Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 1, 2017

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THIS WEEK:

Motions for New Trial; Presiding Judges

Kuhn v. State, S17A0919 (8/14/17)

Appellant was convicted of murder and related offenses. He contended that the motion for new trial judge erred by denying his request to have the trial judge preside over his motion for new trial hearing. The Court disagreed.

First, the Court noted, the judge who presided over the motion for new trial hearing was originally assigned to appellant's criminal case and presided over his pre-trial immunity hearing, which involved evidence and testimony similar to that presented at trial. Second, appellant's reliance on OCGA § 5-5-43 was also unavailing. The statute clearly authorizes a judge who did not try a case to preside over and decide a motion for new trial. Thus, there was no error.

Remanded Cases; OCGA § 9-11-60 (h)

Walker-Madden v. State, S17A0937 (8/14/17)

In *Walker-Madden v. State*, 299 Ga. 32 (2016), the Court affirmed appellant's convictions for murder and aggravated assault, but remanded the case for resentencing after finding that the trial court erroneously determined that the jury's guilty verdicts for cruelty to children in the first degree and for aggravated battery merged with the malice murder conviction.

On appeal from his re-sentencing, appellant argued that the evidence on the two counts were insufficient to support his convictions. Appellant's counsel urged the Court to clarify whether it is necessary to appeal, on the grounds of the sufficiency of the evidence, the entry of a new sentence entered on remand for resentencing, and stated that the criminal defense bar is in need of direction on this issue. Otherwise, counsel stated, appellate counsel may be vulnerable to a claim of ineffective assistance for failure to exhaust all remedies on direct appeal.

OCGA § 9-11-60 (h) provides that "any ruling by the Supreme Court or the Court of Appeals in a case shall be binding in all subsequent proceedings in that case in the lower court and in the Supreme Court or the Court of Appeals as the case may be." Here, the Court noted, in its previous opinion it concluded that the evidence was legally sufficient to support all of appellant's convictions, which included the two crimes which required resentencing on remand. When, on appeal, the evidence is found to be legally sufficient to support a jury's guilty verdict on all counts, but the case is remanded for resentencing as to one or more of the guilty verdicts, then the sufficiency of the evidence may not be raised on appeal of the resentencing order. In a second appeal after remand for resentencing, a criminal defendant may raise issues relating to the new sentencing order but may not raise issues that were, or could have been, raised in the first appeal

of the case. Thus, because this appeal raised no issues relating to the sentencing order, and raised only an issue which was previously decided, the appeal was dismissed.

Prosecutorial Misconduct; Testifying ADA

Coleman v. State, S17A1129 (8/14/17)

Appellant was convicted of murder and related crimes. He contended that the trial court should have granted him a new trial because one of the assistant district attorneys who prosecuted his case violated Rule 3.7 of the Georgia Rules of Professional Conduct by testifying as a witness at the hearing on his motion for new trial regarding the absence of a deal for co-defendant Hambrick's testimony and then later filing a brief in opposition to appellant's motion.

The record showed that the State called the ADA as a witness to testify regarding appellant's contention that Hambrick had a deal to testify at the time of appellant's trial. The ADA testified that Hambrick was not offered any kind of plea deal until appellant's trial had been completed. Hambrick's own attorney confirmed this testimony, and Hambrick stated, "I didn't say that they were going to give me a deal." Hambrick did testify, however, that he believed that he would get a deal for his cooperation, but there was no evidence that a deal actually existed– a fact confirmed by Hambrick's own attorney.

The Court noted that Rule 3.7 (a) provides, in part, as follows: "A lawyer shall not act as advocate at a trial in which the lawyer is likely to be a necessary witness except where: 1. The testimony relates to an uncontested issue; 2. The testimony relates to the nature and value of legal services rendered in the case; or 3. Disqualification of the lawyer would work substantial hardship on the client." Here, the Court found, there was no violation which would merit a new trial for appellant. The ADA testified only with regard to the existence of a deal for Hambrick's testimony, and this testimony occurred after appellant's jury trial concluded. A lawyer is more likely to be allowed to serve as a witness and an advocate where his or her testimony concerns collateral matters heard outside the main trial, such as rebuttal testimony regarding a deal allegedly made by a prosecutor. Therefore, the Court held, none of the dangers inherent in having an attorney testify in court was present and accordingly, there was no error.

