Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 3, 2013

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THIS WEEK:

Mandamus; Terms of Probation

Leach v. Malcom, S13A0568 (4/29/13)

Appellant appealed from the dismissal of a petition for a writ of mandamus. The record showed that in 2007, appellant was convicted of child molestation and sentenced to imprisonment for five years, followed by five years on probation. As a condition of his probation, he was forbidden to change his residence without the consent of his probation officer. After his release, he requested consent to live in a mobile home located on a farm that allegedly was within 1,000 feet of a school. Appellant's probation officer refused to give her consent to appellant living there. Appellant then sought a writ of mandamus to compel his probation officer to give her consent. The trial court dismissed the petition, finding that mandamus is available only to those without another adequate remedy at law.

The Court stated that if appellant had a clear legal right to live in the mobile home, it was a right that could be vindicated adequately under O.C.G.A. § 42-8-34 (g) by the filing in the court that sentenced appellant to probation a motion to clarify, modify, or even lift the condition of his probation that limits his changing residence without the consent of his probation officer. And if appellant were unable for some reason to pursue a motion in the sentencing court, he could file a petition for a writ of habeas corpus to inquire into the legality of the terms of his probation. Therefore, because appellant failed to show that he otherwise was without an adequate legal remedy, the trial court did not err when it dismissed his petition for a writ of mandamus.

Statements; Miranda

Fennell v. State, S13A0153 (4/29/13)

Appellant was convicted of two counts of malice murder, armed robbery, and possession of a firearm during the commission of a felony. Appellant argued that the trial court erred by denying his motion to suppress his pre-*Miranda* statements to police. Specifically, he contended the trial court erred in finding that he was not in custody at the time the statements were made. The Court disagreed, finding that the record supported the trial court's factual findings that appellant voluntarily went to the police station for his interview; he chose to ride with police from his home rather than with his father; he was specifically informed

he was not under arrest at that time; and he was not handcuffed or frisked before getting into the police vehicle. In addition, during the interview, appellant was in an unlocked room where he was allowed to answer his cellular telephone, was given a drink and offered food, and was never restrained. Although one detective told appellant that they knew he was not being completely truthful, the detective was neither hostile nor accusatory toward appellant such that a reasonable person would have thought he was not free to leave. Because under the totality of the circumstances a reasonable person in appellant's position would not have felt restrained to a degree associated with a formal arrest, the Court agreed with the trial court that appellant was not in custody when he made his pre-*Miranda* statements.

Appellant also contended the trial court erred by denying his motion to suppress his post-*Miranda* statements because the State employed the "question first" technique prohibited by *Missouri v. Seibert*, 542 U. S. 600 (2004) and *State v. Pye*, 282 Ga. 796 (2007). The two-stage or question-first technique is an interrogation procedure in which police first question a suspect without administering *Miranda* warnings, gain a statement from the suspect, then administer *Miranda* warnings, and have the suspect repeat that which the suspect has already related, often with little interruption in time. Under such circumstances, post-warning statements must be suppressed because it is unlikely that the *Miranda* warnings will effectively advise a suspect of his rights.

The Court held that *Seibert* and *Pye* were not controlling in this case because detectives did not use the prohibited question-first method of interrogation. The focus of appellant's initial interview with police was on the victims, the conversations police believed appellant may have had with one of the victims shortly before that particular victim was shot, and the reasons why the victims might have been in the park where the crimes occurred. Appellant at that time consistently denied any involvement in the crimes and maintained he did not speak with one of the victims the night of the crimes. Even after appellant told police he saw the particular victim's car in the park that night and saw two men shoot into the vehicle, the focus of questioning was on what appellant saw. After *Miranda* warnings were given, detectives went well beyond the scope of the initial interview, eventually obtaining statements from appellant in which he admitted his direct involvement in the crimes. Thus, the post-*Miranda* interrogation differed not only in the completeness and detail of the questions asked by the detectives but also in the content of appellant's statements. The record, therefore, supported the trial court's determination that appellant had not been subjected to an inappropriate two-stage questioning technique which destroyed the purpose of *Miranda*.

