Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 19, 2016

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THIS WEEK:

Recusal by Prosecutor; Standing to Object

State v. Mantooth, A16A0356 (7/1/16)

Mantooth was charged with DUI in Cobb County. Because of Mantooth's relationship to a member of the Cobb County Solicitor-General's staff, the Cobb County Solicitor-General (the "Solicitor-General") recused himself and notified the Attorney General of Georgia, pursuant to O.C.G.A. § 15-18-65, of his office's conflict of interest in the case. The Attorney General then appointed the DeKalb County Solicitor-General to act as a solicitor-general pro tempore in the case against Mantooth. Mantooth moved to vacate the Solicitor-General's recusal, arguing that there was no actual conflict of interest and that he had recused himself without a hearing or the defendant's consent. Following a hearing, the trial court granted Mantooth's motion. The Court granted the State's petition for an interlocutory appeal.

The State argued that the trial court erred because a criminal defendant does not have standing to object to the recusal of a solicitor-general. The Court agreed. The Court stated that "pretermitting whether the State can — or is even required to — prove that the Solicitor-General had a 'legitimate' conflict of interest, Mantooth has shown us no legal authority supporting the proposition that a criminal defendant has standing to object to a prosecuting attorney's voluntary recusal. Indeed, Georgia law dictates otherwise." Furthermore, a defendant does not have a substantive right to have his case tried by a specific prosecutor so as to make notice necessary in order to oppose the solicitor-general's disqualification.

Mantooth also argued that, even if her relationship to an employee presented a conflict, the Solicitor-General should have imposed an ethical screen around the employee rather than voluntarily recuse his entire office. However, the Court found, that would require the Solicitor-General to remain in the difficult position of having to zealously advocate for the conviction of the family member of an employee or face accusations of showing inappropriate favoritism. While implementing proper screening measures around a non-lawyer may be useful in preventing the improper sharing of confidential information, the Court held that the determination of whether screening measures would be sufficient in this case or whether recusal of the entire office is necessary was best left to the individual prosecuting attorney. Therefore, under the circumstances presented, the Court stated it would not second guess the Solicitor-General's voluntary recusal. In so holding however, the Court stated that it was expressing no opinion as to whether a

screening measure would have been sufficient if the Solicitor-General had elected not to recuse.

Finally, the State contended that the trial court lacked legal authority to vacate the Attorney General's administrative appointment of a solicitor-general pro tempore following the voluntary recusal of the prosecutor's office pursuant to O.C.G.A. § 15-18-65(a). The Court agreed. After a review of the legislative history of the statute, the Court stated that although subsection (d) of O.C.G.A. § 15-18-65 recognizes that trial courts retain the inherent authority to disqualify an attorney who is legally disqualified, they no longer have the same discretion to do so and must specify the legal basis of such order which is then subject to interlocutory appellate review. But, the Court stated, significantly, there is no similar language contained in subsection (a) of the statute granting trial courts any authority to intervene in the voluntary recusal and subsequent appointment of a substitute solicitor-general through the Attorney General's office. Also, under the plain language of O.C.G.A. § 15-18-65(a), neither the solicitor-general nor the Attorney General is required to provide a "legal basis" for the disqualification of a solicitor-general. Accordingly, because the trial court lacked authority to vacate the Attorney General's appointment of a prosecuting attorney pro tempore, the trial court's order granting Mantooth's motion to vacate the recusal was reversed on this ground as well.

Theft by Taking; Rule 404 (b) Evidence

Graham v. State, A16A0473 (6/29/16)

Appellant was convicted of theft by taking. Briefly stated, the evidence showed that the victim wanted kitchen cabinets made and found appellant through a Craigslist advertisement. Appellant accepted money from the victim for the purpose of constructing cabinets, but did not complete the cabinets or provide the victim with what had been completed, and failed to return any money to the victim. Additionally, the State presented two prior act witnesses who testified that they also located appellant on Craigslist and hired him to make cabinets. Both witnesses testified that they paid appellant money but never received completed cabinets or a refund of their money.

