



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, November 5, 2019

10:00 A.M. Session

WILKERSON V. THE STATE (S19G0472)

A man is appealing a Georgia Court of Appeals decision that reversed a trial court's ruling granting him a new trial on three counts of aggravated assault.

FACTS: The evidence at trial showed that on June 24, 2013, the sister of **Jason Edwin Wilkerson** was sitting with her boyfriend in a car that was stopped on the side of the road in **Early County**. Her three sons, ages 3, 2, and 1, were also in the car, with the baby on her lap in the front seat and the other two in the back seat. Suddenly, the couple saw a red pick-up truck driving toward them with Wilkerson riding as a passenger. The boyfriend and Wilkerson's sister began to drive away when they heard the truck revving its engine. The truck had stopped, then "kicked the gas," before plowing into their car, pushing it into a ditch and destroying two tires and the driver's side door. The sister later testified at trial that she could not really see what Wilkerson was doing because she was trying to hold onto her 1-year-old, but that Wilkerson chased them down with the truck and that her two-year-old child sustained cuts to his face when the car speaker hit his nose on impact. As the boyfriend tried to drive the car out of the ditch, he and the sister noticed the truck drive up to them with Wilkerson hanging out the passenger side brandishing a shotgun. Wilkerson pointed the gun at the boyfriend and told him to pull over or he

would “blow his brains out.” The boyfriend pulled over and Wilkerson exited the truck, pointed the gun at the boyfriend’s face, and told the sister to get the kids out of the car. In his statement later that evening to police, the boyfriend said that Wilkerson jumped out of the truck with the gun, cussing and making threats. Wilkerson pulled the hammer back on the gun as he aimed it at the boyfriend, then moved to the front middle of the car, screaming, “get the f***ing kids out!” Wilkerson then moved to the passenger side of the car and got the children out and took them back to their grandmother. The boyfriend and sister drove the car to a friend’s farm, called police, and then ran, immersing themselves in a pond to hide until the police arrived because, as the boyfriend said, he was “scared as hell of all of it.” The boyfriend later testified that Wilkerson believed that the boyfriend had taken the children by force from their grandmother, Wilkerson’s mother. According to the boyfriend and sister, the children lived with Wilkerson and his mother at Wilkerson’s home, and Wilkerson helped raise them because his sister was homeless. At trial, there was evidence that the sister had a drug problem, was in an abusive relationship with the boyfriend, and the local child welfare agency had an “open investigation” regarding the children. The boyfriend said at trial that he did not want Wilkerson prosecuted because he was doing “what any kind of family man would do to try to protect his nephews,” and that it all had been a “misunderstanding.” Ever since the incident, Wilkerson “has been right there around us, we’ve all sat down and ate dinner as a family,” the boyfriend said. The sister echoed his testimony. The boyfriend also testified at trial that “the gun stayed pointed at me,” and that Wilkerson “never pointed it at the kids.” “He never had the intent of hurting the children at all.” At trial, the sister testified that when she handed the baby to Wilkerson, he was not holding a gun.

The State indicted Wilkerson on 13 counts: three counts of kidnapping (Counts 1, 2, and 3), five counts each of aggravated assault with a deadly weapon (Counts 4, 5, 6, 7, and 8), and five counts of aggravated assault with a motor vehicle (Counts 9, 10, 11, 12, and 13). Counts 6, 7, and 8 alleged that “Wilkerson [made] an assault upon the person of [each child], with a deadly weapon, to-wit: a gun.” Following a 2014 trial, a jury acquitted Wilkerson of the kidnapping charges, but found him guilty on all 10 aggravated assault charges. He was sentenced to a total of 60 years in prison followed by 140 years of probation.

Wilkerson’s attorney filed a motion requesting a new trial on all counts, asking the court to modify his sentence and challenging the sufficiency of the evidence to support his convictions. Following a hearing, the trial court granted the motion in part. It reduced Wilkerson’s sentence as excessive to 20 years to serve five in prison, and it found insufficient evidence to support Counts 6, 7, and 8. The trial court found that although there was testimony at trial that Wilkerson had pointed a firearm at “the car,” there was no evidence that he had “ever pointed a gun at, or threatened, any of the children. Nor was there any evidence that the children felt threatened by the firearm or were aware in any way that a firearm had been pointed at them,” the judge wrote. “The fact that a victim is unaware that a firearm has been pointed at the victim precludes a conviction of aggravated assault,” the judge wrote, citing the Georgia Court of Appeals’ 2016 decision in *State v. Harlachen*. The trial court’s order stated that the convictions for Counts 6, 7, and 8, “are strongly against the weight of the evidence, are contrary to the evidence and the principles of equity and justice, and there was not sufficient evidence to allow a rational trier of fact to find [Wilkerson] guilty of these Counts.”