Miranda; Comments on Right to Remain Silent

Yancey v. State, S13A0096 (4/29/13)

Appellant, a deputy sheriff, was convicted of the murder of his wife and a day laborer he employed. The evidence showed that appellant hired the day laborer to come work at his house. After arriving at appellant's house, appellant shot the day laborer with a revolver, and shot his wife with his service weapon. Appellant then called 911 and said that the day laborer shot his wife during an attempted robbery and he shot the day laborer. Appellant was asked to come down to the station and answer questions. Appellant voluntarily did so. At some point, the investigators asked appellant to draw a diagram of the crime scene. Appellant refused and then left when his attorney arrived.

Appellant argued that the trial court improperly permitted witnesses for the prosecution on four occasions to give testimony that touched upon his exercise of his right to remain silent. These four instances related to the failure of appellant to draw the diagram of the crime scene. The Court stated that a comment upon the invocation of the right to remain silent in the course of a custodial interview, and after the reading of the *Miranda* warnings, raises constitutional concerns. But here, appellant was not in custody at the time he declined to draw a diagram, and he had not been warned of his rights under *Miranda*.

However, appellant's contention was not that the testimony about which he complained implicated constitutional concerns. Instead, he relied on *Mallory v. State*, 261 Ga. 625, 629-630 (5) (1991), where the Court recognized as a general rule of evidence that, in criminal cases, a comment upon a defendant's silence or failure to come forward is far more prejudicial than probative. But, the Court stated, this was not a case that was governed squarely by the principle set forth in *Mallory* because here, appellant did not remain silent, nor did he fail to come forward. To the contrary, appellant voluntarily went to a police station, he voluntarily made a statement that included self-serving representations about the day laborer having robbed and shot appellant's wife, he chose to cease his ostensible cooperation with the investigating officers only after they asked him for a diagram of the crime scene, and he never explicitly invoked his right to remain silent. In these circumstances, the *Mallory* principle did not require the exclusion of testimony about his failure to draw a diagram upon the request of the investigating officers.

Prior Bad Acts

Johnson v. State, S13A0605 (4/29/13)

Appellant was convicted of felony murder predicated on second degree cruelty to children. The evidence showed that appellant's three year old son died from ingesting a toxic level of methadone while in appellant's care. Appellant contended that the trial court erred in allowing her former boyfriend to testify that he witnessed, on a prior occasion, appellant put what he believed was a Xanax pill in the victim's milk bottle. The Court noted that at the time of trial, evidence of a defendant's prior acts toward the victim was generally admissible to prove the nature of the relationship between the defendant and the victim and to show the defendant's motive, intent, and bent of mind in committing the alleged crime. Because the admissibility of such evidence did not depend on a showing of similarity between the prior acts and the alleged crime, appellant's efforts to distinguish her prior conduct from the crime here was irrelevant. The Court held that the boyfriend's testimony was clearly relevant to the charge of unlawful administration of a controlled substance as well as to the criminal negligence charge, in that it showed appellant's willingness to expose her son to dangerous prescription medication. The trial court therefore did not abuse its discretion in admitting this testimony.

Motions for New Trial

Choisnet v. State, S13A0810 (4/29/13)

Appellant was found guilty but mentally ill of malice murder and possession of a knife

during the commission of a crime. He argued that the trial court applied an erroneous legal standard in ruling on the amended motion for new trial. In his amended motion for new trial, appellant specifically asserted that the verdict was "contrary to evidence and the principles of justice" and was "decidedly and strongly against the weight of the evidence." See O.C.G.A. §§ 5-5-20 and 5-5-21. These statutes afford the trial court broad discretion to sit as a "thirteenth juror" and weigh the evidence on a motion for new trial alleging these general grounds. A trial court reviewing a motion for new trial based on these grounds has a duty to exercise its discretion and weigh the evidence and consider the credibility of the witnesses. Here, the Court found, the trial court reviewed the evidence in the light most favorable to the jury's verdict under *Jackson v. Virginia*, 443 U.S. 307 (1979). However, a trial court does not fulfill its duty to exercise its discretion when it applies the standard of review set out in *Jackson v. Virginia* to the statutory grounds for a new trial. The trial court also failed to apply the proper standard in assessing the weight of the evidence as requested by the amended motion for new trial when it did not consider witness credibility, stating only in its order that conflicts in testimony were matters of credibility for resolution by the jury.

Both the District Attorney and the Attorney General agreed with appellant that the case should be remanded to the trial court for application of the appropriate legal standard to appellant's amended motion for new trial. Inasmuch as only the trial court is authorized by law to review a verdict pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21, the Court agreed with the parties that the judgment must be vacated and the case remanded to the trial court for consideration of the amended motion for new trial under the proper legal standard.