Appellant argued that that the trial court erred in admitting evidence of the two similar acts. The State sought to admit the evidence pursuant to O.C.G.A. § 24-4-404(b) to show appellant's intent, knowledge, and plan, and the trial court allowed the similar acts for these purposes. Appellant argued that the evidence was more prejudicial than probative because the circumstances of those acts were different. Specifically, he argued that the first witness "was unhappy with the quality of the work and wanted her money back," while the second witness "was unhappy with the time it was taking for [appellant] to complete the work and [wanted] to cancel his contract because of some missed appointments."

The Court stated that without question, intent was put in issue by appellant entering a plea of not guilty. And, as appellant conceded, "the issue of intent was very important to [his] defense." Appellant's counsel argued at trial that appellant had no intent to deprive the victim of her property. Evidence of these other acts - which involved the same sort of intent as required to prove the theft and had a tendency to prove such intent - were therefore relevant and satisfied the first requirement for admission. Moreover, the evidence had a greater tendency to make the existence of appellant's intent more probable and the year-and-a-half span in which the similar acts and charged act occurred, and the similarity between the crimes and the facts relating thereto made the former acts highly probative of appellant's intent.

Thus, the Court determined, in light of the quality of this evidence and the strength of its logical connection to establishing appellant's intent, the trial court did not abuse its discretion in determining that the probative value of the similar acts was not outweighed by their prejudicial effect. Finally, the Court held that the testimony of the similar act witnesses and the testimony of appellant was sufficient proof for a jury to find by a preponderance of the evidence that the defendant committed the prior acts.

Aggravated Assault; Sufficiency of the Evidence

In re L. J., A16A0424 (6/29/16)

Appellant was convicted of delinquent for acts which, if committed by an adult, would have constituted criminal trespass and aggravated assault. Briefly stated, the evidence showed that victim was appellant's father. The victim went to the home of appellant's mother, where appellant lived, to take back some guns which were registered to the victim, but given by the victim to appellant. Appellant did not want the victim to take the guns. After the guns were loaded in the victim's car, the victim went back into the house, leaving a bow case next to the door. Appellant took the bow out of the case and against the victim's orders "knocked" an arrow (placed an arrow on the bow string). When appellant turned in the victim's general direction, the victim opened the driver's side door to stand behind it. Appellant then moved around the passenger side of the truck and oriented the arrow toward the rear passenger-side tire, telling the victim that he was not going to leave with his guns. The victim got into the driver's side of the truck and started to drive away, but appellant shot an arrow into the rear passenger tire after the truck had only moved, at most, "a couple of inches."

Appellant contended that the evidence was insufficient to convict him of aggravated assault for pointing the arrow in his father's general direction. Specifically, he argued that the evidence was insufficient to show that the victim was in reasonable apprehension of receiving a violent injury when he "knocked" the arrow in the bow so as to authorize his adjudication for delinquency for aggravated assault. In support of this contention, appellant pointed to the victim's failure to state he was in reasonable apprehension of receiving an injury from appellant, the victim's testimony that he called police just to prove a point to appellant and his testimony that he did not think appellant would shoot at him with the bow and arrow. But the Court stated, the victim need not say he was afraid, nor in fact be afraid, in order to experience a reasonable apprehension of receiving a violent injury. Here, the Court found, the victim demonstrated he had a reasonable apprehension of an immediate injury when he moved behind the door of his truck after appellant. placed an arrow on the bow string although he told him not to do so. Furthermore, the victim testified that he perceived a threat when appellant removed the bow from the case and pointed the arrow in his general direction, and that he assumed there was a possibility that appellant might shoot the arrow in his direction. Based on this evidence, a rational trier of fact could have

made an adjudication of delinquency on the charge of aggravated assault by taking the bow and arrow and knocking the arrow.

Appellant also argued that the evidence was insufficient to show that he intended to injure the victim by shooting an arrow at the victim's truck while he sat inside or that the victim was in reasonable apprehension of receiving a violent injury. The Court agreed. The evidence showed that appellant shot the arrow at the passenger-side rear tire of the vehicle, away from the driver's side where the victim was located. Moreover, the victim testified that, at most, the vehicle had only moved about two inches when appellant shot the tire, and thus there was no evidence that appellant intended to injure the victim by causing a vehicular accident by shooting the tire of a moving vehicle. Thus, the evidence, even construed to support the adjudication of delinquency, showed only that appellant intended to stop his father from leaving with his weapons by shooting his tire and disabling his vehicle, not that he intended to commit a violent injury to the victim.

