Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 5, 2013

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Charles A. Spahos
Executive Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Resource Prosecutor

Lalaine Briones
Domestic Violence, Sexual Assault, and Crimes Against Children Resource Prosecutor

Todd Hayes
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Clara Bucci
State Prosecutor

Fay Eshleman
State Prosecutor

THIS WEEK:

Rule of Lenity

McNair v. State, S12G1477 (7/1/13)

The Supreme Court granted certiorari to determine whether the Court of Appeals erred in holding that the rule of lenity does not apply when the statutory violations at issue are both classified as felonies, even though the offenses carry different punishments. The evidence showed that appellant was charged and convicted of identity fraud (O.C.G.A. § 16-9-121) for the theft and use of the victim's credit card. Prior to sentencing, appellant argued that the rule of lenity should be applied such that he should be sentenced for committing financial transaction card theft (O.C.G.A. § 16-9-31), a crime for which he was not charged or convicted, but which has a lesser penalty than identity fraud.

The Court stated that the rule of lenity is a sort of "junior version of the vagueness doctrine," which requires fair warning as to what conduct is proscribed. The rule of lenity applies when the law provides different punishments for the same offense, and provides that the ambiguity is resolved in favor of the defendant, who will then receive the lesser punishment. However, the rule does not apply when the statutory provisions are unambiguous. As a rule of construction, the rule of lenity is applied only when an ambiguity still exists after having applied the traditional canons of statutory construction. Additionally, the rule of lenity may be applicable where there are different gradations of punishment for the same offense, giving as a reference the "particular" circumstance in which a statute provides felony and misdemeanor punishments for the same offense. However, the Court noted, it had never held that the rule of lenity *only* applies when the punishments are as between a misdemeanor and a felony. (Emphasis supplied) In fact, the Court stated, it has previously indicated that there may be situations in which the rule of lenity could apply to an ambiguity involving statutes which exact differing felony punishments for the same offense.

Nevertheless, the Court of Appeals in *Shabazz v. State*, 273 Ga.App. 389, 391 (2005) announced a bright line rule that the rule of lenity was inapplicable where the crimes at issue in a case both exacted felony punishments and this bright line rule had been followed many times by the Court of Appeals thereafter. But, the Court stated, the primary consideration in determining whether to apply the rule of lenity is not whether the statutes in question exact felony and/or misdemeanor punishments, but whether there is an ambiguity that would result in varying degrees of punishment for the same offense. Thus, the Court disapproved of *Shabazz* and its progeny to the extent they hold that the rule of lenity cannot be applied

because the statutes at issue exact felony punishments. Accordingly, the Court held that the decision of the Court of Appeals in appellant's case was reversed and remanded to the Court of Appeals so that it could consider the appeal on the merits.

Habeas; Garza

Sellars v. Evans, S13A0596 (7/1/13)

In 1998, Evans was convicted of kidnapping with bodily injury, kidnapping, aggravated assault, and possession of a firearm by a convicted felon. The facts showed that Evans and two other young men went to a known crack and prostitution house where the victim had been staying and began to beat her in the front room. After each of the three men had punched and kicked the victim, they carried or dragged her out the front door and continued to beat her outside the house. The three men then left in a car, leaving the victim on the ground.

Following the Court's decision in *Garza v. State*, 294 Ga. 696 (2008), Evans filed a habeas petition, arguing that his kidnapping convictions should be overturned because there was a lack of asportation. The habeas court agreed and the Warden appealed. The Court stated that under *Garza*, the question as to whether asportation was more than "merely incidental" to another crime is decided based on the consideration of four factors: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. Here, the Court held, the record did not support the conclusion that enough of the *Garza* factors were met to warrant a finding of asportation. Moreover, it could not be determined that the movement of the victim was entirely separate from, and not an inherent part of, the aggravated assault. Indeed, the movement of the victim occurred as a part of a relentless beating both inside and just outside of the house from which the victim had been removed. Furthermore, there was nothing to suggest that the movement of the victim presented a significant danger to her that was independent of the aggravated assault, as the victim was never isolated or somehow exposed to some independent danger outside of the danger that she was already being exposed to from the aggravated assault itself. Accordingly, the Court held that under *Garza*, the movement of the victim was merely incidental to the aggravated assault, and the habeas court correctly concluded that the facts did not support a finding of asportation.

