial court first asked the prosecutor if venue had been established. The trial court then asked the witness, "The store where you were working on the 13th where the shoes were bought using the transaction card was in Muscogee County, is that accurate?" When the witness replied in the affirmative, the trial court then stated, "All right. I know we had some confusion because she had worked at one store and she's now working in another one. I just wanted to make sure."

The Court held that this was an improper judicial comment warranting reversal. In so holding, the Court distinguished *State v. Gardner*, 286 Ga. 633 (2010), because in *Garner*, the trial judge did not express or intimate an opinion in violation of OCGA § 17-8-57 when he directed the prosecutor to prove venue but asked immediately thereafter whether venue had been proven; the prosecutor answered in the negative, and the trial court suggested that he do so. Here, however, the trial court's comment "I just wanted to make sure" following the trial court's questioning of the witness constituted an expression of opinion that venue had in fact been proven. Finally, the Court held that where § 17-8-57 is violated, the entire case is reversed, not just the charge upon which the judicial comment was made.

Polling of Jury; Waiver

Laing v. State, A10A0024

Appellant was convicted of armed robbery. He contended that the trial court erred in not polling the jury as he requested. The record showed that during deliberations, the jury sent out a question concerning the punishment if appellant were convicted. The trial court responded that this was not their concern. The jury then sent word that they were deadlocked 10-2 to convict. After a recess, the jury then sent out a note saying they had reached a verdict. After the verdict of guilty was published, the trial court asked both parties if there was anything further. The State responded no and the defense asked for a couple of days before sentencing. The trial court denied the request and the State then proceeded, in front of the jury, to argue that appellant should be given a harsh sentence. When the State finished its arguments, the defense asked that the jury be polled. After one juror was polled the State objected and the trial court did not poll the remaining jurors.

The Court held that the right to a poll of the jury is a material right derived from the common law. Upon such poll, each juror may be asked whether the verdict reached in the jury room is, after looking upon the accused, still his verdict. In criminal cases the right to poll the jury is not discretionary, and denial of that right when timely requested is reversible error. However, the proper time to request a poll of the jury is when the jury has rendered its verdict, that is, right after the jury has returned a verdict of guilty. Here, appellant waived his right to poll the jury by failing to make a request after the trial court asked whether there were any exceptions to the form of the verdict and whether there was "anything else" they needed to address. Instead, despite knowing that the jury had written a note expressing concern about sentencing, appellant waited until the State presented its sentencing recommendation in the presence of the jury before requesting to poll the jurors.

Statute of Limitations; Motion in Arrest of Judgment

Lee v. State, A10A0177

Appellant was convicted of pimping and keeping a place of prostitution. She contended that her convictions were time-barred and should be overturned. The record showed that the State filed an accusation against her in the State Court on January 31, 2008, charging that on or about June 30, 2006, she committed the misdemeanor offenses of keeping a place of prostitution (OCGA § 16-6-10) and prostitution (OCGA § 16-6-9). The State filed an amended accusation on July 14, 2008, which amended the date alleged in the accusation, stating that the offenses were committed "between on or about June 30, 2006 through on or about July 11, 2006," and alleged that she committed the offense of pimping (OCGA § 16-6-11), also a misdemeanor, rather than prostitution.

Pursuant to OCGA § 17-3-1 (d), "[p]rosecution for misdemeanors must be commenced within two years after the commission of the crime." This period runs from the date the offense was committed until the date the original accusation is filed. Here, the original accusation was filed within the statute of limitation, but the amended accusation was not. OCGA § 17-7-71 (f) governs the amendment of accusations and provides that "[p]rior to trial, the prosecuting attorney may amend the accusation, summons, or any citation to allege or to change the allegations regarding any offense arising out of the same conduct of the defendant which gave rise to any offense alleged or attempted to be alleged in the original accusation, summons, or citation." The Court, citing *Wooten v. State*, 240 Ga. App. 725 (1999), held that an amended accusation is valid as long as the original accusation was still pending, was timely, and did not broaden or substantially amend the original charges. The original accusation here was still pending and was timely. Additionally, as to the charge of keeping a place of prostitution, the amended accusation did not broaden or substantially amend the original charge. However, the State's decision to replace the charge of prostitution with the offense of pimping substantially amended the original charge because the offenses of prostitution and pimping contain elements that are separate and distinct. Therefore, Appellant's motion in arrest

of judgment should have been granted as to the pimping charge.