Theft by Receiving; Miranda

Stacey v. State, S13A0268 (4/29/13)

Appellant was convicted of malice murder, theft by receiving, possession of cocaine, and other crimes. He contended that the evidence was insufficient to support his conviction for theft by receiving. The Court agreed. The evidence showed that the victim was killed when appellant and his co-defendant attempted to hijack the victim's automobile during an arranged drug buy. Appellant used a gun that was later determined to be stolen to shoot and kill the victim.

The Court stated that a person commits theft by receiving when he receives, disposes of, or retains stolen property which he knows or should know is stolen. O.C.G.A. § 16-8-7. Because of its very nature, this crime is one that is usually proved in whole or in part by circumstantial evidence. The evidence showed that appellant admitted he shot the victim with the pistol in question, which was reported stolen several weeks prior to the murder. But, at issue was whether appellant knew or should have known the gun was stolen when he received and used it. Knowledge that property is stolen may be inferred from circumstances, when the circumstances would excite suspicion in the minds of ordinarily prudent persons. Nevertheless, knowledge that a gun was stolen cannot be inferred even when the defendant bought a gun on the street at a reduced price or when the gun was labeled for law enforcement use. Here, the Court found, there was only evidence that appellant found a gun that had been reported stolen, which was insufficient. Accordingly, the Court reversed appellant's conviction for theft by receiving.

Appellant also argued that the trial court erred in denying his *Jackson-Denno* motion in which he sought to exclude inculpatory statements made during his police interview. Specifically, appellant asserted he was denied his right to an attorney. At the *Jackson-Denno* hearing, the trial court viewed videotape of the police interview and heard testimony from appellant and the police officers present at the interview. The officers took multiple steps to ensure appellant was aware of his rights during the interview. Appellant was given a form stating his *Miranda* rights, he read the rights back to the officers and signed his initials on the form. While reading his *Miranda* rights, appellant asked, "So I can have an attorney?" The officers interpreted this inquiry as a question regarding appellant's rights rather than a request for an attorney at that time. One of the officers then read the waiver of rights section of the form and appellant signed the waiver. The interview continued without an attorney present.

The Court stated that a defendant must make a request for counsel sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. Reviewing the transcript of the hearing and the videotape of the interview, the Court agreed with the trial court that the remark at issue was not a clear request for an attorney to be present and that appellant sufficiently understood his rights.

Cross-Examination; Impeachment

Williams v. State, S13A0292 (4/29/13)

Appellant was convicted of murder and other crimes related to the unlawful possession of a firearm. He contended that the trial court erred when it limited the cross-examination of a prosecution witness as to a case in which the witness originally had been charged with armed robbery and had faced a mandatory sentence of life without parole, but in which the witness ultimately was allowed to plead guilty to aggravated assault instead. The trial court admitted the conviction for aggravated assault but would not allow appellant to cross-examine the witness about the sentence he might have received for armed robbery. The Court stated that defense counsel is entitled to a reasonable cross-examination on the relevant issue of whether a witness entertained any belief of personal benefit from testifying favorably for the prosecution. Accordingly, a defendant must be permitted to cross-examine a witness for the State about a charge that was pending either at the time the witness gave a statement or at the time of trial. But here, no charges were pending against the witness either at the time of his interview or at the time of trial that might have led the witness to offer evidence against appellant to curry favor with the State. Moreover, even if no charges were pending against a witness when he was interviewed or testified, a defendant must be allowed to cross-examine a witness about punishment that the witness may have avoided as a result of a deal with the State for his testimony in the prosecution of the defendant. Here, however, the witness said that no one made any promises to him for testifying against appellant. And appellant presented no evidence of any deal or potential deal between the witness and the State for his statement or testimony.

Furthermore, the Court found, the trial court did not cut off all inquiry into the potential bias of the witness, but rather allowed the cross-examination to proceed unfettered

with the exception of an inquiry into the penalty that the witness might have received for armed robbery. Thus, the Court held, because the right of cross-examination integral to the Sixth Amendment right of confrontation is not an absolute right that mandates unlimited questioning by the defense, the trial court did not abuse its discretion in the limitation of the cross-examination of the witness.

Social Media; Authentication

Burgess v. State, S13A0114 (4/29/13)

Appellant was convicted as a party to the crime of felony murder, six counts of aggravated assault, and possession of a firearm during the commission of a crime. The evidence showed that appellant was a member of gang known as Murk Mob. After an altercation with another gang earlier in the evening, appellant drove the vehicle that was involved in a drive-by shooting that injured or killed the victims.

