

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 29, 2017

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THIS WEEK:

- **Interlocutory Appeals; Search & Seizure**
- **Rule of Completeness; Explaining Conduct**
- **Habeas Corpus; Procedural Default**
- **First Offender Status; Sentencing**
- **Impeachment; Prior Convictions**
- **Voir Dire; Sentencing**

Interlocutory Appeals; Search & Seizure

Hourin v. State, S17A0962 (8/28/17)

Appellant, the non-physician owner of a medical clinic, was charged with one count of conspiracy to commit the offense of unauthorized distribution and dispensation of controlled substances in violation of OCGA § 16-13-42. The record showed a visiting judge heard appellant's motion to suppress. After the visiting judge denied the motion, appellant asked for a certificate of immediate review. The visiting judge declined to make the determination, leaving it to the assigned judge. The assigned judge then granted the certificate of immediate review.

The Court noted that it is incumbent upon itself to inquire into its own jurisdiction even when not contested by the parties and noted that the Court has not previously decided whether a judge who signs a certificate of review of an order issued by a different judge of the same court nevertheless constitutes "the trial judge" under OCGA § 5-6-34 (b). Under the facts of this case, the Court found the answer is yes. The assigned judge presumably will preside over any trial on this case. In is-

suing the underlying orders, the visiting judge essentially was acting in the assigned judge's stead as a matter of assisting the court. By the time the certificate of immediate review had issued, the visiting judge's assignment order had expired, and the assigned judge was the judge handling the case when she signed the certificate. Thus, the assigned judge was "the trial judge" at the time she signed the certificate of immediate review.

Appellant argued that the trial court erred in denying his motion to suppress the evidence seized in a search of the clinic. He offered two bases for that argument: (1) the warrant pursuant to which the search was conducted was overly broad and authorized a general exploratory search of a medical practice; and (2) the warrant was executed illegally because officers failed to knock and announce their presence prior to commencing the search as required by OCGA § 17-5-27. Although the State contended that appellant waived his arguments regarding the improper execution and the overly broad nature of the search warrant by failing to raise those arguments in his motion to suppress, the Court found that appellant raised them at the motions hearing, and the State did not then object on lack of notice. Thus, the State could not now complain about lack of notice for the first time on appeal.

As to the first argument of appellant, the Court stated that a search conducted pursuant to a search warrant, regular and proper on its face, is presumed to be valid and the burden is on the person who moves to suppress the items found to show that the search warrant was invalid. In evaluating the particularity of a warrant's description, the Court must determine whether the description is sufficient to enable a

prudent officer executing the warrant to locate it definitely and with reasonable certainty. The degree of the description's specificity is flexible and will vary with the circumstances involved.

And here, the Court found, the warrant limited many of the records to be seized to those pertaining to a list of particular patients provided to the attesting agent by a medical assistant with the clinic, who said these patients had been seen by a nurse practitioner using an otherwise blank prescription pad pre-signed by a doctor. Certain documents listed, such as “financial documents,” although not limited to the care of certain patients, were limited by the clause “related to patient care and medical payments.” Other business records, such as sign-in sheets, were specifically described. Thus, the Court found, the authority of the officers to search for the records in question was sufficiently limited.

Appellant also argued that the search warrant was illegally executed because the officers did not comply with Georgia's statutory requirements under OCGA § 17-5-27 that officers knock and announce their presence before forcibly entering a building. The trial court found that officers entered the back part of the office through a closed door in the waiting room at the same time that another officer approached the receptionist and showed her the warrant. The Court noted that the trial court's finding that these events occurred simultaneously was consistent with video evidence. But even under that factual finding, the agent's approach to the receptionist would not satisfy the prerequisite to the use of force set forth in the statute because the officers did not allow any time at all for a response before entering the back portion of the building. The plain text of OCGA § 17-5-27 requires an officer to announce his or her presence (or make a good faith effort to do so) and wait for some sort of response *before* the officer uses force to effect an entry into a building or part of a building. Therefore, trial court erred in concluding that an announcement simultaneous with entry satisfied this statutory requirement.

Accordingly, the Court remanded the case to the trial court to consider other issues raised in the motion to suppress and the State's response. First, citing *State v. Smith*, 219 Ga. App. 905, 905 (1996), whether the officers in fact used “force” in entering the back door. Second, whether exigent circumstances excused compliance with OCGA § 17-5-27.

