



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Thursday, November 7, 2019

10:00 A.M. Session

DAVIS V. THE STATE (S19A1432)

A man is appealing his conviction and life-without-parole prison sentence for the murder of a man who was selling him marijuana in **Treutlen County**.

FACTS: According to the State's case at trial, in the two days leading up to the murder, **Sylvester Davis, Jr.** had texted Marquise Wadley multiple times asking for drugs. A little after 6:00 p.m. the night of July 12, 2011, Wadley came to Davis's house to sell him marijuana. When his car pulled up, Davis, who lived with his half-brother, Jonathan Wright, went outside to meet Wadley. About 10 minutes later, according to Wright, Davis came back inside in a panic and told Wright, "I f***ed up. I burned the man." After finding Wadley's body in the driver's seat, Wright grabbed a sheet from inside the home, wrapped Wadley's body in it, and placed it in the trunk of Wadley's car. He and Davis then drove the car to Vidalia where they abandoned it on the side of the road, leaving Wadley's body in the trunk. The brothers took a cab back home. The next morning, Wadley's father came to Davis's home, searching for his missing son. Davis admitted having seen his son the day before when Wadley came to sell Davis drugs. Later that day, the father received a call saying his son's car had been spotted along a back road in Vidalia. The father drove to the scene where he found his son's bloodied car. He immediately called police, who arrived a few minutes later and opened the trunk where they found Wadley's body.

Five days after the murder, Davis and Wright turned themselves into police. In a statement to police, Davis said Wadley had come to his home and sold him two small bags of marijuana before driving away. Wright told police – and later testified at trial – that he had remained inside during the drug deal, after which Davis had run back inside and stated, “I f***ed up. I burned the man.” He said they then wrapped the body in a sheet, drove the car to Vidalia, and left the car and body there. Wright also testified that he had seen Davis with a .32 caliber revolver before the murder but had not seen the gun after the murder. The medical examiner who autopsied Wadley recovered two bullets from Wadley’s head, which were later determined to be .32 caliber bullets. Davis’s girlfriend also testified at the trial. According to Davis’s attorney, she said that Davis denied killing Wadley but also stated he told her that he “didn’t mean to do it that way.”

The main issue in Davis’s appeal is the testimony at trial of Special Agent Kendra Lynn, a 12-year veteran of the Georgia Bureau of Investigation and the lead investigator in the case. Over defense objections, she testified that during the investigation, she had interviewed approximately 30 witnesses, and based on what they had told her, she had narrowed her focus on Davis as a potential subject. Davis’s attorney objected, alleging that by “asking how many witnesses she interviewed in total to lead to this suspect, it’s basically trying to backdoor hearsay and say all these people said this, so it must be true.” Davis’s attorney objected on hearsay grounds and the fact that the testimony violated Davis’s Sixth Amendment right to confront any witnesses against him. She also testified about what she learned from her interview with Wright, to which Davis’s attorney also objected on the basis of hearsay as to “anything that she says Jonathan Wright said.” And Lynn testified regarding cell phone evidence between Davis and Wadley and Davis and his girlfriend, prompting Davis’s attorney to again object on the basis of hearsay. The prosecutor argued, and the trial court agreed, that the testimony was admissible to show Lynn’s “course of conduct.” At one point, the State asked her to recount what evidence had led her to believe Davis was the more likely suspect. She responded, “His family and relatives told me that he was the one that would be more likely to do that than anyone else.” Davis’s attorney immediately objected, arguing the statement was hearsay and an improper attack on Davis’s character. After the judge cleared the jury from the courtroom, Davis’s attorney also moved for a mistrial. The judge later denied the motion but instructed jurors they were to ignore the State’s question and Lynn’s response. The judge also polled the jury and asked whether there were any jurors who could not “totally disregard” the question and response. When none said they could not, the trial proceeded.

Following the December 2012 jury trial, Davis was found guilty of malice murder, felony murder, and aggravated assault. He was sentenced to life without parole. Davis now appeals to the state Supreme Court.

