Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 23, 2016

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THIS WEEK:

- Felony Murder; Predicate Offenses
- Habeas Corpus; Ineffective Assistance of Counsel
- Habeas Corpus; Ineffective Assistance of Appellate Counsel
- Motions for New Trial; General Grounds
- Appellate Jurisdiction; Mailbox Rule
- Co-Conspirator Statements; Indicia of Reliability
- Sentencing; Recidivists
- Double Jeopardy
- Criminal Damage to Property; Sufficiency of the Evidence

Felony Murder; Predicate Offenses

Williams v. State, S16A0965 (9/12/16)

Appellant was indicted in connection with the death of an infant for felony murder predicated on the felony offense of contributing to the deprivation of a minor. Specifically, appellant was charged with felony murder "while in the commission of a felony, Contributing to the Deprivation of a Minor, by willfully failing to care for said child so that [he] died from asphyxiation in violation of O.C.G.A. § 16-12-1(b)(3)." Appellant filed a general demurrer with respect to this charge, contending that the offense of contributing to the deprivation of a minor could not serve as the predicate for a felony murder charge because O.C.G.A. § 16-12-1 provides the exclusive scheme of punishment for child deprivation crimes resulting in death. The trial court summarily denied appellant's general demurrer. The Court granted interlocutory review.

The Court found that in looking at the plain language of the felony murder statute and contributing to the deprivation of a minor statute, as well as the fact that the latter statute was passed after the felony murder statute, the felony deprivation statute cannot be used as a predicate offense for felony murder. The clear language of O.C.G.A. § 16-12-1(d.1)(1) & (e) specifically criminalizes the death of a minor resulting from an accused's contribution to the deprivation or delinquency of that child, whereas felony murder criminalizes general felony conduct resulting in death of another. Because the felony deprivation statute specifically criminalizes the actions or inactions of an accused resulting in the death of a child, the general provisions of the earlier enacted felony murder statute are inapplicable to O.C.G.A. § 16-12-1(d.1)(1). Further, because the legislature is presumed to have known the condition of Georgia's felony murder law when it enacted O.C.G.A. § 16-12-1(d.1)(1) & (e), it must be concluded that the General Assembly created the crime of felony deprivation knowing that a violation of that statute would be specifically sentenced pursuant to O.C.G.A. § 16-12-1(e) and therefore not subject to the felony murder sentencing scheme.

Additionally, the Court stated, it has long recognized that the purpose of the felony murder rule is to furnish an added deterrent to the perpetration of felonies which, by their nature or by the attendant circumstances, create a foreseeable risk of death. Here, however, the General Assembly has addressed the "foreseeable risk of death" that could result in the deprivation statute by doing two things. First, the General Assembly added the phrase "resulting in the serious injury or death

of a child" within the felony code section. This portion of the statute requires the State to prove the accused's actions or inactions resulted in the death or serious injury of a child beyond a reasonable doubt in order to obtain a felony conviction. Second, the General Assembly created, and later enacted a specific sentencing scheme for individuals convicted under the felony deprivation statute, including for acts resulting in the serious injury *or death* of a child. Consequently, this offense cannot be used as a predicate for felony murder, because it has a separate and distinct criminal disposition for those who cause the death of another. In fact, the Court found, allowing a crime committed under O.C.G.A. § 16-12-1(d.1)(1) to be a predicate offense where the State charges an accused of felony murder could render the sentencing provision set forth in O.C.G.A. § 16-12-1(e) effectively meaningless, thus forcing judges to impose a life sentence every time a defendant is convicted of a felony under the deprivation statute for conduct resulting in death, as opposed to having the discretion to implement a sentence pursuant to O.C.G.A. § 16-12-1(e) as designated by the General Assembly. The State cannot circumvent the specific sentencing scheme established by the General Assembly in O.C.G.A. § 16-12-1(e) by subsuming it into the felony murder statute in order to take advantage of a harsher sentencing provision. Accordingly, the Court concluded, the trial court should have granted appellant's general demurrer.