Further, the Court found, the evidence was also insufficient to show that the victim was in reasonable apprehension of receiving a violent injury when appellant shot the arrow at the tire of the truck so as to warrant his adjudication for delinquency based on O.C.G.A. § 16-5-20(a)(2). As stated above, appellant shot the tire on the rear-passenger side, on the opposite side from where the victim was sitting inside the truck. Moreover, the victim testified that he no longer perceived a threat from appellant shooting him with the bow and arrow after appellant moved to the passenger side of the truck and was no longer pointing the bow in his general direction. Accordingly, the adjudication of delinquency for aggravated assault based the act of shooting the tire was reversed.

Ineffective Assistance of Counsel; Pleas in Bar

Hantz v. State, A16A0249 (6/30/16)

Appellant was convicted of DUI and speeding. The record showed that immediately prior to selecting a jury, appellant and the State informed the court that she was going to enter a negotiated guilty plea to the speeding offense and proceed to trial only on the DUI charge. The court then held the plea hearing, accepted appellant's oral guilty plea to the speeding charge, and orally announced that it would follow the State's sentencing recommendation of 12 months of probation and a $250 fine. At that time, however, appellant did not sign or tender a written guilty plea to speeding and the trial court did not enter a final written judgment of conviction and sentence on the speeding charge. Rather, immediately after the plea colloquy, the parties proceeded with the jury selection trial on the DUI. Immediately after receiving the verdict and discharging the jury, the court held the sentencing hearing. At the conclusion of the hearing, the court orally announced a 12-month probated sentence for the DUI offense and stated that such sentence would run consecutive to the 12-month sentence for the speeding offense to which appellant had pled guilty. Thereafter, on the same day, appellant signed her written guilty plea to speeding, that written plea was filed in open court, and the trial court issued a single written order entering the judgments of conviction and sentences for the DUI and speeding offenses.

Appellant contended that her trial counsel was ineffective in failing to file a plea in bar to prohibit the State from prosecuting the DUI charge after she had pled guilty to the speeding offense. The Court disagreed. O.C.G.A. § 16-1-8(b)(1) provides, in pertinent part, that a "prosecution is barred if the accused was formerly prosecuted for a different crime … [and] *such former prosecution … [r]esulted in either a conviction or an acquittal* and the subsequent prosecution … is for a crime with which the accused should have been charged on the former prosecution[.]" (Emphasis supplied.) Here, the Court found, appellant's guilty plea to speeding prior to the DUI trial did not result in a conviction. As expressly defined, a "conviction" includes a final judgment of conviction entered upon a verdict or finding of guilty of a crime or upon a plea of guilty. O.C.G.A. § 16-1-3(4). Thus, a conviction is not the verdict or guilty plea; it is the judgment entered on the verdict or guilty plea.

Here, the trial court did not enter a final judgment of conviction on appellant's oral guilty plea at the plea hearing. Rather, the judge simply announced that he would accept the plea and would impose the 12-month probated sentence recommended by the State. An oral declaration as to what the sentence shall be is not the sentence of the court; the sentence signed by the judge is. This is because what the judge orally declares is no judgment until it has been put in writing and entered as such. Thus, the criminal proceedings against appellant were still pending in the trial court until such time as her sentence was entered in writing and became final. And here, the trial judge did not enter the final written judgment of conviction and sentence on the guilty plea to speeding until after the DUI trial, at the same time and on the same order form as the judgment and sentence entered for the DUI offense. Consequently, appellant had not been subjected to any former prosecution within the meaning of O.C.G.A. §§ 16-1-7(b) and 16-1-8(b). Accordingly, the trial court would not have erred in denying a plea in bar and trial counsel's failure to file a meritless motion does not amount to ineffective assistance.