ARGUMENTS: Davis’s attorney argues that the “trial court erred when it allowed Agent Lynn to testify about her ‘course of conduct,’ resulting in admission of irrelevant and prejudicial opinions and hearsay, as well as improper bolstering of key witnesses.” A law enforcement officer’s course of conduct is rarely relevant in a criminal case “and was not relevant here,” the attorney argues in briefs. The Georgia Supreme Court has long held 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,’” the attorney writes, quoting the state Supreme Court’s 2017 decision in *Jackson v. State*. “In the present case, neither the prosecutor nor the court explained the relevance of Agent Lynn’s course of conduct, nor is any relevance apparent from the record.”

The trial court abused its discretion when it failed to grant a mistrial after Lynn’s testimony that Davis’s family believed he was the more likely murderer. “It is a fundamental principle in our system of jurisprudence, intended to protect the individual who is charged with crime, and to ensure him of a fair and impartial trial before an unbiased jury, that the general character of the defendant and his conduct in other transactions is irrelevant unless the defendant chooses to put his character in issue,” the attorney argues, quoting the Georgia Supreme Court’s 1952 decision in *Bacon v. State*. The trial court also erred in admitting Lynn’s hearsay testimony that infringed on Davis’s Sixth Amendment right to confront the witnesses against him. By overruling the defense counsel’s objection to Lynn’s testimony that she had focused on Davis as the suspect based on her interviews of 30 witnesses, “the trial court allowed Agent Lynn to assert that her knowledge of relevant facts goes beyond the evidence presented at trial, thereby lending weight to her improperly admitted opinion testimony regarding Davis’s guilt,” the attorney argues. “This clearly violated Davis’s right to confront the witnesses against him and invited a conviction based on speculation and innuendo.” Finally, the trial court erred when it denied Davis’s motion for new trial based on ineffective assistance of trial counsel.

The State, represented by the Attorney General’s and District Attorney’s offices, argues that the trial court did not err in admitting Lynn’s testimony, arguing that Davis’s contention is “without merit because Agent Lynn’s testimony did not include inadmissible hearsay.” “First, her reference to the approximate number of interviews conducted, did not include any substantive information regarding the content of those interviews,” the State argues in briefs. Her comments about her interviews with Davis’s brother and girlfriend did not qualify as hearsay because both were called to testify at trial and Davis’s attorney had the opportunity to, and did in fact, cross-examine them. The trial court also properly denied the motion for mistrial over Lynn’s testimony that the family had told her that Davis was more likely than his brother to have committed the crime because the judge “provided more than adequate curative instructions.” The State contends Lynn’s testimony about the 30 witnesses did not violate Davis’s Sixth Amendment right to confront witnesses and argues Davis’s attorney has failed to establish how it violated the confrontation clause. Finally, Davis had effective assistance of counsel at trial, the State contends.

Attorney for Appellant (Davis): Betsey Tate

Attorneys for Appellee (State): Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Katherine Emerson, Asst. A.G., Craig Fraser, District Attorney, Brandon Faircloth, Chief Asst. D.A.

CHAVEZ V. THE STATE (S19A1573)

In this gang-related killing in **Fulton County**, a man is appealing his murder conviction and life prison sentence for the shooting death of a man in a rival gang, arguing the evidence was insufficient to convict him and he was denied effective assistance of counsel at his trial.