Jury Instructions; Competency Hearings

Booth v. State, S17A0705 (8/14/17)

Appellant was indicted for malice murder, two counts of felony murder, aggravated sodomy, aggravated sexual battery, and aggravated assault. He entered a plea of incompetency, but a special jury found him competent to stand trial. Following a jury trial appellant was acquitted of aggravated sodomy, but found guilty on all other charges.

Appellant argued that the trial court plainly erred by reading the indictment in its charge to the special jury determining his competency to stand trial. Specifically, he argued that the criminal charges and the allegations of how the crimes were committed were irrelevant and prejudicial to the jury's determination of the issue. The Court disagreed.

At issue in a competency proceeding is whether a defendant is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands. Whether a defendant understands the nature and gravity of the charges against him is highly relevant to the competency proceeding. Thus, the Court concluded, because the indictment provided information about the nature and gravity of the charges against him, the trial court made no error in reading the indictment to the special jury where it otherwise properly charged the jury on its duty to determine appellant's competency.

Recanted Testimony; OCGA § 17-1-4

Lewis v. State, S17A1143 (8/14/17)

Appellant was convicted of malice murder and other related crimes in relation to a botched murder-for hire scheme. The evidence, briefly stated, showed that appellant was introduced by Taylor to Clark, a "hit-man." The target of the scheme was appellant's business partner.

Appellant contended that the trial court erred in denying his motion for new trial based on Clark's recanted testimony. At the hearing, appellant introduced a letter allegedly written by Clark from prison and sent to defense counsel two months after trial. The letter essentially stated that Clark made up the story about appellant's involvement in the crimes and that he was sorry about telling lies about appellant, but did so because the State promised it would "go easy" on him if he so testified. Clark testified at the hearing, but refused to answer any questions about the letter despite being ordered to do so.

The Court stated that generally, a recantation of a witness's trial testimony is merely impeaching of the trial testimony and does not establish a convicted defendant's right to a new trial, even if the witness states under oath that his prior trial testimony was false. The witness's original testimony would be admissible against the defendant at any retrial, and that original testimony would have greater credibility than a later recantation. However, the Court stated, there are two exceptions to this rule. First, citing OCGA § 17-1-4, the Court stated that an exception to this rule is created when a trial witness is convicted of perjury with respect to his trial testimony and the trial court concludes that the guilty verdict could not have been obtained without the perjured testimony. Second, citing *Fugitt v. State*, 251 Ga. 451 (1) (1983), there can be no doubt of any kind that the State's witness's testimony in every material part is purest fabrication. The *Fugitt* exception is met when the witness's testimony is shown to be an impossibility, like where a material witness could not possibly have observed the events to which he testified at trial because it was later shown that the witness was incarcerated at the time of those events, and that a party the witness implicated in his testimony was later shown to have been employed out of state at that time. Where, as in *Fugitt*, the post-trial evidence demonstrates that material trial testimony is purest fabrication, it cannot be said that the new evidence establishing the witness's perjury is merely impeaching.

Here, the Court noted, Clark had not been convicted of perjury and Clark's letter did not demonstrate that Clark's testimony was the "purest fabrication." Even if Clark had verified the contents of the letter under oath (which he did not), the evidence would consist only of the witness's recantation that would merely serve to impeach his previous sworn testimony, and not independent evidence that illustrates the impossibility of the

facts to which the witness previously testified. Moreover, significant additional trial evidence affirmed the trial testimony of the witness and supported the verdict. Accordingly, the trial court did not err in denying the motion for new trial on this ground.