Miranda; Photographs

Norton v. State, S13A0301 (7/1/13)

Appellant was convicted murder, arson and other related crimes. The evidence showed that appellant shot his girlfriend and then set fire to her body and her house. He contended that his oral and written statements should have been suppressed because he was then under the influence of drugs and alcohol and therefore, his waiver of his *Miranda* rights was not made knowingly and voluntarily. The record showed that during the *Jackson-Denno* hearing, appellant's expert witness, a psychiatrist, testified that appellant reported that, before the interview, he had taken 15-20 pills of Xanax, 2 pills of Adderall, and had been drinking bourbon and beer. The expert concluded that appellant had a history of substance abuse that had created in him a tolerance for the substances such that he would appear to be functioning normally, but would not in fact be able to make intelligent decisions, and that, in the expert's opinion, at the time of the interview, he was not able to knowingly or intelligently waive his *Miranda* rights. However, another expert witness, also a psychiatrist, testified that appellant did not display a "significant level of impairment," and knowingly, intelligently, and voluntarily waived his *Miranda* rights. The lead detective testified that he did not promise appellant anything in exchange for speaking with him, that appellant appeared to understand his *Miranda* rights, and that he wished to speak with the detective nonetheless.

The Court held that the mere fact that appellant may have been somewhat intoxicated at the time of the interview did not automatically render the evidence inadmissible. Moreover, the trial court was faced with conflicting evidence, and determined that appellant made his statement knowingly and voluntarily; there was evidence to support that determination; and thus, there was no reversible error in the court's denial of the motion to suppress.

Next, appellant contended that the trial court wrongly admitted into evidence two autopsy photographs that showed the victim's head, one with a portion of the scalp excised and one with a portion of the skull removed. As a matter of law, a photograph that depicts the victim after autopsy incisions or after the pathologist changes the state of the body, is admissible when necessary to show some material fact which becomes apparent only because of the autopsy. Here, the photographs aided the medical examiner in testifying as to the range and direction of travel of the shotgun pellets, which, coming from the rear of the right side of the victim's head, served to rebut the defense of accident, and therefore, it was not error for the court to admit them into evidence.

Self-Incrimination; Commenting on Silence

Romer v. State, S13A0366 (7/1/13)

Appellant was convicted of murder. He contended that the trial court erred in denying his motion to preclude any mention of his brother's refusal to speak to the police. The evidence showed that on the day after the shooting, a few hours after appellant was arrested for the victim's murder, appellant's brother was taken to a police station, but refused to give a statement on the advice of an attorney. At trial, before the start of the second day of testimony and again before the defense case began, appellant indicated that he planned to call his brother as a witness and moved to preclude any questions regarding his brother's refusal to make a statement to the police on the ground that such questions would violate his brother's Fifth Amendment right. The trial court denied the motion both times. Nevertheless, appellant called his brother at trial and elicited from him a version of events supporting appellant's claim of self-defense. On cross-examination, the prosecutor repeatedly questioned the brother about his refusal to speak to the police after the shooting and suggested that if his exculpatory story were true, he would not have waited a year and a half later to tell it at trial.

The Court stated that generally, outside the First Amendment context, a criminal defendant will not be heard to complain of the violation of another person's constitutional rights. In Georgia, courts have specifically held that a criminal defendant has no right to

raise alleged violations of another individual's right against self-incrimination or rights under *Miranda*. Here, appellant did not point to any constitutional authority to the contrary and thus, his claim was without merit.

Nevertheless, appellant argued, the comment on his brother's silence was in violation of the holding in *Mallory v. State*, 261 Ga. 625, 629-630 (1991) in which the Court held that "in criminal cases, a comment upon a *defendant's* silence or failure to come forward is far more prejudicial than probative. Accordingly,. . . . such a comment will not be allowed even where the defendant has not received *Miranda* warnings and where he takes the stand in his own defense." (emphasis supplied). However, the Court noted, appellant did not raise the evidentiary objection discussed by the *Mallory* opinion and thus, had not preserved the claim for appellate review. Moreover, the Court stated, "in the more than two decades since *Mallory* was decided, we have not extended its holding to prohibit comments on the silence or failure to come forward of witnesses other than the criminal defendant who is on trial, and we see no reason to do so now."