Appellant contended the trial court erred when it allowed the admission of a document an officer had printed as part of his investigation from the social media website MySpace. The record showed that prior to the admission of the document, the officer had been qualified as an expert in gang identity and investigation. The printout was a screenshot of the MySpace profile page of a person going by the name of "Oops," on which the person described himself as a 19-year-old male from New York and as a member of Murk Mob, and which profile page depicted images of appellant wearing a bandana in a color associated with Murk Mob and making a sign with his hand. Appellant argued that the State's attempt to authenticate the document was insufficient because the officer could not say who owned the profile page or who created it and because the officer had not subpoenaed the website provider.

The Court stated that the admission of evidence is reviewed for an abuse of discretion. Documents from electronic sources such as the printouts from a website like MySpace are subject to the same rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence. At trial, prior to the entry of the document into evidence, several witnesses testified that appellant was known by the nickname "Oops" and that he was a member of the gang Murk Mob. The officer testified that he confirmed appellant's nickname by speaking with appellant's sister during the investigation, that he used this information to access the publicly-available MySpace profile page, that he printed the document from his computer while observing the MySpace profile page, and that the printout fairly and accurately depicted what he observed on his computer screen. The officer also stated that he compared known photographs of appellant with the images depicted in the printout and determined they were images of appellant. The officer was also able to confirm, through his contact with appellant's family during the investigation, that appellant was 19-years-old at the time the document was printed and that appellant was originally from New York. Thus, the Court found, in this case, there was sufficient circumstantial evidence to authenticate the printout from the MySpace profile page. Accordingly, the trial court did not abuse its discretion when it admitted the printout of the MySpace profile page into evidence at trial.

Judicial Comments and Misconduct

Mitchell v. State, S13A0319 (4/29/13)

Appellant was convicted of malice murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony. He first contended that the trial court made comments in violation of O.C.G.A. § 17-8-57. The record showed that during closing arguments, the trial court sustained the State's objection to a statement made by appellant's counsel about the irreversibility of the jury's decision. In sustaining the objection, the court commented, "It's not necessarily irreversible. . . . That's an incorrect statement of the law," and then called counsel to the bench to discuss the State's objection. Appellant argued the court's reference to the possibility of reversal violated O.C.G.A. § 17-8-57 by suggesting to jurors that the court thought appellant was guilty of the crimes and that their responsibility could be lightly discharged.

The Court stated that it is error for a trial judge in any criminal case to express or intimate an opinion as to the guilt of the accused. However, not all comments made by a trial court regarding reviewing courts or the appellate process require reversal of a conviction. Citing *Gibson v. State*, 288 Ga. 617 (2011), in which the Court reversed a conviction on judicial comments regarding appellate review, and *State v. Clements*, 289 Ga. 640 (2011), in which the Court affirmed a conviction despite such judicial comments, the Court found no error here. The Court stated that although the distinctions between the statements made by the trial courts in *Gibson*, *Clements*, and this case were subtle, as in *Clements*, the court's statements here did not in any way intimate the judge's opinion on the evidence or appellant's guilt. Under these circumstances, the Court concluded that the challenged statements were not reversible error.

Appellant also contended that structural error occurred at trial when the judge left the courtroom during deliberations while the jury was rehearing appellant's recorded statements. The Court noted that it has long been the rule in Georgia that although it is error for a judge to be absent from the court room during trial, it is generally reversible only when it is objected to and when it results in some harm. The Court noted that the record did not reflect when the trial judge exited the courtroom, how long she was gone, or whether defense counsel was aware of her absence at the time. Thus, there was no evidence in the record that defense counsel objected to the judge's absence either before the judge left the courtroom or upon her return to the bench. Pretermitting the issue of whether this error has been preserved for appeal, however, the Court concluded that appellant failed to demonstrate harm. The trial judge's absence occurred during deliberations while the jury was rehearing previously received recorded evidence. It was undisputed that the judge was in the courtroom and available to review the jury's request to rehear the evidence, to instruct jurors as to what evidence they would be allowed to rehear, and when an objection was raised during the playing of the recording, to properly rule on the objection in a substantive manner because she had viewed the same evidence when it was first admitted. Thus, this was not a case where the judge's absence affected the court's ability to make a ruling on a substantive issue. In fact, appellant showed no prejudice other than the possibility that jurors might have inferred from the judge's absence that she considered appellant's statements incredible. While some amount of prejudice may be inferred from the absence of a judge from the courtroom while trial is

ongoing, the Court found it highly unlikely jurors would interpret a judge's absence as a comment on the credibility of a defendant's statements where, as here, the judge already had reviewed the same evidence in the jury's presence during trial. Absent any indication that the judge's absence affected either the fairness or the outcome of the proceedings, the Court found the error was harmless.

