



Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, November 6, 2018

10:00 A.M. Session

IN THE INTEREST OF C.H. ET AL, CHILDREN (S18G0322)

The State is appealing a Georgia Court of Appeals ruling that reversed a **Coweta County** juvenile court order removing three children from their parents for failing to clean up their drug and alcohol use as a condition for maintaining custody. The intermediate appellate court ruled that the juvenile court denied the parents' constitutional right to legal counsel during a critical hearing, rendering the removal order void.

FACTS: The Department of Family and Children Services was first contacted in January 2015 after a 10-year-old boy, identified as "C.H.," called police during an altercation between his mother and father. There were two other children in the house – a 5-year-old and a 1-year-old. The boy said he was afraid of his father, and police subsequently arrested the father and charged him with interference with a 911 call. When arrested, the father "smelled of a strong odor of alcohol" and admitted to having consumed eight beers. C.H. also described seeing drugs in the home, and both the father and the mother's sister confirmed that the mother abused drugs. The Department issued a "safety plan" to the family in an effort to prevent having to put the children in foster care. Six months later, however, after unsuccessfully trying to schedule multiple family meetings, the Department filed a petition with the juvenile court declaring the

children were “dependent” – a term that under state law means the children were abused or neglected and were in need of the court’s protection.

In August 2015, following a hearing, the juvenile court issued an order finding the children were “dependent” and outlined what the court called a “protective order” that required the parents to cooperate with the child welfare department, undergo any assessment and services the department deemed necessary, and submit to drug and alcohol screens. The parents consented to the court’s finding that their children were “dependent,” and the court issued an order allowing the children to remain in their custody as long as they complied with the protective order. But according to the child welfare department and the juvenile judge, they did not. During urine drug screens, the father tested positive for alcohol and the mother’s urine was found to have been diluted. In late July 2015, hair follicle drug screens showed the father tested positive for marijuana and the mother tested positive for methamphetamines and marijuana.

On January 14, 2016, the parents’ lawyer filed a motion to withdraw from representing the couple due to their “inability to follow legal advice.” On Jan. 20, 2016, the juvenile court held a judicial review hearing where the parents were present, along with the lawyer who had filed a motion to withdraw from the case. At the hearing, the lawyer explained to the judge that she did not believe she could ethically represent both parents. The father advised the judge he had hired another attorney the day before who had instructed the parents to get the Jan. 20 hearing postponed. The Department of Family and Children Services objected to a continuance due to the parents’ ongoing failure to comply with the protective order, and the juvenile judge refused to grant a continuance. Following a discussion involving the judge, the parents, the department’s lawyer, and a department case worker regarding the mother’s failure to enter residential substance abuse treatment, the children’s numerous absences from school, and the failure of the children’s maternal grandmother to move into the home to take care for the children, the juvenile court ruled that the children should be transferred to the child welfare department’s custody due to the parents’ failure to comply with the terms of the protective order. The juvenile judge noted he would schedule another judicial review hearing six days later to obtain an update on the children’s well-being and the mother’s progress in getting drug treatment.

Following the Jan. 20 hearing, the parents fled the state with the children, and the juvenile court issued warrants for the parents’ arrest for interfering with custody. The Coweta County superior court also issued warrants for their arrest. The following month, the parents were arrested in Alabama and brought back to Georgia where they were each indicted on three felony counts of interstate interference with custody. The father was also charged with felony theft by conversion. The juvenile court appointed the mother and father separate legal counsel to represent them in subsequent juvenile court hearings and in their criminal cases.

After several more hearings about the parents’ progress in dealing with their alcohol and drug addictions, in October 2016, the juvenile court ordered the return of the children to their parents’ custody after finding that the parents had substantially complied with their reunification case plan.

In September 2016, the parents filed in juvenile court a “Motion to Set Aside Null and Void Orders,” which the juvenile court denied. The parents then appealed to the Georgia Court of Appeals. In its opinion, the intermediate appellate court reversed the juvenile court’s ruling, finding that the parents’ right to due process had been violated because they had not been represented by counsel at the Jan. 20, 2016 hearing when the court transferred custody of their

children to the State. “We agree with the parents’ view that this ‘case is about much more than its individual facts,” the opinion says. “It is about the American legal system, about what our state and country require for every person brought before a court: fairness, respect, and a judicial system that should protect its citizens....” The State, represented by the Attorney General’s office, now appeals to the Georgia Supreme Court.