FACTS: According to the State’s case, on July 23, 2015, Andres Duarte drove Ricardo Hernandez Ovalle to the Department of Motor Vehicles in Sandy Springs so Ovalle could get an identification card. While they were out, Duarte received a call from someone at the Azalea Park apartment complex in Sandy Springs who wanted to buy some Xanax pills. Duarte and Ovalle arrived at the complex at about 4:00 p.m. and went around back to meet the buyer. After the drug sale, Duarte and Ovalle drove around front to leave when, according to Duarte, Ovalle yelled out

something like, there goes that “n---a Joker.” Ovalle asked Duarte to pull over and jumped out of the car. Duarte heard Ovalle ask someone, “where you from,” meaning to what gang do you belong. Duarte then heard Ovalle say, “oh s--t,” and saw Ovalle run by his car. When Duarte looked in his rearview mirror, he saw a dark-skinned individual reach to pull a gun from his waistband. He did not get a look at the person’s face. Ovalle was now out of sight, and as Duarte started driving in the direction Ovalle had run, he heard gunshots. When Duarte couldn’t find Ovalle, he followed an ambulance that led him to the crime scene. There they found Ovalle lying on his stomach with multiple gunshot wounds to his torso. He was dead at the scene. Duarte talked to police who were there and was taken to the Sandy Springs police department to be interviewed. Duarte told police he believed the shooting was gang-related because the name Ovalle had used – “Joker” – was a name of someone in a rival gang, the **Sox Los** gang. Duarte later testified at trial that he and Ovalle, whom he’d met in middle school, were both in the **Westside Locos** gang. He said they had been in the gang since they were 13 or 14 years old. He said the gang originated in Roswell and there were 20-30 members. They used the color, dark blue, and particular signs to identify themselves as Westside Locos. Duarte testified that Ovalle had a gang-related tattoo on his arm that said, “West We Trust.” He also testified that Ovalle had been shot once before in 2011 by the Sox Los. Through their investigation, detectives determined that Joker’s real name was Lionel Marron. Officers showed a photo line-up to Duarte and three other witnesses, which included Marron’s photo, but none selected Marron so the officers ruled him out as a suspect.

During the course of the investigation, they came up with another nickname, “Chucky,” as a possible suspect. Detectives tied the name to **Juan Rabadan Chavez**, who was a friend of Joker’s and also affiliated with the Sox Los gang. At trial, Ovalle’s girlfriend testified that the day of his murder, Duarte called to tell her he had been killed. When Duarte got out of jail, he told her Chucky had been the shooter. A witness who lived at Azalea Park said that on the day of the incident, he heard gunshots and saw Ovalle with a man he knew as Chucky who lived in the apartments next to Azalea Park. The witness said Chucky shot Ovalle, who fell to the ground and did not move. He said Chucky then kicked Ovalle in the head, shoulder, and back. He testified that officers showed him a photo of Chavez (Chucky), and the witness said he was 99.9 percent certain that the person in the photo was the shooter. Cell phone records revealed that immediately following the time of the shooting, Chavez made a flurry of calls to Marron. The records showed that at the time of the shooting, Marron was on Paces Ferry Road in Vinings and did not arrive at the crime scene until more than an hour later. Meanwhile records showed that Chavez’s phone could have been located in the area of the crime scene at the time of the shooting. With a search warrant of Chavez’s home, officers found three spent .38 caliber shell casings in his bedroom. The bullets pulled from Ovalle’s body during the autopsy were .38 caliber bullets. Several days after the murder, Chavez disappeared from the area with only a backpack. In March 2016, he was arrested by border patrol while trying to reenter the United States at the Mexican border in New Mexico.

At his August 2017 trial, the State’s theory was that Chavez killed Ovalle over a local gang rivalry, while the defense argued that the case was one of mistaken identity. The State’s gang expert testified that he was familiar with the presence of the Sox Los gang in Georgia, saying it was a “subset” of the Sureños 13 gang. The expert testified that the Westside Locos

were also a subset of the Sureños 13 but that did not mean they necessarily “get along with each other.”

Following the trial, the jury found Chavez guilty of participation in criminal street gang activity, malice murder, felony murder, aggravated assault with a deadly weapon, possession of a firearm during the commission of a felony, and possession of a firearm by a first offender probationer for the death of Ovalle. He was sentenced to life plus 25 years in prison. Chavez now appeals to the state Supreme Court.