Nevertheless, the Court stated, in reaching this conclusion, it was not holding that a judge's absence from the courtroom during trial may never amount to structural error. Some absences may be so inherently prejudicial that relief is required, and in such cases, the Court will reverse a criminal conviction. But, this was not such a case. "Courts are reminded, however, that a trial by jury in the presence of an impartial judge is the foundation of our criminal justice system. As a general rule, when a judge finds it necessary to be absent from the courtroom, the judge should adjourn the proceedings during his or her absence."

Search & Seizure; Knock-and-Talk

State v. Able, A13A0653 (4/24/13)

The State appealed from the grant of the defendants' motion to suppress. The evidence showed that based on an anonymous complaint that Able and others were smoking marijuana in their apartment, officers, who admittedly, lacked probable cause for a search warrant, went to the apartment to do a knock-and-talk. When Able came to the door, the officer who was at the door could smell marijuana. After the officer introduced himself to Able, she stepped back from the door and indicated or motioned for him to enter. Marijuana was then found in plain view in the apartment.

The Court noted that the trial court granted the motion to suppress, but made no findings of fact or conclusions of law—either in its written order or in the hearing transcript—as to whether law enforcement received consent to enter the apartment. Instead, the hearing transcript contained nearly four pages in which the trial court expounded upon its general dislike for knock-and-talk procedures. The State contended that the trial court erred in granting the motion to suppress based on its general dislike for knock-and-talk procedures and in concluding that the officers did not have the right to use such procedures. The Court agreed.

The Court found that despite the trial court's disdain for knock-and-talk procedures, such measures are unquestionably constitutional. This is true even when the information is provided by an anonymous tipster. Thus, the Court stated, "Suffice it to say, it is not the role of a judge to 'interpret' constitutional or statutory provisions through the prism of his or her own personal policy preferences. A judge is charged with interpreting the law in accordance with the original and/or plain meaning of the text at issue (and all that the text fairly implies), as well as with faithfully following the precedents established by higher courts. And in failing to adhere to these constraints, the trial court clearly erred."

Instead, the Court stated, the trial court's proper focus should have been on whether Able gave valid and voluntary consent for the officers to enter the apartment. Accordingly, the Court vacated the trial court's order granting the motion to suppress and remanded the case for the trial court to consider whether Able consented to the officers' entry into the apartment after the initial encounter.

Search & Seizure

Rodriguez v. State, A12A2397 (4/12/13)

This is a substitute opinion issued by the whole court after its initial panel opinion (see CaseLaw Updates for the week of March 1, 2013). Appellant was indicted for possession of marijuana with intent to distribute. The Court of Appeals accepted this interlocutory appeal after the trial court denied her motion to suppress. The evidence, briefly stated, showed that an officer was on duty in a marked police cruiser monitoring automobile traffic with an automatic license plate scanning system. The license plate recognition (LPR) system alerted the officer that a vehicle had passed which was associated with Enrique Sanchez, who was subject to a failure to appear warrant. The alert identified the license plate, make, model, and color of the vehicle. The officer pulled over the identified vehicle and made contact with appellant and her female passenger. The officer requested appellant's driver's license, which she provided, and explained that he had stopped the vehicle because it was associated with Sanchez, who was subject to an active warrant. Appellant explained that Sanchez was her son, and he had failed to appear to answer a traffic citation because he had been imprisoned before the hearing. The officer also asked appellant who her passenger was, and appellant identified her as a friend, from whom the officer then asked for identification and was identified as Ereka Williams. Williams was flagged by GCIC as having an outstanding warrant in Florida. A backup officer arrived and while waiting for word on whether Florida was willing to extradite, the officers continued talking with the women. Consent was given to search the vehicle and the marijuana was discovered.