ARGUMENTS: The State argues the Court of Appeals erred on a number of fronts, including by failing to dismiss the parents’ appeal as moot. The Georgia Supreme Court has previously held that “any issues involving a dependency action are moot when, as here, a juvenile court returns custody of children to the parents and closes the dependency action.” Here, the parents regained custody months before they filed this appeal. Second, Georgia Code § 15-11-32 authorizes the juvenile court to modify its prior conditional custody order to protect children already determined to be dependent without first hearing sworn testimony and admitting evidence, the State argues in briefs. The Court of Appeals unduly restricted the power of the juvenile court to amend its orders as authorized under § 15-11-32. The General Assembly’s paramount concern in dependency proceedings is “the health, safety, and best interests of a child,” and it provides the juvenile court with critical powers to further the legislative intent that should not be limited as the Court of Appeals requires in its opinion. Also, parents, as civil litigants, do not enjoy a categorical constitutional right to counsel, even where they are facing termination of their parental rights, the State contends. And the Court of Appeals erred in stating that the parents had a constitutional right to counsel at the Jan. 20, 2016 judicial review. With its ruling, the Court of Appeals has created a “novel constitutional right to counsel” in dependency proceedings that already has been rejected. If allowed to stand, any irregularity raised by parents, no matter how inconsequential, can serve as the basis for undermining any juvenile court order, even those clearly necessary to further the best interests of children and protect them from harm, the State contends. By stating in its opinion that this case “is about much more than its individual facts,” the Court of Appeals made it clear that it was not limiting its holding to the facts of this case. The appellate court’s conclusion that the juvenile court’s order was void elevates the rights of parents over all other parties, including the children. While preservation of the parent-child relationship has been repeatedly recognized, it is not the only interest to be considered. The state’s new Juvenile Code states that the “paramount child welfare policy of this state is to determine and ensure the best interests of its children,” a focus that was lacking in the previous Juvenile Code. The General Assembly clearly did not intend to elevate the parents’ right to due process above that of the child, and the Court of Appeals never considered the impact its decision might have on the children, one of whom reported his father to law enforcement due to his fear of his father, the State argues.

The parents’ attorneys argue that the General Assembly did not intend for a juvenile court to seize children in violation of cherished due process rights. “The juvenile court’s actions were an egregious violation of Mr. and Mrs. Henderson’s most basic procedural rights: their right to counsel, notice and an opportunity to be heard, proceedings conducted under sworn oath, and confrontation of their accusers,” the attorneys argue in briefs. Those fundamental rights of the parents were violated at the Jan. 20, 2016 hearing, rendering the court’s judgment null and void. The Department of Family and Children Services filed a dependency petition and sought only a protective order, not removal of the children from their parents’ custody. They did not receive notice that the department was seeking custody until the middle of the Jan. 20 judicial review. A

juvenile court's modification of an order must comport with a parent's statutory and constitutional due process rights, the parents' attorneys contend. Seizing a child from parental custody requires clear and convincing evidence of dependency and parental unfitness at the time of the transfer order and cannot be based on an earlier dependency finding. The Court of Appeals did not create a new constitutional right; instead its analysis was based on the statutory right to counsel in dependency proceedings under Georgia Code § 15-11-103, which guarantees that a party "shall have the right to an attorney at all stages of the proceedings" and "shall be given the opportunity to obtain and employ an attorney of such party's choice." The parents had an established constitutional due process right to counsel in the juvenile court proceeding, and parties are protected by constitutional due process rights in civil cases, the attorneys contend. The Court of Appeals correctly interpreted the legislative intent of the Juvenile Code as to safeguard a party's due process rights, but legislative intent is secondary to constitutional rights. The new Juvenile Code reveals the legislative intent to strengthen the statutory due process rights at issue here.

Attorneys for Appellant (State): Christopher Carr, Attorney General, Linda Taylor, Special Asst. A.G., Annette Cowart, Dep. A.G., Shalen Nelson, Sr. Asst. A.G., Calandra Harps

Attorneys for Appellees (Parents): Corinne Mull, Azadeh Golshan

CAVE V. THE STATE (S18A1539)

A young woman is appealing her conviction and life prison sentence for her role in the murder of a baby girl.