Habeas Corpus; Ineffective Assistance of Counsel

Bryson v. Jackson, S16A1023 (9/12/16)

Jackson was convicted of murder and other crimes. Jackson's appellate counsel, who had been appointed after the trial was complete, immediately filed a notice of appeal rather than a motion for new trial. As a result, Jackson became procedurally barred from raising any claim that trial counsel performed deficiently, as those claims were not raised at the earliest practicable moment. Thereafter, Jackson contended in a habeas petition that trial counsel rendered ineffective assistance and that appellate counsel rendered ineffective assistance by failing to preserve the issues for review. The habeas court found that Jackson's appellate counsel performed deficiently by failing to preserve Jackson's claims that trial counsel was ineffective and that Jackson suffered actual prejudice because trial counsel had, in fact, provided ineffective assistance. The Warden appealed and the Court reversed.

Jackson first contended that trial counsel rendered ineffective assistance by failing to present certain *Chandler* evidence during his trial. In *Chandler*, decided under the former Evidence Code of Georgia, the Court created an evidentiary exception to the general rule that evidence of a victim's character is not admissible at trial. Pursuant to this former exception, evidence of specific acts of violence by a victim against third persons could be used where a defendant claims a justification defense, but this could occur only after the defendant satisfied his burden of showing that the *Chandler* evidence was admissible.

But here, the Court found, there was no showing of justification and in the absence of any such evidence Jackson was not entitled to the admission of *Chandler* evidence, and trial counsel was not ineffective for failing to file a motion to present this inadmissible evidence. Moreover, the Court found, the evidence showed that Jackson was the aggressor and as the initial aggressor, Jackson was not entitled to the defense of justification.

Jackson also contended that trial counsel was ineffective for failing to request an instruction on voluntary manslaughter as a lesser included offense of murder. However, the Court found, there was no evidence which would have supported a charge on voluntary manslaughter. Thus, the Court concluded, because trial counsel did not render ineffective assistance in any of the ways claimed by Jackson, Jackson cannot show that he suffered actual prejudice resulting from his appellant counsel's failure to preserve the issue of trial counsel's performance on direct appeal. Accordingly, the Court reversed the grant of the writ of habeas corpus.

Habeas Corpus; Ineffective Assistance of Appellate Counsel

Hooks v. Walley, S16A0660 (9/12/16)

Warden Hooks appealed from the grant of Wally's petition for writ of habeas corpus. The record showed that Walley's pre-trial counsel was allowed to withdraw after pre-trial counsel stated to the court that he did not believe that it was in Walley's best interest to plead guilty, and after Walley told the court that counsel had not conveyed to him any plea offer from the State that included a recommendation that Walley be sentenced to serve five years in prison. However, at the hearing, the State's articulated plea offer included a recommendation that he serve seven years in prison. New counsel then was appointed and Walley was subsequently tried and convicted of aggravated sexual battery and child molestation. Walley's sentence was 20-to-serve-15. Walley's trial counsel withdrew after his conviction. Appellate counsel then raised ineffective assistance, including a claim that pre-trial counsel failed to convey to Walley the plea offer. However, appellate counsel withdrew the plea offer claim. Walley's conviction was affirmed. *Walley v. State*, 298 Ga.App. 483 (2009).

In 2013, Walley filed a petition for writ of habeas corpus alleging that his appellate counsel rendered ineffective assistance by abandoning the claim that his pre-trial counsel rendered ineffective assistance for failing to communicate the plea offer. The habeas court agreed.

The Court stated that trial counsel's failure to convey a plea offer may form the basis of a claim that counsel's performance was deficient so as to satisfy the first prong of the *Strickland* standard and that the failure to raise on appeal a valid claim of ineffective assistance of trial counsel based on the failure to convey a plea offer may constitute ineffective assistance of appellate counsel. However, while part of Walley's burden in the habeas court included showing that trial counsel failed to convey the plea offer, and was ineffective in doing so, those deficiencies alone do not demonstrate that *appellate* counsel was ineffective in failing to pursue a claim based upon trial counsel's performance. And here, the Court found, although the evidence placed before the habeas court may have authorized that court's conclusion that pre-trial counsel rendered ineffective assistance, there was no evidence presented to the habeas court sufficient to overcome the presumption that appellate counsel made an appropriate strategic decision in withdrawing the claim that pre-trial counsel had rendered ineffective assistance of counsel, and without Walley having met his burden to produce such evidence, the habeas court was not authorized to grant the writ. Accordingly, the habeas court erred and the grant of habeas corpus was reversed.