Appellant first argued that the LPR system used by the officer did not provide an adequate basis for the vehicle stop. Specifically, the State failed to provide the proper foundation as to its reliability under *Harper v. State*, 249 Ga. 519 (1982). The Court, however, found that because evidence exclusion is an extreme sanction and one not favored in the law, O.C.G.A. § 17-5-30 (b) requires a motion to suppress to be in writing and to state facts showing that the search and seizure were unlawful. On a motion to suppress, the State is entitled to proper notice of the issue raised or it will be deemed waived. In other words, the suppression motion must be sufficient to put the State on notice as to the type of search or seizure involved, which witnesses to bring to the hearing on the motion, and the legal issues to be resolved at that hearing. Here, the Court found, the State was plainly not given the required pre-hearing notice of claims that the initial stop was invalid because the LPR system was not reliable under *Harper* or because the system failed to provide the officer with reasonable suspicion. Accordingly, these claims were waived by appellant.

Moreover, the Court stated, assuming the LPR system provided the officer with information sufficient to justify the initial stop, as the trial court ruled, there was no basis for finding that the consent appellant gave to search the vehicle was invalid as the product of an improper expansion of the scope or duration of the stop. Under *Terry*, an officer's actions taken during a valid traffic stop must be reasonably related in scope to the circumstances which justified the stop in the first place, and limited in duration to the time reasonably necessary to accomplish the purpose of the stop. The basis for the officer's *Terry* stop of the vehicle

was to investigate a reasonable suspicion that a person named Enrique Sanchez, who was wanted on an arrest warrant, was the driver or an occupant of the vehicle. When the officer approached the vehicle, he observed that both occupants of the vehicle appeared to be female. The Court noted that the record did not disclose whether the LPR system alert informed the officer that Enrique Sanchez was male. But, even if the officer assumed, based on the name provided in the alert, that the person wanted on the warrant was probably male, and assumed based on appearance that the occupants of the vehicle were female, this did not require, as appellant suggested, that the officer simply walk away from the stop without confirming the identities of all the vehicle occupants. Instead, the Court found, it was reasonably within the scope of the circumstances which justified the stop for the officer to continue to investigate by seeking identification from the vehicle driver and passenger. Once the officer undertook to do so within the scope of the stop, it did not unreasonably expand the scope or the duration of the stop for the officer to conduct a computer check on the identification information for the purpose of determining whether the driver or the passenger had outstanding warrants against them.

Furthermore, the record showed that only four minutes elapsed after the initial vehicle stop was made before the officer received computer confirmation that the passenger, Williams, was the subject of an outstanding arrest warrant from Florida. While waiting "a couple of minutes" for verification of extradition of Williams on the Florida charge, an officer asked for and received permission from appellant to search the vehicle. Thus, the officer's questioning of appellant concerning a consensual search of the vehicle occurred during a reasonably short prolongation of the stop for the purpose of verifying extradition on the outstanding warrant. The Fourth Amendment is not violated when, during the course of a valid traffic stop, an officer questions the driver or occupants of a vehicle and requests consent to search. Even though the officer's request for consent to search was unrelated to the purpose of the stop, a valid ongoing seizure is not rendered unreasonable simply because, during its course, certain unrelated questions, which the detainee is free to decline to answer, are posed to him or her. Accordingly, the Court found, the consent to search the vehicle given by appellant was voluntary and not the product of an illegally expanded vehicle stop.

Courtroom Closures; Right to be Present

Tolbert v. State, A13A0097 (4/25/13)

Appellant was convicted of aggravated child molestation and other related charges. He contended that that the trial court erred when, at two points during the trial, it held a bench conference outside of appellant's presence and then closed the courtroom for a portion of the trial. Pursuant to O.C.G.A. § 17-8-54, the court closed the courtroom twice during trial. This section provides that "[i]n the trial of any criminal case, when any person under the age of 16 is testifying concerning any sex offense, the court shall clear the courtroom of all persons except parties to the cause and their immediate families or guardians, attorneys and their secretaries, officers of the court, jurors, newspaper reporters or broadcasters, and court reporters." The Court initially held that the partial closure of the courtroom permitted under this Code section does not violate a defendant's constitutional right to a public trial. The Court further found that defense counsel waived the first closure by failing to object and that the second closure was with defense counsel's consent. Therefore, neither closure resulted in error.