Impeachment; First Offender Status

State v. Enich, A16A0550 (7/5/16)

Enich was convicted of two counts of rape and child molestation. The record showed that Enich was living with the victim and her mother and because of Enich's mental disability, the victim's mother was receiving social security benefits. Enich and the mother had an argument about her possible misappropriation of his benefits. Shortly thereafter, the victim made the outcry against Enich. During the trial, the trial court refused to allow Enich to introduce evidence that the victim's mother was serving a first offender probation for forgery and theft by receiving. The trial court acknowledged that Enich was entitled to introduce evidence of an ulterior motive or that the witness was attempting to "punish[ ]" Enich by causing her daughter to accuse him, but ruled that he could not use her first offender status to do so. A different judge heard Enich's motion for new trial and granted the motion finding that the trial court erred. The State then appealed.

The Court stated that the successful completion of probation as a first offender shall not be considered a criminal conviction and cannot be used to impeach a witness on general credibility grounds. Because first offender status is not considered an adjudication of guilt, a witness also may not be impeached on general credibility grounds with a first offender sentence that is currently being served.

However, when the impeachment is to show bias, the Confrontation Clause of the Sixth Amendment permits a defendant in a criminal case to cross-examine witnesses about their first offender status. The Sixth Amendment right of confrontation is not absolute, and trial courts retain broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion, repetition, or irrelevant evidence.

Here, the Court found, the earlier theft-related offenses to which the mother pled guilty were committed before the time of her quarrel with Enich and his accusation that she had misappropriated his benefits. Shortly thereafter, the mother initiated the charges against Enich. Moreover, she pled guilty to two of the offenses and received first offender probation immediately before Enich's trial. This evidence provided some support for the trial court's conclusion that the excluded first offender status of the mother could have demonstrated bias on her part. Thus, the accusation could have been motivated by a desire to punish Enich, or to "eliminate his ability to cause [the witness] trouble in the future" with a charge of theft that could affect the mother's very recent first offender probation on theft-related charges. Therefore, the trial court did not abuse its discretion in finding that the evidence was improperly excluded. Moreover, the Court found, the evidence against Enich was not overwhelming. Therefore, Enich was entitled to a new trial.

Miranda; Impeachment

Babbitt v. State, A16A0338 (6/15/16)

Appellant was convicted of two counts of aggravated assault, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony. He contended that the trial court erred by excluding his pre-trial statement but allowing its use for impeachment purposes, which precluded him from presenting an alibi defense. The Court agreed but found the error harmless.

Appellant made his statement to the district attorney's office. It was undisputed that prior to his statement, no one advised him of his *Miranda* rights. The Court stated that for such statements to be admitted for impeachment purposed, the trial court first must ascertain whether the statements were voluntarily made, even if the procedural safeguards of *Miranda* or invocation of the defendant's right to an attorney were violated. O.C.G.A. § 24-8-82410 renders a defendant's confession inadmissible if it was induced "by the slightest hope of benefit. . . ." Thus, in order to determine whether appellant's statement was voluntary in order for impeachment purposes, the trial court was required to determine whether appellant made it with a hope of benefit.

The evidence, briefly stated, showed that defense counsel approached the district attorney's office about working out a plea for appellant. The defense sought to get a lighter sentence for appellant based on reduced charges if appellant cooperated. The testimony of the defense attorneys showed that they did not believe that the statement would be used in any manner at trial. The prosecutors' testimony showed that no plea offer was ever made and that it was their intent to use his statement at trial.

The Court found that the evidence showed that the trial court erred by determining that appellant did not make the statements in the interview without the slightest hope of benefit for a lighter sentence that was brought about by discussions with the State. There is no requirement that a specific plea or specific reduction be offered prior to statements being made by the defendant becoming subject to the hope-of-benefit rule. Although defense counsel may have approached the State initially, the testimony of the prosecutors confirmed that the statement was made as part of plea negotiations and was not merely the product of the defendant's own mind or a tactical decision of defense counsel. Accordingly, the trial court erred by allowing the statements for use as impeachment evidence.

Nevertheless, the Court found, appellant was not harmed by the trial court's error. Appellant contended that the error prevented him from presenting his alibi defense for fear that his statement would be used to impeach the defense. But, the Court found, any error was harmless because the evidence he would have presented in support of his alibi defense — family member's testimony that he was with them in another county removing debris from a foreclosed home — could not counter the victim's identification of him as one of the gunmen, the cell phone records showing calls between his and the victim's phone, or evidence that his cell phone was used in close proximity to the cell phone tower serving the apartment complex, where the crimes were committed.