FACTS: Alexis Jade Cave was 16 years old when she married Darius Virger in May 2011. He was 10 years older. In April 2012, the couple had a baby girl together. However, by then the couple had separated, and at some point Virger became romantically involved with Tina Chappell. In January 2012, Chappell gave birth to Diarra. Although in one document, Chappell listed the father as someone else, in another she listed Virger as the father. By October 2012, Virger, Chappell and her baby, Diarra, had moved into a townhouse in Douglasville, GA in **Douglas County**. Shortly after, Chappell was arrested for first degree forgery in the and sent to jail. Listed as Diarra's legal father, Virger became Diarra's primary caretaker while Chappell was incarcerated. During the following months, various individuals who came into contact with Diarra noticed bruises and other marks on the baby girl. According to later testimony, they said Virger played forcefully with Diarra by thumping her on her forehead; blew marijuana smoke in the baby's face; told Diarra to "shut up" after she fell off a bed and began crying; and remarked that Diarra's "mom needed to come home and get her."

In November 2012, while Chappell was still in jail, Cave and Virger began to reconcile. The following month, Virger took Diarra to the jail to see her mother, Chappell, who noticed a bruise under one of her baby's eyes. Virger said Diarra had fallen down the stairs. In January 2013, Cave moved into the townhome with Virger and Diarra, along with the baby girl she and Virger had had together. However, soon Cave's and Virger's relationship began to deteriorate and Cave expressed animosity toward Diarra, accusing Virger of giving more affection to her than to his own biological daughter.

On Feb. 13, 2013, Cave began sending a series of increasingly hostile text messages to Virger, complaining about his drinking and violence toward her. At about 9:00 the night of Feb. 14, the hostility grew to a head and Cave left the house, returning at about 10 p.m. She found

Virger with Diarra, who was struggling to breathe. Cave later said Virger pressed his hand over the baby's nose and mouth to get her to quiet down. He then began swinging the baby by her ankles and hitting her into the couch hard enough to damage it.

The next morning, Cave and Virger rushed the infant to WellStar Douglasville Hospital where medical personnel found Diarra unresponsive, not breathing, and with floppy muscle tone. An attending nurse and physician noticed injuries on the baby's head. After removing her diaper, an examination revealed signs of trauma to Diarra's rectum, specifically tearing around the edges. The baby's rectum was so damaged that the nurses could not use it to take Diarra's temperature. The emergency room physician pronounced Diarra dead at 9:54 a.m. the morning of Feb. 15, 2013. Physicians then called in law enforcement. That day, officers executed a search warrant at the Douglasville townhouse where they found empty alcohol bottles and a diaper in the garbage covered in packing tape. It later tested positive for blood.

A medical examiner who was an expert in pediatric forensic pathology conducted the autopsy and found extensive bruising throughout Diarra's body, particularly concentrated on her head. Internally, the baby suffered catastrophic injuries, including subdural bleeding. There was blood on Diarra's cervical cords and fresh tears to her rectum. Both of the baby's eyes had retinal hemorrhages. The physician concluded that the cause of the injuries was a striking, swinging motion that ended with Diarra's head making a forceful impact with a sturdy object. The medical examiner also observed bruising to the victim's back, forearm, legs and ankles, as well as a scar on the victim's hip that appeared to be a burn mark.

Chappell learned of her baby's death while still in jail. After authorities granted her clemency and she was released, she moved back in with Virger. By then, Cave had moved out.

In June 2015, Cave and Virger were indicted for malice murder, felony murder, aggravated battery, cruelty to children in the first degree, and aggravated sexual battery in connection with Diarra's death. Following a joint trial in December 2015, the jury found Cave guilty of felony murder, cruelty to children and aggravated sexual battery; she was found not guilty on the remaining counts. Cave was sentenced to life plus 20 years in prison. She now appeals to the state Supreme Court.

