Sims v. State

251 Ga. 877

SIMS

v.

The STATE.

No. 40313.

Supreme Court of Georgia.

Jan. 4, 1984.

Rehearing Denied Jan. 25, 1984.

Defendant was convicted in Superior Court, Spalding County, Ben J. Miller, J., of the murder of her husband, and she appealed. The Supreme Court, Gregory, J., held that: (1) evidence at trial authorized jury to find defendant guilty of murder beyond reasonable doubt; (2) failure of State to disclose certain items in response to defendant's notice to produce did not violate due process; (3) communications between victim and psychiatrist during joint counseling sessions in which defendant and victim were necessary participants were privileged; and (4) defendant did not have expectation of privacy in contents of her diaries warranting Fourth Amendment protection, where diaries were unlocked and had been casually placed in unenclosed space in area to which undetermined number of persons had access.

Judgment affirmed.

1. Homicide ⇐250

Evidence at trial, which included evidence that wife, the defendant, and husband, the murder victim, had quarreled in the past over methods of raising and disciplining son, that wife brought gun to husband's office subsequent to argument over disciplining son, and expert testimony tending to suggest that wife's account of how fatal shot was fired was impossible, authorized jury to find defendant guilty of murder beyond reasonable doubt.

2. Criminal Law ⇐772(2), 805(1)

In prosecution for murder, trial court properly defined criminal negligence, and fact that definition of criminal negligence was given as part of charge on "accident or misfortune" did not prevent jury from applying charge on accident to the facts as they might be found to exist. O.C.G.A. § 16-2-2.

3. Homicide ⇐163(2)

Reputation of homicide victim for violence is generally irrelevant and inadmissible.

4. Homicide ⇐188(1)

Deceased victim's general reputation for violence may be admitted, where there is prima facie showing that deceased was assailant, that deceased assailed defendant and defendant was honestly seeking to defend himself.

5. Criminal Law ⇐699

Trial court has sound discretion to control content of opening statement of either party, particularly with regard to matters of questionable admissibility.

6. Criminal Law ⇐703

In prosecution for murder, trial court's ruling that in his opening statement defense counsel could make general references to acts of violence committed by victim, but precluding defense counsel from disclosing details of those incidents until proper foundation was laid, was not abuse of discretion.

7. Criminal Law ⇐627.8(1)

Statutory "notice to produce" provisions governing pretrial production of physical evidence are applicable to criminal cases. O.C.G.A. § 24-10-26.

8. Criminal Law ⇐627.6(2)

In a criminal case, "notice to produce" pursuant to statutory provision governing pretrial production of physical evidence may compel production of books, documents or tangible things in the State's possession, where such books and other items would be admissible and are needed for use as evidence on behalf of defendant. O.C.G.A. § 24-10-26.

9. Constitutional Law ⇐268(5)

State's failure to disclose defendant's diaries, used at trial on cross-examination

to impeach defendant's testimony, under defendant's pretrial notice to produce physical evidence did not violate due process, where diaries were not needed by defendant as evidence in support of her defense and where trial court, in response to State's disclosure during cross-examination of defendant that State had the diaries, recessed trial so that defense counsel would be able to examine diaries overnight. O.C.G.A. § 24-10-26; U.S.C.A. Const.Amends. 5, 14.

10. Constitutional Law ⇐268(5)

States failure to disclose certain crime scene photographs under pretrial notice to produce physical evidence did not violate due process, where State did not offer those particular photographs into evidence and where in response to motion by defendant, trial court conducted in-camera inspection of the photographs and determined that they were not exculpatory. O.C.G.A. § 24-10-26; U.S.C.A. Const.Amends. 5, 14.

11. Criminal Law ⇐627.6(3)

Murder defendant had no right to independent expert examination of her diaries or of certain crime scene photographs, which were in possession of State, absent showing that expert analysis of the photographs would relate to critical matter which was subject to varying expert opinion; assertion that expert analysis might produce evidence helpful to defense was insufficient.

12. Witnesses ⇐184(1)

The presence of a third party will sometimes destroy privileged nature of communications.

13. Witnesses ⇐208(1)

Strong public policy favors preserving confidentiality of psychiatric-patient confidences where third party is present as necessary or customary participant in consultation and treatment, particularly when third party is communicant's spouse. O.C.G.A. § 24-9-21.