Attempt to Elude; Sufficiency of the Evidence

Johnson v. State, A16A0110 (6/29/16)

Appellant was convicted for felony fleeing or attempting to elude a police officer, and leaving the scene of an accident, and reckless driving for conduct occurring on Oct. 22, 2011. The evidence showed that officers approached appellant's vehicle while it was parked at a Food Mart. As the officers approached, appellant began to slowly drive out of the parking lot. Appellant ignored the officers' attempt to get him to stop. Once out of the parking lot, appellant drove off at a high rate of speed and was pursued by another officer who happened to be driving into the parking lot as appellant was pulling out. The pursuing officer activated his patrol car's lights and siren in an attempt to get the vehicle to stop. The officer observed the car driving erratically and at a high rate of speed, "so wildly that it went through the yards in between two residences." Appellant's vehicle rear-ended another vehicle, but did not stop. The pursuing officer lost sight of appellant's vehicle. Eventually, appellant's vehicle was located abandoned and appellant later claimed it was stolen and he was somewhere else at the time of the offenses.

Appellant argued that the evidence was insufficient to support his conviction for felony fleeing or attempting to elude. The Court agreed. Under the version of O.C.G.A. § 40-6-395(b)(5)(A) in effect at the time of appellant's trial: "Any person violating the provisions of subsection (a) of this Code section who, while fleeing or attempting to elude a pursuing police vehicle or police officer in an attempt to escape arrest for any offense *other than a [traffic offense]*: … (ii) [s]trikes or collides with another vehicle or a pedestrian … shall be guilty of a felony. (Emphasis supplied). Here, the Court found, the indictment did not allege, and no evidence was presented at trial, that appellant was attempting to elude arrest for a non-traffic violation when he struck the other vehicle. Thus, the Court vacated appellant's felony sentence. However, because the evidence supported a misdemeanor conviction, the Court remanded the case with direction that a conviction and sentence be entered for the

misdemeanor offense of fleeing or attempting to elude a police officer.

Statements; Rule of Completeness

Morales v. State, A15A2386 (6/29/16)

Appellant was convicted of rape, but acquitted of kidnapping. The evidence, stated briefly, showed that appellant approached the victim in a nightclub and wrote his name and phone number on her hand. Later when the victim was leaving, he offered her a ride. When she refused, he put his hand over her mouth and forced her into a vehicle occupied by three men. Appellant and the other men took the victim to a park and raped her. When appellant heard sirens, he fled. After he was arrested, appellant was interviewed by the police and made a Mirandized statement which was videotaped. During the first part of the fifty-two- minute interview, all of which was transcribed, appellant admitted that the other men had told him that they "were going to rape" the victim, but denied that he had done so. Toward the end of the interrogation, however, appellant admitted that he had intercourse with the victim and had ejaculated a "little" into her body.

Prior to trial, the State filed a motion in limine to exclude the "exculpatory and neutral portions" of appellant's statement in which he denied raping the victim on the ground that self-serving declarations of a defendant are inadmissible hearsay. The trial court granted the motion such that appellant was barred from cross-examining the detective as to all except the exculpatory sections of appellant's statement unless appellant decided to testify in his own defense. At trial, and after consultation with counsel, appellant decided not to take the stand, with the result that the detective testified only on direct examination as to appellant's admissions that he had sex with the victim and ejaculated inside her a "little."

Appellant argued that in light of the admission of the incriminating portions of his statement into evidence, the trial court should have also admitted the earlier portions of that statement under the "rule of completeness" codified at O.C.G.A. §§ 24-1-106 and 24-8-822, and therefore erred when it granted the State's motion in limine to exclude those earlier portions. The Court agreed. Although the State argued that the exculpatory statements were hearsay, the Court stated that this argument ignored Georgia's longstanding "rule of completeness," now codified as O.C.G.A. § 24-8-822 (formerly O.C.G.A. § 24-3-38), which provides that "[w]hen an admission is given in evidence by one party, it shall be the right of the other party to have the whole admission and *all the conversation connected therewith* admitted into evidence." (Emphasis supplied.).

