Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 19, 2015

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THIS WEEK:

Search & Seizure

State v. Anderson, A15A0331 (4/21/15)

Anderson was charged with VGCSA. The evidence showed that after stopping Anderson for a taillight violation, the officer ran Anderson's license, found no violations and then told Anderson, who was standing at the front of the officer's car, that he was going to issue him a verbal warning. The officer admonished Anderson to get the light fixed and returned his driver's license to him. Anderson walked back to his truck, and as he was about to enter it, the police officer asked for a few more moments of his time. Anderson agreed and walked back towards the officer, who was waiting behind the truck. The officer asked Anderson if he had anything illegal in his truck, and Anderson answered in the negative. The officer also asked for and received Anderson's consent to search his vehicle. During a search of the truck, drugs were found. The trial court granted Anderson's motion to suppress, concluding that after Anderson started to enter his vehicle, the police officer initiated a second detention that was not supported by additional articulable suspicion. The State appealed and the Court reversed.

A law enforcement officer who questions and detains a vehicle's driver and passengers outside the scope of a valid traffic stop exceeds the scope of permissible investigation unless he has reasonable suspicion of other criminal activity or unless the valid traffic stop has de-escalated into a consensual first-tier encounter. A consensual encounter requires the voluntary cooperation of a private citizen with noncoercive questioning by a law enforcement official. Because the individual is free to leave at any time during such an encounter, he is not 'seized' within the meaning of the Fourth Amendment. In determining whether a stop has de-escalated into a first-tier encounter, such that a reasonable person would have felt free to leave, three important factors have been given particular scrutiny: (a) whether the driver's documents have been returned to him; (b) whether the officer informed the driver that he was free to leave; and (c) whether the driver appreciated that the traffic stop had reached an endpoint.

Here, the Court found, after receiving confirmation from dispatch that Anderson's driver's license was clear, the videotape recording clearly showed that the police officer engaged in a brief conversation with Anderson and then gave Anderson a verbal warning to fix his taillight. At this point, the police officer returned Anderson's driver's license. Although the police officer did not expressly tell Anderson that he was free to go, the videotape recording clearly showed that Anderson believed the stop had ended because he walked back to his vehicle and proceeded to get inside it. The fact that Anderson agreed to continue talking to the police officer did not render the post-stop encounter a second detention. Notably, during this subsequent

exchange, there was no evidence that Anderson was mandated to wait, that the officer had drawn his weapon, or that Anderson was otherwise impeded from leaving. Under these circumstances, merely asking Anderson if he minded speaking further with the officer did not extend the initial traffic stop detention, because mere police questioning does not constitute seizure. As the traffic stop had ceased and Anderson was no longer detained, the encounter had de-escalated to a consensual first-tier encounter. Therefore, the trial court erred in concluding that the police officer initiated a second detention that needed to be supported by articulable suspicion of illegal activity.

Right to Counsel

Banks v. State, A15A0084 (4/21/15)

Appellant was convicted of one count of possession of marijuana (less than an ounce) and acquitted of one count of possession of alcohol by a minor after a bench trial in probate court at which appellant proceeded pro se. Appellant's appeal to the superior court was affirmed. Appellant then appealed to the Court of Appeals, arguing that she did not knowingly and intelligently waive her rights to counsel and to a trial by jury.

The Court stated that under Georgia law, regardless of whether a charge is a felony or a misdemeanor, an accused facing a term of imprisonment is constitutionally guaranteed the right to counsel, but may waive that right. Such a waiver of counsel is valid only if it is made with an understanding of (1) the nature of the charges, (2) any statutory lesser included offenses, (3) the range of allowable punishments for the charges, (4) possible defenses to the charges, (5) circumstances in mitigation thereof, and (6) all other facts essential to a broad understanding of the matter. When the record is silent, waiver is never presumed, and the burden is on the State to present evidence of a valid waiver. The State may carry its burden by showing a valid waiver through either a trial transcript or other extrinsic evidence, including an appropriate pretrial waiver form. However, in order for the State to use a pretrial waiver form to show that a defendant has intelligently elected to represent himself at trial after being advised of his right to counsel and the "dangers" of waiver, the form should outline those pertinent dangers: such as (1) the possibility of a jail sentence; (2) the rules of evidence will be enforced; (3) strategic decisions with regard to voir dire and the striking of jurors must be made by defendant; (4) strategic decisions as to the calling of witnesses and/or the right to testify must be made by defendant; and (5) issues must be properly preserved and transcribed in order to raise them on appeal. In other words, a proper waiver form should contain the warnings, themselves, not just conclusions.