Motions for New Trial; General Grounds

State v. Hamilton, S16A0986 (9/12/16)

Hamilton was convicted of felony murder and other crimes in connection with the shooting death of her ex-husband. The trial court granted Hamilton's motion for new trial on general and other grounds. The State appealed.

The Court found that the evidence was legally sufficient to support Hamilton's convictions under *Jackson v. Virginia*. The State argued that because the evidence was sufficient under *Jackson v. Virginia*, the trial court erred in granting a new trial under O.C.G.A. §§ 5-5-20 and 5-5-21. The Court disagreed. Even when the evidence is legally sufficient to sustain a conviction under the *Jackson v. Virginia* standard, a trial judge may grant a new trial if the verdict of the jury is "contrary to . . . the principles of justice and equity," O.C.G.A. § 5-5-20, or if the verdict is "decidedly and strongly against the weight of the evidence." O.C.G.A. § 5-5-21. When properly raised in a timely motion, these grounds for a new trial – commonly known as the "general grounds" – require the trial judge to exercise a broad discretion to sit as a "thirteenth juror." In exercising that discretion, the trial judge must consider some of the things that she cannot when assessing the legal sufficiency of the evidence, including any conflicts in the evidence, the credibility of witnesses, and the weight of the evidence. Although the discretion of a trial judge to award a new trial on the general grounds is not boundless – it is, after all, a discretion that should be exercised with caution and invoked only in exceptional cases in which the evidence preponderates heavily against the verdict – it nevertheless is, generally speaking, a substantial discretion.

Here, the Court noted, the trial court explained that after it carefully reviewed the trial transcript and exhibits and "considered the conflicts in the evidence, the credibility of the witnesses, and the weight of their testimony," it had concluded that the jury's guilty verdicts were "decidedly and strongly against the weight of the evidence" and "contrary to the principles of justice and equity." The court therefore exercised its discretion to grant a new trial. Accordingly, the Court held, it could not say that the trial court's conclusion was an abuse of the trial court's substantial discretion to act as the "thirteenth juror" in the case. Nevertheless, because the evidence was legally sufficient, the State may retry Hamilton. But, the Court cautioned, it "should proceed with dispatch, given that Hamilton has already served more than five years in prison."

Appellate Jurisdiction; Mailbox Rule

Waller v. State, S16A0788 (9/12/16)

Appellant was convicted of murder in May, 2010. His trial counsel filed a timely motion for new trial (MFNT) and his appellate counsel filed an amended MFNT. At the hearing, appellant elected to represent himself and was given additional time to file a supplemental MFNT. The supplement was filed in October and denied Nov. 21, 2013. Appellant's pro se notice of appeal was post-marked December 20, but not file-stamped until December 26, 2013. The Supreme Court dismissed his appeal as untimely. Thereafter, appellant filed a motion for an out-of-time appeal, which the trial court denied.

Appellant contended that his right to a direct appeal was frustrated because O.C.G.A. § 5-6-38(a) entitles him to 30 days to file his notice of appeal, but he was given only 24 days because he did not receive the order denying his MFNT until November 27, 2013. Specifically, he argues that the "mailbox rule" makes his notice of appeal timely. The Court disagreed.

First, the Court stated, the 30-day time frame provided in O.C.G.A. § 5-6-38(a) is triggered by the "entry" of the judgment sought to be appealed, and the filing with the clerk of a judgment, signed by the judge, constitutes the entry of a judgment. Second, the "mailbox rule" of *Massaline v. Williams* does not apply outside the attempted appeal of a final order by a pro se inmate in a habeas corpus case. And here, the Court found, appellant failed to demonstrate in this appeal that his direct appeal of right of his convictions and sentences was lost due to the professional deficiency of any attorney. On the contrary, the record showed that appellant attempted a pro se direct appeal, but it was dismissed as untimely, and rightly so. Accordingly, appellant failed to show an abuse of discretion in the trial court's denial of his motion for an out-of-time appeal.

Co-Conspirator Statements; Indicia of Reliability

McClendon v. State, S16A0699, S16A0700 (9/12/16)

Appellants McClendon and Burks were jointly tried and convicted of malice murder and related offenses. The evidence showed that appellants shot the victim in retaliation after the victim robbed a prostitute. At trial, a witness to the shooting testified that while in jail on unrelated drug charges, he had been approached by another jail inmate, who admitted that he, along with Burks, had shot the victim in retaliation for the robbery. Thereafter, Green identified McClendon from a photographic lineup as the person who had made this jailhouse statement.