Nevertheless, the record further showed that appellant was not present at the bench during the bench conferences that immediately preceded the two courtroom closures. Thus, appellant also argued that his absence from these two bench conferences violated his constitutional right to be present at all critical stages of his trial. The Court stated that this right exists where there is a reasonably substantial relation to the fullness of opportunity to defend against the charge and to the extent that a fair and just hearing would be thwarted by the defendant's absence. The constitutional right to be present is not violated, however, when the defendant's absence occurs during conferences addressing legal matters to which the defendant cannot make a meaningful contribution.

Here, neither of the bench conferences implicated appellant's constitutional right to be present. Rather, the discussions at the conferences addressed either legal issues or courtroom logistics, neither to which appellant could have made a meaningful contribution. At the first bench conference, counsel merely informed the trial court of their agreement to close the courtroom for the playing of the victims' recorded statements and the forensic interviewer's testimony regarding those statements, and they discussed with the court the logistics of implementing that agreement. Much of the second bench conference also concerned logistical issues, namely whether one of the minor victims could sit on an adult's lap while testifying (the trial court ruled she could not) and the timing of the minor victims' testimony with a lunch break. The Court noted that appellant failed to offer any argument for how his presence during these discussions could have made a meaningful contribution to them. Specifically regarding his counsel's agreement to the courtroom closure, appellant did not suggest that his counsel was acting outside the bounds of his authority or that he would have countermanded his counsel had he been present when counsel expressed that agreement to the trial court. And appellant was present when the trial court closed the courtroom immediately after this conference, providing him with some knowledge of the topic of the conference. Accordingly, since appellant could not have made a meaningful contribution to the discussions about counsel's agreement to close the courtroom and other matters of courtroom logistics, his right to be present was not violated by his absence from those discussions.

The Court also found that the second bench conference addressed the closure of the courtroom during the victims' testimony. The only discussion on this issue was the prosecutor's statement: "The next two witnesses are the little girls. I'm going to ask that the courtroom be cleared for that." The propriety of closing the courtroom for the minor victims' testimony was a legal matter, in that it was authorized by O.C.G.A. § 17-8-54. Since there was not a reasonably substantial relationship between appellant's presence during the discussion of this legal matter and his opportunity to defend against the charges, the Court concluded that his right to be present during critical stages of his trial was not violated.

Voir Dire; Jurors

Ware v. State, A13A0595 (4/25/13)

Appellant was convicted of burglary. He argued that the trial court erred in granting the State's motion to strike a potential juror for cause. The record showed that during voir dire, a potential juror stated that he had problems with the court system, it would be "tough" to be impartial, and he might end up helping appellant. The potential juror had been arrested several times, served time in jail, and believed that he had been jailed without reason. The trial court excused the juror based on the juror's mannerisms and demeanor. Appellant argued that the trial court erred in doing so because the trial court did not excuse the juror based upon his bias, and there was no indication that the juror's bias was so fixed and definite that it could not be set aside in this case.

The Court stated that whether to strike a juror for cause is within the sound discretion of the trial court. And inasmuch as the trial court's conclusion on bias is based on findings of demeanor and credibility, which are peculiarly within the trial court's province, those findings are to be given deference.

Here, the Court found, even if the trial court erred, appellant had no vested interest in having any particular juror to serve; he was entitled only to a legal and impartial jury. The erroneous allowing of a challenge for cause affords no ground of complaint if a competent and unbiased jury is finally selected. Appellant failed to demonstrate that the jurors selected to decide his case were incompetent or biased. Therefore, his claim afforded no basis for reversal.

Appellant also contended that the trial court abused its discretion in failing to remove a juror who, after the trial had started, informed the court that she was certain that she had seen appellant before in the area of town where he was arrested. The record showed that although she recognized appellant, she had never seen appellant do anything illegal, and did not have any reason to suspect that he committed a crime. She further stated that her decision would be based on the evidence at trial, and that she would be fair and impartial. The juror also stated that she had not spoken to the other jurors about recognizing appellant, and the trial court instructed her not to discuss it with the other jurors during the trial. Appellant, through counsel, stated that he was satisfied with the juror's response and did not request that this juror be struck for cause. As a result, the Court found, appellant waived any challenge to the juror remaining on the jury.

But, the Court further found, even if the issue had not been waived, the trial court did not abuse its discretion. The juror did not display a definite and fixed opinion regarding the guilt or innocence of defendant, nor did she indicate an inability or unwillingness to listen to the evidence, apply the law, or deliberate with fellow jurors to reach a verdict.