Out-of-State Witnesses; Intoxilyzer Source Code

Cronkite v. State, S12G1927 (7/1/13)

In connection with his DUI prosecution, appellant filed a motion under the Uniform Act to Secure the Attendance of Witnesses from Without the State, former O.C.G.A. § 24-10-94, to obtain, through the testimony of an out-of-state witness, the source code for the Intoxilyzer 5000. The trial court denied the motion, finding that the evidence was not material.

On interlocutory appeal, the Court of Appeals affirmed, concluding that the trial court did not abuse its discretion. The Court of Appeals applied the Supreme Court's decision in *Davenport v. State*, 289 Ga. 399, 404 (2011), which similarly dealt with a defendant seeking evidence relating to the source code of the Intoxilyzer 5000, and established that a "material witness" under former O.C.G.A. § 24-10-94 was "a witness who can testify about matters having some logical connection with the consequential facts." The Court of Appeals concluded that appellant's expert's testimony amounted only to speculation that the Intoxilyzer 5000 software contained an unknown flaw that could have affected the test results. Thus, the Court of Appeals held, appellant failed to establish the materiality of the source code. The Court of Appeals stated that, although the expert was not required to demonstrate an error in the source code, the expert was required to testify to "some fact indicating the possibility of an error in this case," as "[s]ome evidence of such an error [in the source code] is the consequential fact that would render testimony regarding the source code logically connected to the issue presented here."

The Supreme Court agreed with the Court of Appeals' decision, but not with its analysis. Although the Court of Appeals properly recognized that a material witness is a witness who can testify about matters having some logical connection with the consequential facts, the Court of Appeals was incorrect to conclude that evidence of a possible error in the source code was the essential consequential fact that would render testimony regarding the source code logically connected to the issue presented. Moreover, the Court stated, it cannot be the case that a defendant must be able to show the possibility of an error in the source code itself in order to compel testimony regarding the very same source code. Rather, the consequential facts are whether the Intoxilyzer 5000 may have generated erroneous results from a defendant's breath test. Thus, in order to show that the out-of-state witness who was to provide testimony regarding the source code was a "material witness" in this case, appellant was required to show that the witness' testimony regarding the source code bore a logical connection to facts supporting the existence of an error in his breath test results.

Here, the Court noted, the parties stipulated that appellant had a surgical implant in his upper teeth and a retainer on his lower teeth. Appellant contended that the implant and retainer could allow alcohol to remain present in the mouth, and, in this regard, his expert testified that the Intoxilyzer 5000 software is designed to generate error messages in certain circumstances where an erroneous reading may occur, including circumstances involving the presence of alcohol in the mouth. However, the Court found, appellant presented no evidence that mouth alcohol was present during his breath test such that an error message should have been generated that was not generated. Indeed, the mere possibility that alcohol could remain present in the mouth due to the existence of a surgical implant and retainer did not amount to evidence of facts pointing to the actual existence of excess alcohol in the mouth at the time of appellant's breath test that should have produced an error message from the Intoxilyzer 5000 that was not produced. Moreover, appellant did not point to any other evidence supporting the existence of a possible error in his specific breath test results such as discrepancies in the operation of the Intoxilyzer 5000 machine itself. Therefore, the Court held, appellant made no logical connection between possible problems in the source code and any consequential facts in his case that would have made the out-of-state witness' testimony regarding the source code "material." Accordingly, the Court agreed with the Court of Appeals that, under the standard established in *Davenport* and under the facts of this case, the trial court did not abuse its discretion in denying appellant's motion.

Recidivists; O.C.G.A. § 17-10-7(a)

Pardon v. State, A13A0010 (6/25/13)

Appellant was convicted of two counts of failure of a registered sex offender to report a change in residence prior to moving, two counts of first degree forgery, and a recidivist charge (O.C.G.A. § 17-10-7(a)). The evidence showed that appellant pled guilty in Ohio in1982 to aggravated robbery, attempted murder, aggravated assault, and rape. After his release in 2006, appellant moved to Georgia. During that time, he failed to report his location to the local sheriff's office, forged a signature on a housing application and an employment application, and gave a false name when signing two traffic citations. He was indicted and convicted on two separate indictments consolidated for trial.