ARGUMENTS: Chavez’s attorney argues that the State’s evidence is insufficient to prove count one (participation in criminal street gang activity) and count four (felony murder based on criminal street gang activity.) The State has “failed to prove beyond a reasonable doubt that Sox Los met the definition of a criminal street gang,” Chavez’s attorney argues in briefs. Under Georgia Code § 16-15-3 (2), a “criminal street gang is a group of three or more persons associated in fact, whether formal or informal, which engages in criminal gang activity.” Here, the State’s expert testified that he hadn’t “seen many” of the Sox Los gang members, did not know how many members there were in Georgia, and could not say there were more than three. The expert’s statement at trial that the gang “absolutely” had more than three members was not based on personal knowledge. Among other errors, Chavez’s attorney argues Chavez received “ineffective assistance of counsel” from his trial attorney, in violation of his constitutional rights. And the trial court erred in denying Chavez’s motion for mistrial, the attorney argues.

The State, represented by the Attorney General’s and District Attorney’s offices, argues that the State proved Chavez’s participation in criminal street gang activity and that the Sox Los gang was a criminal street gang. The gang expert testified that the Sox Los gang was a subset of the Sureños 13 gang, existed in Georgia and Los Angeles, and “absolutely” had three or more members. Duarte testified that Ovalle had been shot previously by a member of the Sox Los Gang. And the State admitted as evidence multiple photos of Chavez displaying gang signs and having tattoos representing the Sox Los gang. The State also argues that Chavez received effective legal assistance at his trial, and the trial court did not err in denying Chavez’s motion for mistrial.

Attorney for Appellant (Chavez): Matthew Winchester

Attorneys for Appellee (State): Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Leslie Coots, Asst. A.G.

DALY ET AL. V. BERRYHILL ET AL. (S19G0499)

A cardiologist who was sued by a man for allegedly giving him too much blood pressure medication, causing him to faint and sustain injuries in a fall, is appealing a Georgia Court of Appeals decision reversing a **Chatham County** jury’s verdict that was in the cardiologist’s favor.

FACTS: The evidence at trial showed that on Oct. 2, 2009, **Shane H. Berryhill** went to a local care clinic for chest pain. The doctor at the clinic prescribed Vasetreric, a blood pressure medication, and referred Berryhill to **Dr. Dale P. Daly**, a cardiologist. Daly performed a nuclear stress test that indicated that a large area of Berryhill’s heart was not getting enough blood flow. Daly instructed Berryhill to keep taking the Vasetreric, but in addition he prescribed Bystolic, another blood pressure medication, to protect against a heart attack. Less than 24 hours later, Daly performed a balloon angioplasty to clear a 99 percent blockage in Berryhill’s left artery.

After the procedure, Daly gave post-surgical instructions to Berryhill's wife, including that Berryhill was not to engage in any strenuous or risky activity, or any lifting, bending, or stooping over for one week. Daly later went over the restrictions with Berryhill, telling him he could return to work in a week but he was not to engage in any strenuous activity or lift objects weighing more than 10 pounds. Before discharge, a cardiac nurse discussed post-stent limitations and Berryhill said he understood. Berryhill was discharged from the hospital one day after the procedure. Four days later, Berryhill went hunting. He walked 200 yards through rough terrain, carried his nearly 10-pound rifle, his cell phone, and a flashlight, and climbed an 18-foot ladder to the tripod deer stand. He sat down and hoisted his rifle up via a rope and pulley, at which time he quickly became nauseous, weak, and light-headed. He fainted and fell from the stand, fracturing two vertebrae.

The Berryhills sued Savannah Cardiology, P.C. and Daly, alleging that Daly prescribed too much blood pressure medication, which caused Berryhill to faint. That was the only allegation against Daly in the Berryhills's initial complaint, although through the course of the trial they added more, including that Daly had failed to counsel Berryhill properly on the side effects of his medication and on the appropriate exercise he could do in the days following surgery. Berryhill also sued Walgreens pharmacy and the manufacturer of the deer stand, although he later dismissed both defendants from the case.