Homicide by Vehicle; Special Demurrers

State v. Outen, A10A0436

The State appealed from the grant of Outen's special demurrer as to Count 1 of the indictment charging him with homicide by vehicle in the first degree. The State charged in Count 1 that Outen committed homicide by vehicle in the first degree, alleging that he "without malice aforethought and while driving a motor vehicle on West Broad Street, unlawfully cause[d] the death of Trina Heard through the violation of OCGA § 40-6-390, Reckless Driving; in that said accused did drive said motor vehicle on said roadway in reckless disregard for the safety of persons and property; said Reckless Driving being the cause of said death; in violation of OCGA § 40-6-393 (a), contrary to the laws of said State." The trial court found that Count 1 provided insufficient detail to allow Outen to prepare his defense because it lacked any specific facts supporting the reckless driving allegation. The Court agreed and affirmed. By filing a special demurrer, an accused claims, not that the charge in an indictment is fatally defective and incapable of supporting a conviction (as would be asserted by general demurrer), but rather that the charge is imperfect as to form or that the accused is entitled to more information. When reviewing an indictment before trial, the rule is that a defendant who has timely filed a special demurrer is entitled to an indictment perfect in form and substance. The Court held that reckless driving can be committed in a number of different ways, none of which is alleged in the indictment. Thus, the trial court properly determined that the use of the statutory language in Count 1 of the indictment was generic and did not adequately inform Outen of the facts constituting the offense alleged against him.

Child Molestation; Evidence

Snider v. State, A10A1055

Appellant was convicted of numerous counts of child molestation against three victims, P. H., Chevy, and Charles. Appellant contended that the trial court erred in granting the State's motion to exclude evidence of an alleged prior molestation of Chevy by P. H.'s father. Specifically, appellant sought to introduce evidence that P. H.'s father had shown to Chevy a pornographic videotape of anal sex between a man and a woman and had told Chevy that such conduct was appropriate. The Court held that generally, a defendant may introduce evidence tending to show that another person committed the crime with which he is charged, if a proper foundation is laid, unless the probative value of the evidence is substantially outweighed by actual risk of undue delay, prejudice, or confusion. But such evidence must be limited to such facts as are inconsistent with the defendant's own guilt, and to such facts as raise a reasonable inference or presumption as to his own innocence. Thus, to be admissible, the evidence must directly connect the other person with the corpus delicti, and tend clearly to point out someone besides the defendant as the guilty person. Evidence which can have no other effect than to cast a bare suspicion on another, or to raise a conjectural inference as to the commission of the crime by another, is not admissible.

Here, the Court found that the trial court did not err. The evidence that P. H.'s father showed Chevy a pornographic videotape of anal sex between a man and a woman "hardly suggests" an inference that he was the man who fondled Chevy's private parts, placed his mouth on Chevy's private parts, or had Chevy fondle his private parts. Furthermore, the Court stated, "[t]here [wa]s simply no logical connection between the acts of P. H.'s father showing a videotape of heterosexual conduct between adults and the direct hands-on same-sex child molestation of Chevy.

Appellant also contended that the trial court erred in admitting similar transaction evidence. The Court noted that at trial, appellant was the first to make reference to the similar transaction evidence, which he did during the cross-examination of Chevy (the State's first witness). Where the defendant is the first to elicit testimony regarding the similar transactions at trial, he waives any complaint about the State later presenting such evidence.

Res Gestae; Crawford

Toney v. State, A10A0138

Appellant was convicted of attempted trafficking in methamphetamine. The evidence showed that an undercover officer offered to sell a half pound of methamphetamine to Bottrell. Bottrell was arranging the sale for appellant, who was financing the purchase. Appellant contended that the trial court erred in admitting the video and testimonial evidence recounting Bottrell's out-of-court statements implicating appellant in the drug purchase under the res gestae exception to the hearsay rule. The Court disagreed. The Court held that the rule in Georgia is that the surrounding circumstances constituting part of the res gestae may always be shown to the jury along with the principal fact, and their admissibility is within the discretion of the trial court. Hence, acts and circumstances forming a part or continuation of the main transaction are admissible as res gestae.

Appellant also contended that the statement were testimonial in nature and thus violative of *Crawford v. Washington*. However, the Court held, statements are testimonial in nature when the primary purpose of the statements is to establish or prove past events potentially relevant to later criminal prosecution. It was undisputed that Bottrell's statements were made to an undercover officer unknown to Bottrell, before Bottrell's arrest, while Bottrell negotiated and consummated the purchase of a half pound of methamphetamine with money provided by appellant. Therefore, the statements were not testimonial for purposes of *Crawford*.