Appellant argued that the trial court erred by allowing his one prior conviction to serve as the basis both for his failure to register counts and his recidivist sentence under O.C.G.A. 17-10-7(a). The Court agreed. Citing *King v. State*, 169 Ga.App. 444 (1984) (State could not use a prior felony conviction required to convict a convicted felon for being in possession of a firearm, and then use the same prior conviction to enhance the sentence to the maximum punishment for the offense under the repeat offender statute), the Court held that the same

rationale applied here. Appellant had only one prior conviction—the 1982 conviction for which the failure to register as a sex offender stemmed. Despite the State's argument that the "rape" portion of his 1982 conviction was used to support the failure to register charge while the "other" portions of his 1982 conviction were used to support his recidivist charge, the Court found that the legislature specifically stated otherwise in O.C.G.A. § 17-10-7(d): "[f]or the purpose of this Code section, conviction of two or more crimes charged on separate counts of one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction."

Indictment; Dismissal

State v. Rambert, A12A0848 (6/21/13)

The State appealed the trial court's order dismissing a burglary indictment filed against Rambert in response to Rambert's motion in limine asking the court to disallow any third party witnesses, property managers or agent, from testifying on behalf of the property's owner of record. The record showed that on March 18, 2011, a grand jury indicted Rambert on one count of burglary and one count of possession of tools for the commission of a crime in connection with the alleged theft of copper from the walls of a vacant building owned by Abraham Vaknin, a New York resident. The matter was originally set for trial in August 2011, but was continued at the request of the State because Vaknin was out of the country. The matter was rescheduled for October, but Vaknin was again unavailable when the case was called for trial, prompting Rambert's motion in limine to prevent Karen Booker, Vaknin's property manager, from testifying on his behalf. Although the prosecutor indicated that he had correspondence establishing that Booker was the manager for the subject property and the record indicated that she was the party who reported the crime, the trial judge ruled that Booker would not be allowed to testify, stating that he would not "let an agent testify" and would require the property owner to appear himself. The trial court then dismissed the indictment against Rambert with prejudice.

The State argued that the trial court erred in dismissing the indictment because Georgia law authorizes an agent to testify on behalf of a property owner in cases of burglary. The Court agreed. It is well settled that the State may establish a defendant's lack of authority to enter a building through circumstantial evidence and that the testimony of an agent or caretaker of the property is sufficient to show that an entry was unauthorized. Additionally, the Court held that the trial court erred in dismissing the indictment with prejudice because the trial court impermissibly interfered with the State's right to prosecute.

Jury Instructions; Lesser Included Offenses

Franks v. State, A13A0118; A13A0932 (6/26/13)

Appellants, Franks and Long, were convicted of one count of attempted trafficking by manufacturing methamphetamine. Long contended that the trial court erred in denying his written request to charge on the lesser included offense of possession of a drug related object and possession of pseudoephedrine. The record showed that the trial court acknowledged that the crimes were lesser included offenses of trafficking, and that "it was error for the court to fail to give the charges requested by [appellant]," but the court determined that its error was harmless.

The Court stated that where the State's evidence establishes all of the elements of an offense and there is no evidence raising the lesser offense, there is no error in failing to give a charge on the lesser offense. Where a case contains some evidence, no matter how slight, which shows that the defendant committed a lesser offense, then the court should charge the jury on that offense. In determining whether one crime is a lesser included offense of another crime, a court should apply the "required evidence" test set out in *Drinkard v. Walker*, 281 Ga. 211(2006). Under the "required evidence" test, the question is not whether the evidence actually presented at trial establishes the elements of the lesser crime, but whether each offense requires proof of a fact which the other does not.