The State appealed to the Court of Appeals, Georgia's intermediate appellate court. The State argued it was error to grant a new trial because the evidence was sufficient to support the charges of aggravated assault for two reasons: 1) there was evidence that Wilkerson pointed a gun at the car in which the children were riding; and 2) it wasn't necessary that the State prove the victims felt threatened by the firearm. The Court of Appeals agreed with the State that the trial court erred in ruling there was insufficient evidence that "the children felt threatened by the firearm or were aware in any way that a firearm had been pointed at them." "Because this portion of the trial court's order is based on the legal sufficiency of the evidence...the trial court was not authorized to act as the thirteenth juror and could neither weigh the evidence nor exercise its own discretion," the Court of Appeals said in its opinion. The Court of Appeals reversed the trial court's ruling, finding the evidence was sufficient to convict Wilkerson of three counts of aggravated assault with a deadly weapon regarding the three children. The Court of Appeals then examined the trial court's grant of a new trial on Counts 6, 7, and 8 "on the general grounds," i.e. for sufficiency of the evidence to support the verdict. After being "unable to determine which standard the trial court applied to its ruling under the general grounds," the Court of Appeals vacated the trial court's grant of a new trial on the general grounds and remanded it to the trial court for reconsideration. Wilkerson now appeals to the state Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred in vacating and remanding for the trial court to reconsider the motion for new trial under the general grounds.

ARGUMENTS: Wilkerson's attorney argues the Court of Appeals erred in vacating the trial court's grant of a new trial on the general grounds. It erred when it decided "sua sponte," i.e. on its own, to review the trial court's ruling on the general grounds. "The Court of Appeals was not authorized to rule on the general grounds because the State failed to raise the issue in its appeal," the attorney argues in briefs. "It is basic appellate practice that error argued in the brief but not enumerated as error will not be considered on appeal." The State's brief is "devoid of any reference to the general grounds, to the statutes supporting the general grounds (Georgia Code § 5-5-20 and § 5-5-21), or to the standard of review applicable to a reversal based on the general grounds." The Court of Appeals "further erred when it held that it could not determine which standard the trial court applied when it reversed Counts 6, 7, and 8 on the general grounds. Even if it was proper for the Court of Appeals to consider the trial court's ruling on the general grounds, there is no basis for a remand because the trial court properly exercised its discretion and ruled based on the standards laid out in the general grounds statutes." Here, the trial court articulated three distinct reasons for granting a new trial on Counts 6, 7, and 8 as the order stated. "The trial court's order itself supports the conclusion that the trial court ruled on *both* sufficiency and the general grounds," Wilkerson's attorney argues, requesting the Supreme Court "reverse the Court of appeals decision vacating the trial court's grant of a new trial on Counts 6, 7, and 8 on the general grounds and reinstate the trial court's order granting a new trial on that basis."

The State, represented by the District Attorney's office, argues the Court of Appeals correctly reviewed the trial court's ruling on the general grounds. Wilkerson argued that the State failed to enumerate as error the trial court's reversal of Counts 6, 7, and 8 on the general grounds. "On the contrary, given the wording of this portion of the trial court's order, we find that the State implicitly challenges this ruling in its claim that the trial court erred in finding the evidence insufficient to sustain the three convictions." Therefore, the Court of Appeals followed the dictates of § 5-5-20 and § 5-5-21. The Court of Appeals also correctly held that the standard

used by the trial court in reversing Wilkerson’s convictions on Counts 6, 7, and 8 on the general grounds could not be determined merely by reading the trial court’s order, the State argues. The Supreme Court should uphold the Court of Appeals ruling.

Attorney for Appellant (Wilkerson): Christina Cribbs

Attorney for Appellee (State): Thomas Bishop, Assistant District Attorney

CASH V. THE STATE (S19A1280)

A man who was tried and convicted in 2017 for the 2006 murder of a man outside a **Muscogee County** strip club is appealing his conviction and life prison sentence, arguing he was denied his constitutional right to a speedy trial.