Here, the Court found, and the State conceded, the record did not support a knowing and intelligent waiver of appellant's right to counsel. First, the form appellant executed contained only conclusory statements concerning her rights rather than an explanation of the dangers of proceeding to trial pro se. Likewise, the State elicited no testimony during appellant's hearing on her appeal from probate court to demonstrate a knowing and intelligent waiver, relying instead upon appellant's waiver form. Finally, although the parties included a purported audio recording of appellant's trial proceeding in probate court (a recording the Court noted was on a CD that could not be opened or examined) no transcript was supplied. Accordingly, there was no evidence, extrinsic or otherwise, that appellant was adequately informed of the nature of the charges against her, the possible punishments she faced, the dangers of proceeding pro se, and other circumstances that might affect her ability to adequately represent herself. Accordingly, the Court reversed and remanded the case for a new trial at which appellant may choose to be represented by counsel, or waive her right to counsel and defend herself - after being made aware of the dangers of proceeding without counsel.

Attorney-client Privilege; Doctor-patient Privilege

Neuman v. State, S15A0011 (6/15/15)

Appellant was found guilty but mentally ill of murder. At trial, appellant raised an insanity defense. He argued that the trial court erred in its failure to quash the subpoenas of Dr. Thomas, a licensed psychologist, and Dr. Rand Dorney, a forensic psychiatrist. The record showed that appellant pled not guilty, and then his counsel began investigating appellant's psychological state at the time of the shooting. At the request of appellant's attorneys, Dr. Rand Dorney and Dr. Thomas met with appellant to initially evaluate his psychological issues, and they reported their findings to defense counsel. Upon the advice of these doctors, counsel then hired an expert witness to conduct a forensic psychological evaluation of appellant to assess his criminal responsibility. After this expert's evaluation, appellant changed his plea of not guilty, to not guilty by a reason of insanity. The State then sought and obtained, over objection, the doctors' notes concerning their evaluations of appellant and appellant's statements to them. It was undisputed that up until this time, appellant's attorneys never intended to call Dr. Rand Dorney or Dr. Thomas to testify at trial. However, in light of the court's rulings, the defense anticipated that the State would call the doctors as rebuttal witnesses, and therefore, needed to call them as part of the defense's case-in-chief.

Appellant contended that the trial court erred in allowing the State access to the doctors' notes and evaluation of him and statements he made to the doctors because this evidence was protected by the attorney-client privilege. The Court agreed and reversed his convictions. The Court held that the attorney-client privilege applies to confidential communications, related to the matters on which legal advice is being sought, between the attorneys, their agents, or their client, and an expert engaged by the attorney to aid in the client's representation. The privilege is not waived if the expert will neither serve as a witness at trial nor provide any basis for the formulation of other experts' trial testimony.

Here, the Court found, the privilege applied because neither Dr. Thomas nor Dr. Rand Dorney conducted an independent investigation of the facts of the criminal case, nor did they review any discovery. Neither doctor prepared an evaluation of appellant's mental capacity with regard to insanity to be used in court, nor did they professionally treat appellant. Finally, neither of appellant's expert witnesses at trial relied on Dr. Rand Dorney's or Dr. Thomas' notes in the formulation of their expert opinions.

Nevertheless, the State argued, appellant signed a form, presented to him when Dr. Thomas and Dr. Rand Dorney met with him at the jail, waiving any confidentiality. But,

the Court found, although the form stated that the exam would not be confidential, it also stated that the exam was at the referral of defense counsel and information would be reported to them. "When a client authorizes his lawyers or their agents, expressly or impliedly, to waive his confidential communications as necessary to carry out his representation, that does not authorize *the other party* to the litigation to demand that the waiver be exercised." (Emphasis in original). Thus, the Court concluded, the communications between Dr. Thomas, Dr. Rand Dorney, and appellant at this jail meeting were intended to be confidential within the defense team and to be reported to defense counsel to better assess how to prepare his insanity defense. The Court further found that its conclusion was further supported by the fact that only after Dr. Rand Dorney communicated her assessment from this meeting to appellant's attorneys did his attorneys then seek out an expert witness to testify at trial and to conduct a forensic psychological evaluation of appellant.

The Court also rejected the State's argument that appellant waived all privileges by raising an insanity defense. The Court found that the attorney-client privilege is vital in cases such as this one where the defendant's sanity is at issue because the privilege allows the attorneys to consult with the non-testifying expert in order to familiarize themselves with central medical concepts, assess the soundness and advantages of an insanity defense, evaluate potential specialists, and probe adverse testimony. Moreover, a blanket waiver of attorney-client privilege by raising an insanity defense would chill a defendant's willingness to confide in his attorneys or any defense-employed consultants or experts. Additionally, without the protection of privilege, the defendant's attorneys run the risk that the psychiatric expert they have hired to evaluate the defendant will render an opinion inconsistent with the defense's insanity theory and the expert will then be made an involuntary witness for the State. The Court noted that it was mindful of the prejudice that would result if the trier of fact learns that a mental health professional, who is testifying for the State, was originally consulted and then rejected by the defense. But, attorneys must be free to make an informed judgment about the best course for the defense and should not be restricted from consulting multiple experts holding possibly conflicting views due to the fear that they are creating a witness for the State. "For these reasons, we align ourselves with other jurisdictions that have rejected a waiver of attorney-client privilege merely because the defendant has placed his sanity at issue."