Nevertheless, appellant contended that OCGA § 17-1-4, the current Georgia standard for granting a new trial based on recanted testimony, is unconstitutional. The Court again disagreed. The Court noted that in *Burke v. State*, 205 Ga. 656, 659-660 (1949), it rejected the same constitutional challenges that were now asserted by this appellant. In *Burke*, the Court held that OCGA § 17-1-4 (formerly codified at Code 1933 § 110-706) was actually in harmony with United States Supreme Court decisions holding that the due process guaranteed by the Fourteenth Amendment is denied when a conviction is procured by perjured testimony. The statute requires a verdict obtained by perjured testimony to be set aside. The Court noted, however, that when the only evidence of perjury is that a trial witness later gives testimony contrary to that given at trial, the trial court ought not to be called upon to say whether or not one of such statements is enough reliable evidence to authorize disbelief of the other. Instead, the statutory requirement for a perjury conviction to be obtained before a guilty verdict may be vacated "relieves the court of the burden of choosing between contradictory statements and requires evidence which is convincing and which comes from the purest source, to wit, a conviction for perjury." The Court further held that this code section applies to all persons, and therefore does not deny equal protection of the law to anyone. Consequently, the Court rejected the assertion that the provisions of OCGA § 17-1-4 violate a convicted criminal's rights to due process and equal protection of the law.

Crime Lab Reports; Testimonial Hearsay

Thomas v. State, A17A0820 (7/10/17)

Appellant was convicted of trafficking in methamphetamine and three misdemeanor drug offenses. She argued that the trial court erred by allowing a GBI forensic chemist to testify about drug identification tests performed by a different chemist who was not available at trial. The record showed that the chemist who had weighed and performed the drug analysis of the methamphetamine was unavailable to come to court due to a medical emergency. Over appellant's objection, the State presented the testimony of the woman's co-worker, another GBI chemist, who was tendered as an expert in forensic chemistry and drug identification testing. The second chemist stated that while he had neither performed the drug analysis himself nor witnessed the first chemist doing so, he had independently evaluated the data on which her results were based and reached his own conclusion that the substance was 37.24 grams of solid material containing methamphetamine.

Citing *Bullcoming v. New Mexico*, 564 U. S. 647 (131 SCt 2705, 180 LE2d 610) (2011), appellant argued that the admission of the second chemist's testimony violated her right to confront the witnesses against her under the Confrontation Clause. The Court disagreed. The Court noted that Georgia courts have consistently held that the Confrontation Clause does not require the analyst who actually completed the forensic testing used against a defendant to testify at trial. And here, there was evidence that the first chemist was known to be careful in her work, but was unavailable at trial due to circumstances unrelated to her job performance. The second chemist explained the procedures the first chemist had followed, inspected the testing instruments she had used, analyzed the data she had electronically stored, determined that the data appeared to be reliable, reached an independent conclusion concerning the nature of the tested substance, and generated his own report. Given the second chemist's personal, albeit limited, connection to the scientific test at issue, his testimony was not the sort of "surrogate testimony" forbidden by *Bullcoming*. Accordingly, the Court held that appellant's Confrontation Clause rights were not violated.

Kidnapping; Asportation

Floyd v. State, A17A1058 (7/20/17)

Appellant was convicted of two counts of armed robbery, two counts of kidnapping, burglary, and two counts of first degree cruelty to children. He contended that the evidence was insufficient to support his kidnapping convictions. The evidence, briefly stated, showed that appellant entered the house and forced V.Y. upstairs and into her bedroom. When V. Y. screamed to wake her brother, P. Y., in the other bedroom, appellant forced V. Y. into her brother's bedroom. Appellant then took items from the P. Y.'s bedroom and fled.

The Court found the evidence that appellant kidnapped V. Y. to be sufficient. Appellant took V. Y.'s phone at gunpoint and forced her to walk upstairs and into her bedroom, where he demanded that she remove her shirt. He then made her walk to P. Y.'s room, where appellant had P. Y. gather multiple items that appellant then took from the house. In doing so, appellant moved V. Y. from one floor to another and ultimately removed her from her room and had her go into her brother's room, making it substantially easier for appellant to commit armed robbery including forcing P. Y. to gather various items in his room. Therefore, the movement of V. Y. was not merely incidental to any other charged offense, and was sufficient to establish the asportation element of the kidnapping charge.

However, the Court found, the evidence was not sufficient to support appellant's conviction for kidnapping P. Y. Appellant forced P. Y. to stand up from his bed, at gunpoint, and retrieve various items from around the room and place them in a bag for appellant to take; P. Y. was never forced to leave his bedroom. Thus, the evidence showed that the movement simply was incidental to the crime of armed robbery; it did not conceal or isolate P. Y., it did not lessen the risk of detection, and it was not done for the purpose of avoiding apprehension. Thus, the State failed to establish the required element of asportation as to P. Y.