FACTS: On Jan. 30, 2017, a Muscogee County jury found **Dundell Cash** guilty of malice murder and felony murder for the shooting death of Euan Dougal on Nov. 10, 2006. According to the facts presented at trial, Cash shot and killed Dougal outside the Platinum Nightclub, a strip club in Columbus, GA. The day of the shooting, detectives with the Columbus Police Department took out warrants for the arrest of Cash, who was seen running from the scene of the murder. Nearly two years later, on Nov. 2, 2008, police in South Carolina arrested Cash on the outstanding warrants and he was brought back to Georgia. Cash’s attorney later argued it was unreasonable that it took almost two years to arrest Cash as he was on probation in Muscogee County for unrelated charges during that time. In April 2009, a grand jury returned a “No-Bill of Indictment,” finding it had insufficient evidence to indict Cash due to the unknown whereabouts and possible death of the State’s main eyewitness, Dennis Archer. Archer was a homeless man who was paid by the Platinum Nightclub to clean the parking lot a few nights a week after closing. The night of the shooting, Archer had just pulled up on his bicycle to begin work when the shooting occurred. After the grand jury decided not to indict, Cash was released from jail, where he had remained for six months. In March 2015 – more than eight years after Dougal’s death – the State again presented Cash’s case to a Muscogee County grand jury, advising the grand jury they had found Archer, who was not dead and was available to identify Cash as the perpetrator of the offenses listed in the indictment. This time, the grand jury indicted Cash for several crimes including the malice murder and felony murder of Dougal, and Cash was re-arrested March 12, 2015 and jailed without bond pending trial. On Oct. 1, 2015, Cash’s attorney filed a motion to dismiss the indictment based on the speedy trial guarantee of the Sixth Amendment to the U.S. Constitution. Following a hearing, the trial court denied the motion on April 7, 2016. Cash’s attorney then sought a pre-trial appeal before the Georgia Supreme Court, which this Court denied in June 2016. Cash subsequently was tried before a jury, which on Jan. 30, 2017 found him guilty of malice murder and felony murder. He was sentenced to life in prison with the possibility of parole. Cash filed a motion requesting a new trial, which the trial court denied on April 16, 2019. Cash now appeals to the Georgia Supreme Court.

ARGUMENTS: Cash’s attorney argues the trial court clearly erred in attributing to Cash any fault for the delay when there are no facts to support that finding. “If a defendant intentionally evades the government’s efforts to bring him to trial, the delay will be attributable to the defendant,” the attorney argues in briefs. But in this case, “There is no evidence in the record that Appellant [i.e. Cash] was aware of the outstanding warrants for his arrest. The State maintains that the reason it took two years to arrest the Appellant is because he fled the county and was actively hiding from authorities. The State has provided nothing to base their accusation

that the defendant had fled the jurisdiction.” The trial court also erred in denying Cash’s motion for new trial because the standards set forth in the U.S. Supreme Court’s 1972 decision in *Barker v. Wingo* weigh in favor of Cash, not the State. In a speedy trial case, a delay approaching one year is considered to be “presumptively prejudicial” – or damaging to one’s case – and demands further analysis. Under *Barker*, the factors a court must weigh in determining whether there was a speedy trial violation are (1) whether the delay was uncommonly long; (2) who’s more to blame for the delay – the government or the defendant; (3) whether, in due course, the defendant asserted his right to a speedy trial; and (4) whether he suffered harm or prejudice as a result of the delay. Here, the trial court erred in calculating the length of the delay, and it erred in not attributing the weight heavily against the State. Under the Georgia Supreme Court’s 2012 decision in *The State v. Johnson*, “The right to a speedy trial attaches at the time of arrest or formal accusation or indictment, whichever occurs first, and the courts measure the delay from the time the right attaches.” If a trial has not occurred, the delay should be calculated from the date of arrest to the date when the defendant’s speedy trial motion was denied. “Therefore, the initial calculation is over 28 months, not 19 months as the trial court determined,” the attorney argues. The trial court then erred by not calculating the more than 70 months between the No-Bill of Indictment and the second indictment to determine how heavily the post-indictment delay weighed against the State. The trial court also erred in finding that Cash failed to assert his right to a speedy trial with reasonable promptness. And it erred in finding that Cash failed to demonstrate actual prejudice caused by the delay, Cash’s attorney argues, asking the Supreme Court to reverse the conviction and remand the case with instructions to dismiss the indictment.

The State, represented by the District Attorney’s and Attorney General’s offices, argues the trial court properly decided that Cash was partially responsible for the delay. “Moreover, the State presented sufficient evidence for the trial court to find that Appellant fled the scene of the crime,” the State argues in briefs. The trial court correctly denied Cash’s motion for new trial as his right to a speedy trial was not violated. The State argues that based on each of the four facts weighed under the *Barker* test, “Appellant has not established a violation, and the trial court properly denied Appellant’s motion for new trial.” The State urges the Supreme Court to affirm Cash’s convictions and sentences.