Appellant Long was charged under O.C.G.A. § 16-13-31(f), which required proof that a defendant knowingly manufactured methamphetamine. In order to knowingly manufacture methamphetamine, a defendant must necessarily possess the ingredients and tools required for the manufacturing process and have the intent to use them. Here, the State presented evidence that appellant possessed pseudoephedrine and a number of objects required for the manufacture of methamphetamine. The trial court succinctly described the other two offenses, "[i]t is a crime, per O.C.G.A. § 16-13-32.2 to possess any object with the intent to manufacture a controlled substance such as methamphetamine. . . . Likewise, it is a crime pursuant to O.C.G.A. § 16-13-30.3 to possess pseudoephedrine with intent to manufacture methamphetamine." Thus, the trafficking statute required proof of an element that the other two statutes do not—the manufacture of methamphetamine. However, the other two statutes do not require proof of any element that is not also required for the crime of trafficking as charged in this case. Accordingly, the Court agreed with the trial court that the crimes set forth in O.C.G.A. §§ 16-13-30.3(b)(2) and 16-13-32.2 were lesser included offenses of the crime of trafficking by manufacture of methamphetamine under O.C.G.A. § 16-13-31(f).

Despite the error, the trial court nevertheless determined that its failure to give the requested charges on the lesser included offenses was not harmful error because that failure did not contribute to the verdict. It concluded that the jury could not have found appellant Long guilty of illegal possession of pseudoephedrine or possession of drug-related objects unless it found him guilty of either trafficking by manufacturing methamphetamine or attempted trafficking by manufacturing methamphetamine.

The Court, however, found that although the evidence was sufficient to submit the charge of trafficking by manufacturing methamphetamine to the jury, the evidence was not overwhelming as shown by the jury's acquittal of that charge. Moreover, the review of the record showed that even though an officer testified that the items found indicated that the manufacturing process had been completed, other evidence in the record indicated that the process may not yet have occurred. Therefore, the Court held, the evidence was not overwhelming as to the charge of trafficking by manufacturing methamphetamine, and it was not harmless error for the trial court to refuse to instruct the jury on the lesser included offenses requested by appellant Long. Accordingly, the Court reversed appellant Long's conviction.

Expert Witnesses; Hearsay

Hosley v. State, A13A0587 (6/26/13)

Appellant was convicted of kidnapping, aggravated assault, false imprisonment, possession of a gun during the commission of a crime, fleeing from a police officer, carrying a gun without a license, and simple battery. During trial, appellant offered several defenses, including his claim that he suffered Post Traumatic Stress Disorder (PTSD) while serving in the Navy in both Afghanistan and Iraq. Moreover, a clinical psychologist testified that she diagnosed appellant with PTSD and stated that appellant's worst experiences were the ones he experienced in Iraq. She stated that this diagnosis was based solely on his "self report." Based on this, she testified that she "[did not] think he was responsible [for the offenses] at the time." When asked if she were informed that what appellant told her about his military experiences was not true, the psychologist stated that her opinion would change if she found out that he had not had combat experience and had not experienced a traumatic event.

In rebuttal, the State called a shipmate of appellant who testified that their ship never went to Iraq or Afghanistan, was never in combat, and was never attacked. A representative from the VA stated that appellant had no land or ground service, only sea duty. Appellant's post-deployment assessment showed that he stated that he was never in combat duty, did not see anyone wounded or killed, and never felt in grave danger. Moreover, a forensic psychologist testified that he examined appellant and found him to be responsible for his actions at the time of the crimes. The psychologist also testified that his "self report" of his history proved to be "highly unreliable." For instance, he claimed to have been diagnosed with PTSD at a VA facility in Nashville, but when the records were sent to the psychologist, however, the diagnosis was "malingering."

Appellant contended that the trial court erred in allowing the State's forensic psychologist to testify as a "conduit" for a Veteran's Administration psychiatrist who did not testify at trial. The Court disagreed. When an expert personally observes data collected by another, the expert's opinion is not objectionable merely because it is based, in part, on the other's findings, even when such testimony is based on hearsay; the lack of personal knowledge does not result in exclusion of the expert's opinion but merely presents a jury question as to the weight it is to be given. Here, the forensic psychologist testified as a rebuttal witness after appellant testified that he received treatment for PTSD at the VA facility in Nashville. The forensic psychologist noted that appellant was diagnosed "with malingering" at the VA facility. Thus, the Court held, there was no error in allowing the testimony. Furthermore, the Court noted, the testimony was cumulative of other properly admitted evidence; appellant's discharge papers stated, "[i]t is the opinion of the treatment team that any presentation of mental illness was malingered."