

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JULY 21, 2017

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## THIS WEEK:

- **Ineffective Assistance of Counsel; Insanity**
- **Guilty Pleas; Ineffective Assistance of Counsel**
- **Discovery; Failure to Produce Drawings**
- **First Offender; OCGA § 42-8-66**
- **Shoplifting; Aggregate Amounts**

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### *Ineffective Assistance of Counsel; Insanity*

*Scott v. State, S17A0524 (6/26/17)*

Appellant was convicted of malice murder. She contended that her trial counsel rendered ineffective assistance by failing to consult with a mental health expert about the case, and that but for this error, there is a reasonable probability that she would have been found incompetent to stand trial or would have been found not guilty by reason of insanity or guilty but mentally ill. The record showed that trial counsel affirmatively waived a mental competency evaluation for appellant immediately before trial and at trial pursued a defense that appellant accidentally shot the victim.

As to the deficient performance prong of *Strickland*, the Court found that appellant's counsel could not reasonably have decided to forgo seeking the assistance of a mental health expert. It was undisputed — and clear from a responding officer's dashboard camera recording — that appellant was extraordinarily distraught after shooting the victim and repeatedly implored responding officers to shoot and kill her, and this information prompted trial counsel to request a mental evaluation of appellant. As the case moved forward, appel-

lant's family suggested to trial counsel that she had mental illness and gave him medical records supporting their concerns. The medical records showed that appellant was hospitalized for eight days in 1996 after stabbing the same man that she was on trial for shooting to death. They also showed that after appellant was arrested for the stabbing in 1996, she reported hearing a voice telling her to "kill," which the medical staff of the psychiatric hospital took seriously enough to put her on an antipsychotic medication, which appeared to be effective. Despite these facts, trial counsel did not contact any of appellant's treatment providers or consult with any other mental health expert to assist him in evaluating her mental condition at the time of the shooting or at the time of trial. Instead, he relied on his own impressions of appellant to decide that no further investigation into her mental health was necessary, and he accordingly withdrew the request for a mental evaluation. Under these circumstances, trial counsel could not reasonably conclude that further investigation would have been fruitless. Therefore, the Court found, trial counsel rendered deficient performance.

The Court then addressed the prejudice prong of *Strickland*. The Court noted that appellant did not contend that a mental evaluation would have prompted her to attempt to enter a plea of guilty but mentally ill at the time of the crimes, much less that there is a reasonable probability that such a plea would have been agreed to by the prosecution and accepted by the trial court. Regarding competency, the trial court made an explicit finding in its order denying the new trial motion that appellant was "legally competent at the time of trial," and the testimony and report of the State's mental health expert, along with trial counsel's

testimony and the court's own observations and interactions with appellant before and during the trial, provided evidence to support the court's finding. The trial court was entitled to credit the State's expert's testimony and report over the views of the expert appellant found after trial. Under these circumstances, the Court found that appellant failed to show that but for her trial counsel's deficient performance, there was a reasonable probability that she would have been found not competent to stand trial.

Furthermore, the Court added, a mental health defense strategy would have been a hard sell in this case for several reasons, beginning with the organized nature of, and apparent motivation for the crimes: appellant brought a loaded gun to the original meeting with the victim but did not shoot him during that encounter, instead following him in her car, calling him, and only after he cursed at her and told her that there was no way they were getting back together, parked near him and then chased him around the gas station before shooting him. Appellant never claimed before trial that she shot the victim as a result of mental illness. While she was suicidal on the day of the shooting, she said and did nothing in her interactions with a minister shortly before the crimes, or the police after the shooting, to suggest that she was suffering from psychosis or did not know what she had done was wrong. And according to her trial counsel, "Appellant was insistent from day one the gun accidentally discharged."

In addition, nothing in the record indicated that appellant received any diagnosis of, or treatment for, mental illness, much less psychotic incidents, for more than a decade before these crimes, or that she had any trouble with the law during that extended period of time. Finally, the trial court explicitly adopted the findings of the State's mental health expert that appellant's 1996 diagnosis "was made during a time [when she] was facing potential legal charges" and she was faking symptoms of psychosis when he evaluated her when she was seeking to reverse her convictions in this case.

For these reasons, the Court concluded that appellant failed to demonstrate a reasonable probability that the jury would have returned a verdict of not guilty by reason of insanity. And while there was a chance that a mental health defense would have resulted in a verdict of guilty but mentally ill, appellant

did not show that this verdict — unlike an insanity verdict that results in a defendant not being incarcerated in a penal facility — would have been more favorable for her. Moreover, there was no evidence that appellant would have wanted such a verdict. In a case like this one, the availability of a guilty but mentally ill verdict at trial benefits the State more than the defendant, as it gives the jury an outlet for sympathy for a defendant's mental illness without giving the defendant a shorter sentence or even necessarily one served under different conditions.

### **Guilty Pleas; Ineffective Assistance of Counsel**

*Davis v. State, S17A1152 (6/30/17)*

Appellant was indicted for malice murder and felony murder. As part of a negotiated plea, appellant pled to the felony murder and received a life sentence. Within the same term of court, appellant, who was still represented by the same defense counsel, moved to withdraw his guilty plea. Appellant personally alleged that guilty plea counsel was ineffective; while counsel acknowledged that this was the crux of appellant's complaint, he also argued that appellant's plea was not knowingly and voluntarily made. The trial court neither appointed new counsel after appellant raised a claim of ineffective assistance nor received evidence on the claim. Nevertheless, the trial court made a verbal ruling that there was no evidence to support appellant's allegation of ineffective assistance and, later, entered an order summarily denying appellant's motion. Appellant appealed and, after the case was docketed, obtained new counsel who reasserted appellant's ineffectiveness claim.