Rule of Completeness; Explaining Conduct

Jackson v. State, S17A1128 (8/28/17)

Appellant was convicted of murder. He contended that the State's introduction of a partial recording of a phone call that he made to his mother violated the Rule of Completeness. The evidence showed that appellant called his mother from jail, and near the beginning of the phone call, he told his mother that he would not plead guilty because he had not done anything wrong. Later in the phone call, they discussed Stewart, an eye-witness, and appellant told his mother to encourage Stewart to stay “out of sight, out of mind” while police investigators were looking for him. The State was permitted to play for the jury a recording of the phone call that only included the portion of the call in which appellant discussed Stewart (and that excluded other portions of the call, including where appellant claimed to his mother that he had not done anything wrong).

The Court stated that the Rule of Completeness prevents parties from misleading the jury by presenting portions of statements out of context, but it does not make admissible parts of a statement that are irrelevant to the parts of the statement introduced into evidence by the opposing party. Here, the portion of the phone call in which appellant told his mother about a potential plea offer (and in which he denied having done anything wrong) was unrelated to the later conversation about Stewart (and separated by conversations about a potential alibi and family issues involving appellant's father). The discussion about a plea was not necessary in fairness to be considered as part of the later discussion about Stewart because it did not qualify, explain, or place into context the appellant's request that his mother encourage Stewart to remain unavailable to investigators. Therefore, the Court concluded, the trial court did not err when it allowed the State to play only the portion of the phone call in which the appellant discussed Stewart.

Appellant also argued that the trial court erred when it allowed the lead investigator to testify on redirect about what another investigator told him. In response to the appellant's hearsay objection, the trial court ruled that the testimony — in which the lead investigator passed along the other investigator's conclusion

that a certain eyewitness “did not see anything of evidentiary value” — was admissible to explain why the lead investigator did not follow up with that eyewitness.

The Court noted that an investigating officer may not testify about what others told him during his investigation merely under the guise of explaining the officer's conduct. But here, a central tenet of the appellant's defense was his claim that the lead investigator had inadequately performed his duties, and it was appellant who brought up the subject of the eyewitness when he asked the investigator on cross-examination if he “did any further investigation” related to this eyewitness. And, the Court noted, the lead investigator's acknowledgment that he did not follow up with the eyewitness allowed appellant to return to this subject in his closing argument, when he reviewed the numerous alleged failings of the lead investigator, including his failure to follow up with the eyewitness at issue. Thus, the Court found, given that the conduct of the lead investigator was a material issue in the case, the trial court did not err when it concluded that the lead investigator could report on what the other investigator told him (that the eyewitness had not seen “anything of evidentiary value”) to explain on redirect why he chose not to follow up with the eyewitness.

Habeas Corpus; Procedural Default

State v. Butler, S17A0891 (8/28/17)

The State appealed from the grant of Butler's petition for writ of habeas corpus based on ineffective assistance of plea counsel. The record, briefly stated, showed that in January, 2011, Butler, with the assistance of a public defender, pled to aggravated assault pursuant to the First Offender Act and was sentenced to 8 years to serve 18 months. Several hearings ensued with reference to Butler's motion to withdraw or amend the plea, at which he was represented at different times by privately retained counsel and by the public defender's office. That motion was ultimately denied. On March 16, 2012, and through various hearings, Butler was represented by a third attorney, also a public defender. Ultimately, Butler, still with the assistance of this third attorney, had his First Offender status revoked and he was resentenced. In January, 2015, Butler retained a fourth attorney, who filed on his behalf a

“Motion to Seek Clarification of Order and Final Disposition Felony Sentence with Probation” and a “Motion for Reconsideration.” The trial court then resentenced him to 20 years to serve 6. Butler thereafter filed a pro se petition for writ of habeas corpus based on ineffective assistance which the court granted.

The Court stated that in order to avoid a waiver of a claim of ineffective assistance against trial counsel, the claim must be raised at the earliest practicable moment, and that moment is before appeal if the opportunity to do so is available. The pre-appeal opportunity is “available” when the convicted defendant is no longer represented by the attorney who represented him at trial. Here, the Court found, Butler’s “previous counsel” was not his third attorney, the public defender who represented him at the March 16, 2012 hearing and subsequent hearings, including the revocation hearing on April 21, 2014. Rather, “previous counsel” was his fourth, privately retained attorney, who filed the motion to seek clarification and the motion for reconsideration on Butler’s behalf in the trial court after entry of the revocation order, and failed to assert any claim of ineffective assistance. That attorney having failed to raise allegations of ineffective assistance at the first possible stage of post-conviction review, those claims were barred. Therefore, the Court concluded, the habeas court erred in granting habeas relief on this basis, and it therefore reversed.