At issue in this case is the instruction the judge gave jurors on "assumption of risk" prior to their deliberations. According to the Berryhills's attorney, the judge gave the jury the standard charge on assumption of risk: "When a person knowingly and voluntarily takes a risk of physical injury, the danger of which is so obvious that the act of taking such risk, in and of itself, amounts to a failure to exercise ordinary care for one's own safety, that person cannot hold another liable for injuries proximately caused by such action even though the injuries may be in part attributable to the negligence of the other person." Following trial, the jury ruled in Daly's favor. The Berryhills appealed to the Court of Appeals, the state's intermediate appellate court, which reversed the trial court's decision, concluding that the trial court erred in giving the jury an instruction on assumption of risk because the evidence did not justify the instruction. Daly and Savannah Cardiology now appeal to the Georgia Supreme Court, which has agreed to review the case to determine whether the Court of Appeals correctly ruled that the trial court erred in instructing the jury on assumption of risk.

ARGUMENTS: The attorney for Daly and Savannah Cardiology argues that the Court of Appeals incorrectly held that the trial court erred in charging the jury on the assumption of the risk. "Georgia law is clear that a trial court must give a jury instruction on assumption of the risk as long as there is at least 'slight evidence' to support such a charge," the attorney argues in briefs. Here, the evidence justifying the charge "was well beyond 'slight.'" The evidence may be direct or circumstantial evidence, and the jury may choose not to accept the plaintiff's testimony that he was unaware of a particular risk of harm if there is "circumstantial evidence sufficient to support a reasonable inference that he was aware." Giving the assumption of risk charge in this case "was not only appropriate, but the trial court had a duty to give it," the attorney argues. Furthermore, appellate courts "will not overturn a trial court's decision to give a particular jury charge if there was *any evidence* presented at trial to support the charge," the attorney argues, quoting the Georgia Court of Appeals' 2013 decision in *Lee v. CHN Am., LLC*. "There was more than slight evidence that Mr. Berryhill assumed the risk of injury by disregarding Dr. Daly's

post-surgery instructions.” Berryhill testified at trial that he had received instructions advising him to avoid strenuous activities for seven days following his procedure, and that those instructions specifically advised him to avoid lifting, bending, and stooping over. He also told the jury that until the day he decided to go hunting, he had been taking it easy at home and stayed mostly in a recliner. Even if the assumption of risk jury charge were error, and Daly denies that it was, “the error was harmless given the evidence in the record and the other charges given to the jury,” his attorney argues. The jury’s verdict should be reinstated.

The Berryhills’s attorneys argue that the Court of Appeals properly concluded that the trial court erred in charging the jury on assumption of the risk. “The defense of ‘assumption of the risk’ focuses on the plaintiff’s subjective and actual understanding of the ‘risk’ he faces,” the attorneys argue in briefs. “There is no evidence in this case that Shane Berryhill had any actual subjective knowledge of the side effects of the combination of the prescribed blood pressure medication. Nor is there any evidence that Shane Berryhill was advised that participation in ‘strenuous’ activity would cause him to faint, or that he had any appreciation that climbing a deer stand was ‘strenuous.’” Concentrating on Berryhill’s lack of knowledge that “dizziness or loss of consciousness was a possible side effect of his blood pressure medication,” the Court of Appeals correctly concluded that the record was devoid of evidence of the “actual knowledge” element necessary to support a jury instruction on assumption of the risk, the attorneys contend. “With no knowledge of the risk attendant to the prescription of the medications, there is no known ‘risk’ for Mr. Berryhill to assume.” Berryhill “did not ‘assume the risk’ of the side effects of the medications.” And the Court of Appeals properly concluded that a charge on assumption of the risk was not proper.

Attorney for Appellants (Daly): Wiley Wasden, III

Attorneys for Appellees (Berryhills): Brent Savage, Kathryn Pinckney