ARGUMENTS: Cave's attorney argues the trial court made a number of errors and her convictions should be reversed. Among them, the trial court erred by excluding the testimony of an expert witness, Dr. Marty Loring, about battered women syndrome and post-traumatic stress disorder (PTSD). Dr. Loring had interviewed Cave and others and found that, "Ms. Cave suffered from battered women syndrome and post-traumatic stress disorder, with certain symptoms being predominant and operating during the time of the tragic incident." The State had filed a motion seeking to prohibit Cave from presenting evidence that she had been abused, and the trial court granted the State's motion. "This testimony was critical to defend against Count three felony murder based on the commission of Cruelty to Children in the 2nd Degree," the attorney argues in briefs. "Specifically, Count three alleged that Ms. Cave did, 'with criminal negligence, cause Diarra Chappell, a child under 18 years of age, cruel and excessive physical pain by failing to seek necessary medical care for said child.'" Dr. Loring's testimony would have explained to jurors that, "Ms. Cave's behavior, conduct, contradictory statements, and failure to inform law enforcement regarding Mr. Virger's actions against the baby was consistent with someone who had battered person syndrome and PTSD." The trial court also erred by denying Cave's motion requesting a continuance after the trial court excluded Loring's expert

witness testimony. And the trial court erred by allowing the admission of impermissible “character evidence,” including testimony about Cave’s decision to have an abortion, which was irrelevant to the murder of Diarra. Among other errors, Cave’s attorney argues the trial court erred by denying Cave’s motion to sever her trial from Virger’s. “Ms. Cave’s motion to sever should have been granted because of the intense spillover effect of the overwhelming evidence against Mr. Virger,” her attorney argues. Finally, the attorney argues the evidence was insufficient to convict Cave of felony murder and aggravated sexual battery.

The State, represented by the District Attorney’s and Attorney General’s offices, argues the trial court did not abuse its discretion in denying Cave’s motion to admit evidence of battered person syndrome and PTSD. Although battered person syndrome is an accepted justification defense, “evidence of abuse or violent acts committed against a defendant by someone other than the victim [who caused battered person syndrome] is not admissible to support a justification defense,” the State argues in briefs. Furthermore, Cave did not admit to injuring the baby, and she was therefore not entitled to present expert testimony of the syndrome. The trial court also did not abuse its discretion by refusing to grant Cave a continuance. Cave “has not demonstrated that she suffered any harm based on the trial court’s denial of her continuance request,” the State argues. And the trial court did not abuse its discretion in admitting certain evidence, including Cave’s reference to an abortion in her statement to law enforcement and in text messages with Virger. The trial court properly denied Cave’s motion to sever her trial from Virger’s, and the evidence is constitutionally sufficient to support Cave’s convictions for felony murder and aggravated sexual battery, the State contends.

Attorney for Appellant (Cave): James Luttrell

Attorneys for Appellee (State): Ryan Leonard, District Attorney, Sean Garrett, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Michael Oldham, Asst. A.G.

BEAVERS ET AL. V. PROVOST, DIRECTOR OF PAULDING COUNTY DIVISION OF FAMILY AND CHILDREN SERVICES (S18A1479)

Parents who lost custody of their three daughters in **Paulding County** Juvenile Court are appealing the Paulding County Superior Court’s dismissal of their petition asking that court to review their case and return their children.

FACTS: Jack and Lynette Beavers had three children. In May 2017, the juvenile court judge issued an order to remove the children from their home based on a request from the Paulding County Division of Family and Children Services. The removal was due to allegations that the father was sexually abusing his two youngest girls. In its complaint, the child welfare department alleged that the father had a history of such behavior, that there was also domestic violence in the home, and that the father instructed the mother to abscond with the children. On June 23, 2017, the juvenile court entered an order finding the children “dependent,” which under Georgia law means the children were in need of the court’s protection due to abuse or neglect. All three children were placed in the temporary legal custody of the Division of Family and Children Services. The juvenile court found clear and convincing evidence “that the children are dependent as to the issue of sexual touching while the father was taking showers with” two of the children and that the mother failed to protect them. The Beavers appealed the decision to the

Georgia Court of Appeals, the state's intermediate appellate court. But that court upheld the lower court's ruling.