Attorney for Appellant (Cash): Manubir Arora

Attorneys for Appellee (State): Julia Slater, District Attorney, Benjamin Gephardt, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Youn, Asst. A.G.

PARHAM V. STEWART (S19A1498)

This appeal in an election contest stems from a special election for the mayor of the city of Blythe, GA, in which a total of 118 votes were cast.

FACTS: Blythe is a small city located in Richmond and Burke counties. On March 20, 2018, the city held a special election for mayor in which **Cynthia English Parham** and **Phillip Stewart** were the only two candidates. Of the 118 votes cast, Parham received 57 and Stewart received 61 – a 4-vote difference. Because the vote margin exceeded 1 percent, a recount was not mandatory under state law. However, Parham requested – and received – a recount after which the **Richmond County** Board of Elections confirmed the vote election results. Parham filed a petition in the Richmond County Superior Court, asking the court to declare the results void and

order a second election. She alleged that illegal votes were cast and legal votes were rejected at the polls in a number sufficient to change the results. Specifically, she alleged that certain voters were not residents of Blythe and that a campaign advisor, John Daniel Martin, engaged in one or more acts of voter fraud by providing alcohol to a person under 21 in exchange for his vote for Stewart. (Criminal charges of Buying Votes and Furnishing Alcohol to person under 21 are currently pending against Martin.) The Chief Judge of Augusta Judicial Circuit transferred the matter to a judge outside the circuit, and following a June 2018 trial, the judge ruled in favor of Stewart, upholding the election results and finding that Parham had failed to establish by a preponderance of the evidence that enough illegal votes were cast to change or place in doubt the outcome of the March 20 election. Parham now appeals to the Georgia Supreme Court.

ARGUMENTS: Parham’s attorney argues the trial court made four errors, including in finding that only two votes were illegally cast in the election for mayor. At least two voters were not residents of Blythe at the time they voted for mayor, including the mayor-elect’s ex-wife. The two had been divorced since 2015, they were no longer living together, and there was “overwhelming evidence at trial that she was a resident of Augusta,” Parham’s attorney argues in briefs. But most of the actions that jeopardized the election were directly attributable to one man: John Daniel Martin. According to Stewart’s ex-wife, Martin was Stewart’s campaign manager. Martin gave one voter a chicken dinner in exchange for his vote for Stewart; he gave another cigarettes and beer. He also drove a mentally incapacitated woman a ride to and from the polls and later asserted his Fifth Amendment privilege not to incriminate himself when asked if he’d given the woman something in exchange for her vote. “The trial court abused its discretion in refusing to draw adverse inferences from John Daniel Martin’s repeated assertion of his Fifth Amendment privilege, and erred in finding that there was sufficient other evidence offered at trial to rebut those adverse inferences,” Parham’s attorney argues. In doing so, the trial court “rewarded Mr. Martin’s actions in blatantly violating election laws.” Among other errors, the trial court also erred in failing to require Martin to answer questions under oath that were not subject to Fifth Amendment privilege. “There is no blanket Fifth Amendment right to refuse to answer questions in civil proceedings,” the attorney contends.

Stewart’s attorney argues that Parham’s appeal is moot due to her failure to expedite an election matter. Parham “had an obligation to seek an expedited review of her election challenge but failed to do so until 17 months after the election in question and 14 months after filing her notice of appeal” with the state Supreme Court. During that time, Stewart has been serving as Blythe’s elected mayor. Regardless, the trial court did not err in finding that only two votes were illegally cast in the election for mayor. The trial court had evidence that Stewart’s ex-wife was living in Blythe at the time of the election and therefore was eligible to vote. Furthermore, Parham “did not provide sufficient evidence to convince the trial court that John Daniel Martin’s actions changed the results of the election.” The trial court also found that the woman Martin drove to the polls was not mentally incompetent or otherwise ineligible to vote. And the trial court did not err in refusing to draw adverse inferences from Martin’s assertion of his Fifth Amendment privilege, or in finding that there was sufficient other evidence offered at trial to rebut those inferences, Stewart’s attorney argues. Nor did the trial court err in failing to require Martin to answer questions under oath that were not subject to the Fifth Amendment privilege.

Attorney for Appellant (Parham): John Long

Attorney for Appellee (Stewart): Edward Tarver