Appellant also argued that the trial court erred by not allowing the defense to introduce statements from Dr. Warsaw, a psychotherapist. The record showed that in the months prior to the shooting, appellant and his wife participated in joint marital counseling sessions as well as individual counseling sessions with Dr. Warsaw. Appellant intended for his expert witness to state that she based her opinion in part on statements that appellant's wife made to Dr. Warsaw, which Dr. Warsaw then recorded in his files.

The Court, however, agreed with the State that communications between Dr. Warsaw and appellant's wife were privileged. Former O.C.G.A. § 24-9-21(7) (now O.C.G.A. § 24-5-501(7)) protected as privileged, communications between a patient and a licensed professional counselor during the psychotherapeutic relationship. The privilege is held only by the patient, and therefore, only the patient may waive it. The Court found that although appellant's wife waived any privilege with regard to the joint counseling sessions she and appellant attended with Dr. Warsaw, she did not waive any privilege regarding her individual sessions with Dr. Warsaw. Thus, statements she made during those individual sessions were privileged, and the trial court properly excluded them.

Open Records; Pending Investigations

Evans v. GBI, S15A0103 (6/15/15)

In Sept. of 2010, the GBI obtained two arrest warrants for Evans, based on allegations that he was part of a racketeering enterprise; arrest warrants were also obtained for two other persons as part of the same suspected racketeering activity. The investigation of the alleged racketeering enterprise, and all three of the persons suspected to be involved, treated the alleged activity as a single undertaking; one case number was assigned to the combined investigation of Evans and the other two individuals, and one investigatory file maintained. On January, 2012, the two arrest warrants against Evans were dismissed, In July, 2013, Evans submitted a request to the GBI under the Open Records Act, O.C.G.A. § 50-18-70 et seq., for materials from its investigative file that pertained to him. The GBI declined to produce the materials, citing O.C.G.A. § 50-18-72(a)(4), the exemption for pending investigations. Evans then sought a writ of mandamus to compel the GBI to produce these materials which the trial court denied. It was undisputed that no indictment had been sought against him as of the time his petition for a writ of mandamus was denied.

The Court found that Evans was not entitled to the materials because the Open Records Act exempts from disclosure records of "law enforcement, prosecution, or regulatory agencies in any pending investigation. . . [A]n investigation or prosecution shall no longer be deemed to be pending when all direct litigation involving such investigation and prosecution has become final or otherwise terminated." O.C.G.A. § 50-18-72(a)(4). And, while the warrants had been dismissed against Evans, the warrants against the other two individuals had not been dismissed and remained pending, thus disclosure was not mandated.

Nevertheless, citing *Parker v. Lee*, 259 Ga. 195, 198 (5) (1989), Evans argued that in order for the GBI to assert the "pending investigation" exemption, it must show that at least one of the three persons whose alleged activity is addressed in the file is faced with a prosecution that "is imminent and of a finite duration." But, the Court found, *Parker*, and the principle upon which Evans relied, concerns O.C.G.A. § 50-18-72(a)(4)'s "pending prosecution" exemption, not the "pending investigation" exemption. Under the "pending investigation" exemption, a seemingly inactive investigation which has not yet resulted in a prosecution logically remains undecided, and is therefore "pending," until it is concluded and the file closed. Only at that point has an investigation, in the absence of any prosecution, reached a decision with a high level of finality, even though it could possibly be reopened thereafter. And, there was no evidence that the racketeering investigation was concluded or that the file from which Evans requested information can be considered closed. Even assuming that the dismissal of the racketeering arrest warrants against Evans

established that he was not the subject of a pending investigation, the evidence presented was that the two other individuals arrested at the same time as Evans were suspected of being engaged in a racketeering scheme with him, and those investigations were still ongoing. Although Evans contended that the records that prompted his arrest can be separated from those of the other two individuals alleged to be involved in racketeering, and that any evidence about them could have been redacted from the records supplied to him, there was no evidence to support this in the record. Moreover, the focus of subsection (a)(4) is not upon the specific type of information contained in law enforcement and prosecution records. This subsection broadly exempts from disclosure the entirety of such records to the extent they are part of a "pending investigation or prosecution" and cannot otherwise be characterized as the initial arrest or incident report. Therefore, the Court concluded, the trial court did not err in determining that, under the circumstances presented, the pending investigation exemption of O.C.G.A. § 50-18-72(a)(4) removed from mandatory disclosure the materials that Evans requested.