Rather than appealing the Court of Appeals decision to the Georgia Supreme Court, the state's highest court, in March 2018, the Beavers filed a petition for a "writ of habeas corpus" in the Paulding County Superior Court, seeking the return of their children. (Habeas corpus is a civil action generally brought by those who have been criminally convicted and who are challenging their detention as illegal.) The Beavers named **James Provost**, director of the Paulding County Division of Family and Children Services, as the respondent. Provost filed a motion asking the superior court to dismiss the petition, arguing that the children were not in his custody but in the child welfare department's custody based on an order by the juvenile court. Therefore, Provost contended, the juvenile court had sole jurisdiction or authority over the matter. At an April 2018 hearing, Lynette Beavers testified that following the children's removal, a safety plan had been initiated and that by the time the child welfare department removed the children, Jack Beavers was no longer residing at the home. The mother admitted that the children were removed from her custody due to the fear she was coaching them on what to say and would not protect them. Lynette Beavers also acknowledged that there had been other allegations of sexual abuse made against the father.

On April 26, 2018, the superior court entered an order dismissing the writ of habeas corpus due to the court's lack of jurisdiction. The Beavers now appeal that decision to the state Supreme Court, representing themselves "pro se," without legal representation. They contend that the juvenile court's removal order contained various deficiencies that cleared the way for the superior court to exercise jurisdiction over their habeas petition.

ARGUMENTS: In their brief, the Beavers argue the superior court made eight errors, and that their appeal is properly in the state Supreme Court, rather than in the lower Court of Appeals, because the Constitution confers appellate jurisdiction of all habeas corpus cases to the Supreme Court. Among the errors made by the superior court, the Beavers argue the court erred by not finding that the children are illegally detained because of the following: the juvenile court did not have subject-matter jurisdiction over the children; the children were put in state custody without prior court authorization involving urgent circumstances; the judgment is void because it lacks sufficient facts to give the court jurisdiction over the children and because it was signed by a person who was not the judge; the dependency order was too vague and ambiguous to be enforced; and the "pretense of their detention was obtained on the basis of fraud." "Proper application of law to the undisputed facts of this case demands this Court find the children were illegally removed to state custody and detained without prior court authorization in non-exigent circumstances in violation of the rights of parents and children to not be separated by the state except in an emergency, that the juvenile court failed to acquire jurisdiction of the children, and that the children are illegally detained under pretense of a facially void judgment and otherwise void judgment," the Beavers argue in briefs. "All orders of the juvenile court should be vacated and the children should be immediately returned to [the Beavers'] custody."

Provost, represented by the Attorney General's office, argues that the Georgia Supreme Court should uphold the superior court's ruling and deny the petition. "The superior court lacked subject-matter jurisdiction to entertain Appellants' (i.e. the Beavers') habeas petition challenging the juvenile court's custody determinations," the State argues in briefs. The superior court correctly denied the Beavers' habeas action because the petition for a writ of habeas corpus "was

an improper vehicle for correction of alleged erroneous action by a juvenile court.” Under Georgia statutory law, “Juvenile courts have exclusive jurisdiction over actions ‘concerning any child who...is alleged to be a dependent child.’” As a result, this Court “has held that superior courts lack jurisdiction to consider habeas petitions challenging a juvenile court’s orders in dependency actions.” Furthermore, the child welfare department filed a complaint invoking the juvenile court’s jurisdiction as it contained 24 allegations supporting the children’s removal from their home. The children’s circumstances were urgent, contrary to their parents’ assertion that they were not. “The juvenile court found that the removal of the children was necessary based on information it received to safeguard their welfare,” the State argues. “The removal order provided that the children were removed due to allegations of sexual abuse by the father.” The U.S. Eleventh Circuit Court of Appeals has held that allegations of sexual abuse constitute “objectively imminent danger,” which authorizes emergency removal. The removal order is not vague or ambiguous, was not obtained by fraud and is not void because of the signature, the State contends. The Beavers’ habeas action is also prohibited by the doctrine of “res judicata,” which “precludes re-litigation of claims where the cause of action and the parties or their privies are identical and the claim was previously adjudicated on the merits by a court of competent jurisdiction.” Even if habeas relief were available to the Beavers, James Provost is not the correct defendant, the State argues.

Attorneys for Appellants (Beavers): Jack Beavers, pro se, Lynette Beavers, pro se

Attorneys for Appellee (Provost-State): Christopher Carr, Attorney General, Annette Coward, Dep. A.G., Shalen Nelson, Sr. Asst. A.G., Penny Hannah, Sr. Asst. A.G., Gayle Abramson, Spec. Asst. A.G.