Burk contended that the trial court erred by admitting the hearsay statements of co-defendant McClendon at trial in violation of his Sixth Amendment right to confrontation. Specifically, that the trial court erred because the State failed to show the required indicia of reliability as established in *Copeland v. State*, 266 Ga. 664 (1996), and *Dutton v. Evans*, 400 U.S. 74 (91 S.Ct. 210, 27 L.E.2d 213) (1970). The Court disagreed.

The Court stated that the *Dutton* paradigm is no longer applicable in light of *Crawford v. Washington*, 541 U.S. 36, 68-69 (124 S.Ct. 1354, 158 L.E.2d 177) (2004), which held that the Confrontation Clause applies only to out-of-court statements that are *testimonia*l in nature. In *Crawford*, the United States Supreme Court overturned the "indicia of reliability" test as laid out in *Ohio v. Roberts*, 448 U. S. 56 (100 S.Ct. 2531, 65 L.E.2d 597) (1980), holding that a Confrontation Clause violation occurs when a declarant is unavailable to be called as a witness, was not previously subject to cross-examination, and when the statements to be introduced at trial are "testimonial" in nature. Thus, the question of whether hearsay evidence violates the Confrontation Clause turns, not on indicia of reliability, but rather on whether the hearsay statement is testimonial. Citing *McKinney v. State*, 281 Ga. 92, 95 (4) (2006), the Court stated that statements properly admitted pursuant to the co-conspirator hearsay exception do not qualify as "testimonial" statements which implicate Sixth Amendment protections. Thus, the statements made by McClendon and testified to by Green were not testimonial and therefore did not

violate the Confrontation Clause. Further, "the "indicia of reliability test" established by this Court in *Copeland* is no longer good law. We therefore disapprove of *Copeland* and its progeny in this regard."

Sentencing; Recidivists

Ingram v. State, A16A1221 (8/23/16)

Appellant appealed after the trial court denied his motion to withdraw his guilty plea based on ineffective assistance of counsel. The record showed that appellant was indicted for three counts of violating the Georgia Street Gang Terrorism and Prevention Act, trafficking in cocaine, and possession of a firearm by a convicted felon. The State filed a notice of intent to offer evidence in aggravation of punishment and a recidivist notice, which provided that appellant faced "a sentence of 75 years to serve with no parole." In exchange for appellant agreeing to enter a non-negotiated plea to three counts of the indictment, appellant's counsel got the State to agree to remove the recidivism component and to cap its recommended sentence at 40 years, to serve 20. Appellant's counsel asked for a sentence of 20 years, to serve 10. The trial court sentenced him to 35 years, 20 in confinement and the remainder on probation.

Appellant contended that his plea counsel performed deficiently when counsel erroneously informed him that he was subject to treatment as a recidivist and that this deficient performance prejudiced him by inducing him to waive his right to trial and enter a guilty plea. The Court agreed. The State listed three prior felony "convictions" in its recidivist notice, but appellant pled guilty and obtained first offender treatment for one of the listed offenses. A first offender's guilty plea does not constitute a "conviction" as that term is defined in the Criminal Code of Georgia. Thus, appellant would not have been subject to recidivist treatment and his plea counsel's advice in this regard was erroneous. Furthermore, because it affirmatively misinformed appellant about parole eligibility, it satisfied the first prong of the *Strickland v. Washington* test.

As to prejudice, it was undisputed that the defense strategy was based on the removal of the recidivist component - it was the goal of appellant's counsel's discussions with the State and the basis for appellant's willingness to enter a non-negotiated plea. Thus, there was a reasonable probability that, absent counsel's erroneous advice that the plea would be in appellant's best interest because he would otherwise be subject to recidivist treatment, appellant would not have entered the guilty plea. Therefore, the Court concluded, appellant received ineffective assistance of counsel. Consequently, the trial court erred in denying his motion to withdraw his guilty plea. In so holding, the Court noted that the State conceded that appellant's counsel was ineffective and likely prejudiced him and did not contest his appeal.