First Offender Status; Sentencing

Williams v. State, S17A0954 (8/28/17)

Appellant was convicted of malice murder and related offenses in connection with the death of Lomax, with whom appellant had a tumultuous and violent years-long on-again, off-again romantic relationship. The jury heard numerous accounts of violent incidents between the parties; one such account came from James Ryan, a close friend of Lomax. Ryan testified without objection that in 2008, appellant attacked Lomax with a hammer and choked her. The jury learned that the attack left Lomax in the hospital and that appellant was later arrested as a result of the incident. During cross-examination, defense counsel elicited testimony from Ryan that Lomax had “requested that the charges be dismissed.” In response, the State successfully moved the trial

court to admit a certified copy of appellant’s first offender plea to the charges arising out of the incident, namely aggravated assault and battery. Appellant argued that the certified copy of the first offender plea was inadmissible because it was not a “conviction.”

However, the Court stated, a first offender plea is not per se inadmissible as impeachment evidence. Indeed, a first offender record is admissible as impeachment evidence to disprove or contradict facts so that a jury is not misled by false or deceiving testimony. Thus, under the doctrine of impeachment by contradiction, even evidence that would be inadmissible if offered to impeach the defendant’s character may be admissible to impeach the veracity of a witness, and a witness may be impeached on a collateral issue which is only indirectly material to the issue in the case.

Here, the Court found, the State was not using the first offender plea record as evidence of the defendant’s character or to impeach the defendant on general credibility grounds. Instead, the State sought to utilize the first offender plea record to challenge the veracity of Ryan’s testimony, namely the alleged implication that the 2008 charges had been dismissed. Because the State was attempting to impeach Ryan by contradiction, it is immaterial that the first offender plea does not constitute a conviction. And the Court found, although it was unclear whether Ryan’s testimony that the victim requested that the charges be dismissed was contradicted by the first offender plea record that was adduced by the State, even if the trial court abused its discretion in admitting the plea record, the ruling did not rise to the level of reversible error, given the extensive testimony concerning incidents in which Williams had assaulted Lomax, and the jury was aware that Williams had been arrested in connection with the 2008 incident.

However, the Court found, the Court erred in sentencing appellant. It was undisputed that the trial court utilized first offender pleas to sentence appellant as a recidivist under OCGA § 17-10-7 (c). Thus, the Court agreed with appellant that the trial court erred in this respect because first offender pleas are not a “conviction” as understood in the criminal code and, therefore, cannot be used as a conviction for recidivist sentencing purposes. Accordingly, the Court vacated appellant’s sentence and remanded for resentencing.

Impeachment; Prior Convictions

Stroud v. State, S17A0709 (8/28/17)

Appellant was convicted of murder and related offenses. He contended that the trial court erred in admitting evidence of his prior convictions. The Court disagreed.

The record showed prior to taking the stand, the trial court ruled that appellant’s two prior theft by receiving convictions were admissible as impeachment evidence, but not his prior two theft-by-taking convictions. Appellant then admitted on direct he had two theft-by-receiving convictions and later stated that “I’m a good person, I’m not a bad person.” The State was then allowed to cross-examine appellant on his two theft-by-taking convictions because appellant “opened the door” with his comment about his character.

The Court first found that appellant acquiesced in the admission of all four convictions. But even assuming he did not, the trial court did not err in admitting the prior theft-by-receiving convictions because this evidence was admissible under former OCGA § 24-9-84.1 (a) (2). Thus, the Court noted, the trial court agreed with the State’s contention that, given appellant’s reliance on his claim of self-defense and the absence of any eyewitnesses to the fatal altercation, appellant’s credibility was of central importance in the case. Because the crime of theft implicates a perpetrator’s honesty, the court did not abuse its discretion in making the initial determination that the two theft-by-receiving convictions — the most recent of the four — were admissible as bearing on appellant’s credibility as a witness.

Further, the Court found, regarding the remaining two convictions, the Court assumed that appellant’s remark that he was “a good person” did not open the door to the admission of these convictions under former OCGA § 24-9-20 (b). But even if evidence of the additional two prior convictions was not properly admitted, any error in this regard was harmless. The jury was already aware of appellant’s two theft-by-receiving convictions, which had occurred more recently in time than the theft-by-taking convictions, and thus was fully aware of his status as a recent, repeat felon. The incremental impact on appellant’s standing in the jury’s eyes introduced by evidence of two additional, less recent convictions for crimes of similar severity made

it highly probable that this evidence did not contribute to the verdict.