The Court then addressed whether the error was harmless. The Court found that the State's evidence authorized the jury to conclude that appellant approached the victim at the club, wrote his name and phone number on her hand, put his hand over her mouth and threatened her, had intercourse with her, ejaculated inside her, and fled the scene even before the approach of police. Appellant also made an admission in the earlier portions of his statement which would have led the jury to consider that by his own account, he remained at the scene after the three other men told him that they were "going to rape" the victim and after two actually did so — in short, that, as he himself put it, he "just stayed there watching." Further, appellant never suggested that he took any action to help the victim as she was raped by the two men. Thus, the erroneous exclusion of this highly inculpatory evidence made it impossible for appellant to show that he was harmed by the trial court's error in excluding the arguably exculpatory sections of his statement. Accordingly, the Court concluded, taken together, the admitted and improperly excluded evidence showed overwhelmingly that appellant was guilty of rape, whether principally or as a party to the crime, rendering it highly probable that any error in failing to admit the earlier portions of his statement did not contribute to the jury's verdict.

Transcripts; Collateral Attacks

Bell v. State, A16A0670 (7/5/16)

Appellant pled guilty to four counts of VGCSA. He did not seek a direct appeal. Three years later, he filed a "Motion for Discovery, Court Records, and Transcripts at State Expense." The trial court denied his motion, and he appealed.

The Court stated that while an indigent is entitled to a copy of his trial transcript for a direct appeal of his conviction, such is not the case in collateral post-conviction proceedings. However, a petitioner may obtain such records upon a showing of necessity or justification, via an affidavit setting forth certain facts:

> The affidavit should set out the particular reasons why the transcript is necessary, and should include a statement that the petitioner or his attorney have never previously been supplied a copy of his transcript and record, and that it is not otherwise available to him. A copy of the pending or proposed habeas petition should be attached. Similarly, the clerk may certify that a copy of the transcript has previously been provided the defendant or his attorney. From this, the trial court can make appropriate findings of fact and conclusions of law in determining whether the petitioner has shown some justification or necessity for a copy of his trial transcript and record.

Here, the Court found, the trial court failed to make appropriate findings of fact and conclusions of law in determining whether the prisoner has shown some justification or necessity for a copy of his trial transcript and record. In making such findings, the trial court may consider whether the affidavit facially fulfills the requirements and should determine whether appellant has shown justification or necessity. The Court therefore vacated the judgment of the trial court and remanded for further proceedings. Nevertheless, in so holding, the Court stated, "We note our concern that too lenient an interpretation of the affidavit requirements…. could open the floodgates for petitions in which every potential litigant, with or without a colorable claim, could demand 'a free transcript just so the prisoner may have it.'"

Guilty Pleas; Kelley

State v. Bankston, A16A0003 (6/28/16)

Bankston was indicted on two counts of armed robbery involving two banks. At the plea hearing, Bankston freely and voluntarily admitted his guilt to the robbery charges, but denied he was ever in a possession of a firearm. The State responded that, had the case proceeded to trial, it would offer evidence to

prove that both bank tellers handed over money because they believed Bankston was armed, which was all it needed to prove. The State then asked for the negotiated recommendation of punishment to be twenty years, to serve ten, on each count of armed robbery, which is the mandatory minimum sentence for that offense. After discussing Bankston's mental health issues, his older age at 61, and the recidivist punishment the State sought, the trial court reduced the conviction to two counts of robbery by intimidation and sentenced Bankston to twenty years, to serve seven.

The State appealed, contending that the trial court erred by entering judgment on an unindicted lesser included offense over the State's objection, and impermissibly engaging in plea negotiations. Relying on *State v. Kelley*, 298 Ga. 527 (2016), the Court first found that the issue was preserved for appellate review because the State objected to the lesser charge when it argued to the trial court that it intended to prove the charges of armed robbery against Bankston if the case proceeded to trial. Second, the Court found that although the trial court has wide discretion in rejecting a plea agreement, a trial court may not compel the State to accept a plea to an offense other than that which is charged in the charging instrument. Moreover, where the State has agreed to a reduced charge in exchange for a specific sentence, the State has the authority to withdraw from the negotiated plea and demand a trial if the trial court rejects the sentence in favor of one which the State does not consent. Accordingly, because the trial court rejected the State's plea negotiation and reduced the conviction to a lesser charge without giving the State the opportunity to withdraw its consent, the Court reversed the trial court's judgment.