Victim's Character; Specific Bad Acts

Mohamud v. State, S15A0586 (6/15/15)

Appellant was convicted of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony. The evidence showed that appellant fired a weapon into a vehicle, killing one of the occupants. At trial, he raised a justification defense, claiming that he was forced to shoot because the victim had a gun. Appellant argued that the trial court erred by excluding evidence of a violent robbery committed by the victim against a third party, despite the fact that, prior to the murder, appellant had no knowledge of the robbery. The Court disagreed.

The Court noted that appellant based his contention on *Chandler v. State*, 261 Ga. 402, 407 (3) (c) (1991), in which the Court created an evidentiary exception permitting a defendant claiming justification to introduce evidence of specific acts of violence by the victim against third persons. But, the Court stated, *Chandler* was decided under Georgia's old Evidence Code, and, it related specifically to the application of that old code. The present case, however, was subject to the new Evidence Code, under which the admissibility of evidence of a victim's character is governed by O.C.G.A. § 24-4-404 and O.C.G.A. § 24-4-405. In reviewing O.C.G.A. § 24-4-404(a)(2) and O.C.G.A. § 24-4-405(a), the Court held that as a general rule, character evidence of a victim is limited to reputation or opinion, not specific bad acts. Therefore, "the evidentiary rule set forth in *Chandler* does not remain viable under the new [E]vidence [C]ode, and [appellant]'s argument based on this outdated precedent fails."

Void Sentences; Baker v. State

Humphrey v. State, S15A0588 (6/15/15)

In 1998, appellant negotiated a plea agreement with the State, entered a plea of guilty but mentally ill, was convicted of murder upon his plea, and was sentenced to a term of imprisonment for life with the provision that he would be eligible for parole, but only after he served 25 years of his sentence. Almost sixteen years later, appellant filed a motion to vacate his sentence, alleging that the sentence is void because murder is punishable only by death, imprisonment for life without any possibility of parole ever, or imprisonment for life with the possibility of parole at the earliest point permitted by law, which would have been, in appellant's case, after fourteen years under former O.C.G.A. § 17-10-6.1(c)(1). The trial court denied his motion.

The Court agreed that the sentence was void and reversed. The Court noted that although appellant consented to his sentence, including the provision that he would be ineligible for parole for the first 25 years of that sentence, when a court imposes a criminal punishment that the law does not allow, the sentence is not just an error, it is void. And the consent of the parties cannot validate a void sentence. Moreover, the Court stated, these principles seem especially sound when applied to a sentence that purports to limit eligibility for parole in a way that is not authorized by statutory law. By imposing such a sentence, a court intrudes upon the constitutional prerogative of the State Board of Pardons and Paroles to extend clemency to persons under sentence. Although the Constitution permits the General Assembly by statute to limit this prerogative in certain respects, the Constitution gives the courts no such authority. For that reason, a judicial incursion upon the constitutional prerogative of the Board "violates the constitutional provision regarding the separation of powers." And whatever the prosecuting attorneys and defendant in a criminal case might agree to, they cannot simply by agreement confer upon the judicial branch an extraconstitutional power to limit the constitutional prerogatives of another branch of the government. Moreover, the Court held, "to the extent that we held otherwise in *Baker v. State*, 284 Ga. 280, 281 (2) (663 S.E.2d 261) (2008), we overrule that decision."

Thus, the Court concluded, the sentence that the trial court imposed in this case was void to the extent that it purported to limit the power of the Board to parole appellant as soon as the statutory law permits. "That provision of the sentence — but only that provision — must be vacated." Accordingly, the Court reversed the denial of the motion to vacate the sentence, and remanded for the trial court to vacate the provision of the sentence that purported to limit appellant's eligibility for parole.

Nevertheless, in so holding, the Court noted that in his plea agreement, appellant not only consented to the imposition of a sentence that purports to limit the power of the Board to parole him, he also promised that he would not *seek* parole for 25 years. "No one should misunderstand our decision as holding that his promise not to seek parole is unenforceable. When a defendant promises the State that he will not ask for parole, his promise is a personal one. It does not require a court to do anything, and it does not purport to limit the constitutional power of the Board. If [appellant] breaks his promise and applies to the Board for parole before he has served 25 years, the State may ask the Board itself or a court to enforce the promise. We express no opinion today about the availability of a remedy for the State, but our decision does not foreclose the possibility of such a remedy."