Voir Dire; Sentencing

Edwards v. State, S17A0929 (8/28/17)

Appellant was convicted of malice murder and other crimes related to the death of his 13-month old child. The evidence, briefly stated, showed that appellant was observed by A. B. holding onto something tied around the 13-month-old victim's neck and swinging the child like a "rag doll." Appellant swung the victim around for 30 to 45 seconds. A medical examiner testified that the victim's cause of death was blunt force head trauma evidenced by retinal hemorrhages, a swollen brain, subdural hemorrhages, and two skull fractures caused by at least two forceful impacts to the child's head.

Pursuant to *Georgia v. McCollum*, 505 U.S. 42 (112 SCt 2348, 120 LE2d 33) (1992), the State challenged appellant's peremptory strikes against Jurors 45, 57, 59, 68, 70, and 73. Appellant argued that the trial court erred in evaluating the State's motion because the court improperly combined steps two and three of the three-part *McCollum* evaluation, which impermissibly shifted the burden of persuasion. The Court disagreed.

The Court noted that under *McCollum*, the trial court must engage in a three-step process to determine if the defendant's peremptory challenges were used in a racially discriminatory manner. The opponent of a peremptory challenge must make a prima facie showing of racial discrimination; the burden of production shifts to the proponent of the strike to give a race-neutral reason for the strike; the trial court then decides whether the opponent of the strike has proven discriminatory intent. Although the burden of production shifts to the defendant if the State makes a prima facie case, the ultimate burden of persuasion as to discriminatory intent rests with — and never shifts from — the State.

The Court determined that after the trial court found that the State made a prima facie case of racial discrimination, the court asked appellant to explain his reasons for the strikes. Following appellant's race-neutral reasons, the trial court asked the State for additional argument, implicitly indicating it was moving to step three. The State did not challenge appellant's reasons for striking Juror

68 but argued that his reasons for striking the other jurors were pretextual. The trial court then gave appellant one final opportunity to make an argument, saying "at this point in time, the burden is on you. You get the final word." The Court noted that by reading this last statement in isolation, it could appear as though the court placed the ultimate burden of persuasion on appellant. But when properly read in context, the trial court suggested to appellant that it was tentatively persuaded by the State's argument and was giving him one final opportunity to convince the court to accept his reasons for using his peremptory strikes. Appellant gave additional arguments before the court sustained the State's motion as to Jurors 45, 57, 59, 70, and 73 and denied the motion as to Juror 68. The fact that the trial court used the term "race neutral" in its ultimate findings — a term generally used in connection with the second *McCollum* step — did not alter the conclusion that the court properly conducted the *McCollum* inquiry in considering appellant's peremptory strikes. In so holding, the Court also rejected appellant's suggestion that the Court presume error because the trial judge was previously reversed in a different case for failing to apply *McCollum* properly. The Court stated that it does not presume error simply because a judge erred in a previous case. Instead, the Court noted, absent evidence of error, it presumes trial courts follow the law.

Appellant contended that the aggravated assault conviction should have merged with the malice murder conviction. The Court again disagreed. The Court noted that separate convictions for the malice murder and aggravated assault of a single victim are authorized where the evidence shows that the defendant committed an aggravated assault independent of the act that caused the victim's death. To authorize a separate conviction, there must be a "deliberate interval" separating the infliction of an initial non-fatal injury from the infliction of a subsequent fatal injury. In the absence of some evidence of a deliberate interval, the aggravated assault conviction must be vacated.

Here, the Court found that the evidence did not require merger. The medical examiner stated that the external injuries on the victim's neck, which were correlated to having been swung around the neck, did not have any associated internal injuries and thus did not contribute to his death, which was caused by

forceful impacts to the head. A.B. testified that once appellant stopped swinging the victim, he put the child on the floor and went to sit at a nearby desk. A.B.'s testimony about the victim's condition at this point was ambiguous, as A.B. testified that the victim was sitting up at that point but also that the victim was flat on the floor. The evidence that the victim was sitting up was some evidence of a "deliberate interval" between the non-fatal injuries inflicted by the aggravated assault and the fatal blows to the victim's head that caused his death, because the medical examiner testified that the victim would not have been able to keep his head up after sustaining the deadly blows to the head.