The Court stated that after sentencing, a defendant may withdraw a guilty plea only to correct a manifest injustice, such as where the defendant was denied effective assistance of counsel, or the guilty plea was entered involuntarily or without an understanding of the nature of the charges. However, because appellant was represented by the same counsel at both his guilty plea hearing and on his motion to withdraw guilty plea, appellant could not have raised a claim of ineffective assistance at that time. Instead, the earliest practicable moment appellant could have properly raised a claim of ineffectiveness is with new counsel on appeal. Furthermore, the Court held, to

the extent that the trial court considered appellant's claim of ineffective assistance without first appointing new counsel, and then ruled on the merits of such a claim, this was reversible error. Accordingly, the Court reversed and remanded for the trial court to hold a hearing on appellant's ineffectiveness claim with current new counsel.

### **Discovery; Failure to Produce Drawings**

*Morris v. State, A17A0615 (6/5/17)*

Appellant was convicted of one count each of aggravated child molestation, child molestation, and aggravated sexual battery. He contended that the trial court erred in admitting a drawing made by the victim during a counseling session with the family therapist, which the State did not produce during discovery. The Court disagreed.

The record showed that before calling the family therapist as a witness, the State informed appellant and the trial court that the therapist brought to court a picture the victim had drawn during one of her therapy sessions. The drawing depicted the victim crying while appellant was placing his penis in her mouth. The State then sought to admit the drawing and explained that although the drawing was never in its possession and thus, was not included in the documents provided in discovery, it nonetheless should be admitted because the therapist's notes, which were included in discovery, described the drawing in considerable detail. Appellant objected, but the trial court concluded that the State had not acted in bad faith and ruled that it would admit the drawing after giving appellant time to review it.

Appellant argued that the admission of the victim's drawing prejudiced his right to a fair trial. But, the Court found, although appellant apparently had not seen the drawing prior to trial, he undisputedly had access to the State's discovery, which contained the therapist's notes describing the drawing in significant detail. Furthermore, appellant did not present any evidence of bad faith on the part of the State with regard to this drawing. In fact, while arguing against the drawing's admission, appellant's trial counsel explicitly stated that he was not claiming that the State had acted in bad faith. Moreover, the drawing and the act depicted in it were cumulative of

the testimony given by the family therapist and the psychologist, both of whom testified that the victim claimed appellant placed his penis inside her mouth. Thus, the Court concluded, given that appellant failed to show that the State acted in bad faith by not including the drawing in the discovery materials or that he suffered prejudice as a result, the trial court did not abuse its discretion in admitting the drawing over appellant's objections.

## **First Offender; OCGA § 42-8-66**

*Bishop v. State, A17A0569 (6/6/17)*

In 2000, appellant pled guilty possession of cocaine. She thereafter petitioned the court to resentence her under the First Offender Act pursuant to OCGA § 42-8-66. The trial court dismissed her petition.

The Court stated OCGA § 42-8-66 provides that under certain circumstances, a court may retroactively grant first offender treatment and discharge to a defendant. However, the legislation that enacted OCGA § 42-8-66 specifically provides that it “shall apply to sentences entered on or after” July 1, 2015. Thus, the trial court correctly dismissed her petition.

Appellant nevertheless argued the remedial purpose behind the enacting legislation and that a trial court's grant of first offender status is a matter of legislative grace that does not affect any vested rights. The Court, however, was unpersuaded. Instead, the Court found, the law clearly applies only to sentences entered after July 1, 2015. “That this result may not comport with what [appellant] perceives to be the remedial purpose of the statute is an argument properly directed to the General Assembly rather than this Court.”

## **Shoplifting; Aggregate Amounts**

*Wallace v. State, A17A0051 (6/6/17)*

Appellant was convicted of three counts of felony theft by shoplifting. Count 3 of the indictment, provided, in pertinent part, that appellant, “did take possession of ... the property of Tractor Supply Company, ... the property of JC Penney, ... the property of Radio Shack, ... and ... the property of Cox Spirits, ... said merchandise totaling a value greater than five hundred dollars (\$500.00).” Appellant contended that his felony shoplift-

ing conviction on Count 3 of the indictment was void because the State used the aggregated value of the goods from the various stores to support the felony charge and the indictment had to specify that the thefts occurred within the statutorily prescribed period of seven days or less.

The Court noted that OCGA § 16-8-14 (b) (2), provides that a person who commits the offense of theft by shoplifting is guilty of a felony where the property stolen has a value in excess of \$500, and “[a] person convicted of the offense of theft by shoplifting, as provided in subsection (a) of this Code section, when the property which was the subject of the theft is taken from three separate stores or retail establishments within one county during a period of seven days or less and when the aggregate value of the property which was the subject of each theft exceeds \$500.00 in value, commits a felony.” And here, the Court found, even assuming without deciding that the date was a material averment of Count 3 of the indictment and the State had to prove that the aggregate shoplifting offenses happened within a seven-day period or less, that period of time was sufficiently alleged in the indictment by saying that the crimes occurred “on or about” May 27, 2014. Moreover, there was no fatal variance because the evidence at trial demonstrated that the shoplifting that occurred at the three stores at issue in Count 3 occurred on the same day, May 27, 2014. According, the Court affirmed appellant's conviction on Count 3.