Double Jeopardy

State v. Davis, A16A1156 (9/7/16)

Two months after Davis pled guilty to 25 counts of sexual exploitation of children, he was charged in a second indictment with one count of sexual exploitation of children and two counts of child molestation. Davis filed a plea in bar, asserting that his prior guilty plea precluded prosecution for these additional counts, and the trial court granted the motion. The State appealed and the Court reversed.

The State argued that the trial court erred by granting Davis's double jeopardy plea in bar as to the child molestation charges because these crimes did not arise from the same conduct alleged in the first indictment. The Court stated that under O.C.G.A. § 16-1-7(b), if several crimes (1) arising from the same conduct are (2) known to the proper prosecuting officer at the time of commencing the prosecution and are (3) within the jurisdiction of a single court, they must be prosecuted in a single prosecution. A second prosecution is barred under O.C.G.A. § 16-1-8(b)(1) if it is for crimes which should have been brought in the first prosecution under O.C.G.A. § 16-1-7(b). In order for this procedural aspect of double jeopardy to prohibit a prosecution, all three prongs must be satisfied. Crimes arise from the same conduct if they emerge from the same transaction or continuing course of conduct, occur at the same scene, occur on the same date, and occur without a break in the action.

Here, the Court found, the initial 2014 indictment charged Davis with 25 counts of sexual exploitation of children in violation of O.C.G.A. § 16-12-100(b). The State clarified, however, that each of those 25 counts was for possession of child pornography, which crimes are prohibited under O.C.G.A. § 16-12-100(b)(8), which provides that "[i]t is unlawful for any person knowingly to possess or control any material which depicts a minor or a portion of a minor's body engaged in any sexually explicit conduct." In Counts 2 and 3 of the second 2015 indictment, the State charged Davis with child molestation in violation of O.C.G.A. § 16-6-4(a). Count 2 charged him with transmitting by cell phone images of a person engaging in an immoral act (a video of a woman performing oral sex on a man) to a child under the age of 16; Count 3 charged him with actually fondling the child's buttocks. The Court stated that possession of material depicting a minor engaged in sexual conduct is vastly different conduct from actually transmitting pornography to a child or fondling a child's buttocks. And, although the evidence supporting the charges in both indictments was seized on the same date, the charges were entirely separate and did not involve a continuing course of conduct nor did they occur without a break in the action. Furthermore, the State can establish each set of offenses without proving the other. Accordingly, the Court concluded, the charges in the first and second indictments did not arise from the same conduct, and the trial court erred by granting Davis's plea in bar.

Criminal Damage to Property; Sufficiency of the Evidence

Frey v. State, A16A0829 (9/8/16)

Appellant was convicted of arson, criminal damage in the second degree to a jeep, and assault. He contended that the evidence of criminal damage to property in the second degree was insufficient because the State failed to prove that damage to the Jeep exceeded $500. The Court agreed and reversed.

O.C.G.A. § 16-7-23(a)(1) provides that "[a] person commits the offense of criminal damage to property in the second degree when he: (1) Intentionally damages any property of another person without his consent and the damage thereto exceeds $500.00." Although the indictment alleged that appellant had damaged a Jeep, the victim testified that appellant also damaged her GMC pickup truck. After the court prohibited the State from introducing evidence regarding damage

to the GMC, the prosecutor asked about damages as follows: "Q: And is the damage he caused more than $500? A: Yes. It was $300 to get the windshields put in and the side glass in the Jeep and we couldn't afford to get the camper part of the truck fixed. Q: Was there also damage done to the body of the vehicle? A: Yes, sir. The mirrors were knocked out and there was (inaudible)."

The Court noted that in response to the first question, whether she agreed the damage exceeded $500, the victim clearly testified about both the Jeep and the truck. While discussing the $300 amount of damages, she did so in reference to more than one windshield, which suggested she was talking about the front glass in both vehicles. Her later reference to the Jeep's "side glass" confirmed this conclusion. Thus, the State failed to show that the $300 was spent only on the Jeep. And even construing the second question as pertaining only to the Jeep, the victim failed to place a monetary value on the cost of replacing the mirrors. Thus, the State failed to prove that appellant caused at least $500 of damage to the Jeep as charged in the indictment and therefore failed to prove that appellant committed criminal damage to personal property in the second degree with regard to the Jeep. Thus, his conviction for this crime was reversed.