14. Witnesses ⇐214

Communications between homicide victim and psychiatrist during joint counseling sessions attended by both victim and wife were privileged, where wife and victim were jointly seeking psychiatric counseling for marital problems and victim was necessary participant in the psychiatric sessions.

15. Witnesses ⇐208(1)

Psychiatrist-patient privilege survives death of communicant.

16. Criminal Law ⇐394.5(2)

Factors to be considered in evaluating whether justifiable expectation of privacy exists, for purposes of determining whether Fourth Amendment applies to suppress fruits of a search, include whether accused has right to exclude others from place searched, whether accused has possessory interest in items seized, and whether accused took normal precautions to maintain privacy and security of items seized. U.S.C.A. Const.Amend. 4.

17. Criminal Law ⇐394.5(2)

Defendant had no reasonable expectation of privacy in content of her diaries, for purpose of invoking Fourth Amendment protection to suppress fruits of police search, where defendant had casually placed unlocked diaries in open box on floor of office storage area to which undetermined number of persons had access. U.S.C.A. Const.Amend. 4.

Donald F. Samuel, Edward T. M. Garland, Steven H. Sadow, Garland, Nuckolls & Catts, P.C., Atlanta, for Nancy Sims.

Johnnie L. Caldwell, Jr., Dist. Atty., Michael J. Bowers, Atty. Gen., Eddie Snelling, Jr., Thomaston, for the State.

GREGORY, Justice.

The defendant was convicted of the murder of her husband, Marshall Sims, and sentenced to life imprisonment.

The evidence at trial indicated the couple had a turbulent relationship during their three-year marriage and had separated on at least two occasions. At the time of the victim's death the couple had recently effected a reconciliation. The defendant had taken a leave of absence from her teaching position to work as the victim's secretary.

At trial the defendant testified that on the evening of the victim's death she returned to their home around 5:30 p.m. from a psychiatrist's appointment. She declined the victim's request to prepare dinner, stating she had some work to finish at the office. She returned to the office and completed the work within a few minutes. Enroute home she passed the victim in his car, headed in the direction of his office.

At home the defendant's 11-year old son informed her that he and the victim had quarreled over the child's failure to perform certain household tasks assigned to him. As punishment the victim had forbidden the child to spend the night with a friend even though the defendant had previously given her permission. The defendant's son testified that his mother stated "[the victim] is not going to do you this way because I told you you could go."

The defendant testified she returned to the victim's office determined to discuss the differences the couple had over disciplining the defendant's son.[1] She found the victim in his woodshop, located on the floor directly above his office. The defendant testified the victim was "in a rage" over the impending break-up of his law firm. According to the defendant the victim threw her to the floor, struck her "four or five" times and told her he was seeing, and would continue to see, other women. The victim then told her, "go home and get the gun. I'll put you out of your misery."

The defendant testified her psychiatrist had previously instructed her to "obey ... the absurd demands [the victim] made when he would go into a rage" on the theory that he would see how "stupid" his demands were and "would calm down." Following this advice, the defendant testified she returned home, located the victim's .38 caliber pistol and drove back to the office. The victim was still angry. According to the defendant the victim pinned her down on her back against the top of a tablesaw and raised a large board above her to strike her. The defendant testified the gun discharged as she raised her arm to protect herself from the blow.

A firearms examiner gave his opinion, based on the absence of gunpowder particles on the victim's clothing, that the fatal shot had been fired from a distance of at least 30 inches. The medical examiner testified that the fatal shot entered the victim's left chest, traversed the media sternum and down through the right lung before exiting the body. Based on the trajectory of the bullet, the State argued it would have been impossible for the defendant to have fired the fatal shot from a supine position.

[1] 1. The evidence at trial authorized the jury to find the defendant guilty of murder beyond a reasonable doubt. *Jackson v. Virginia*, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979).

[2] 2. In response to defendant's request to charge the law of accident and misfortune, the trial court charged OCGA § 16–2–2 (Code Ann. § 26–602), "A person shall not be guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, intention or criminal negligence." In conjunction with this charge the trial court gave the jury the definition of criminal negligence which, defendant agrees, was legally correct. Defendant argues, however, that the trial court erred in charging the law of criminal negligence as the jury may have believed a finding of criminal negligence would have authorized a conviction of murder. We do not agree.

The trial court's charge was a correct statement of the law. We do not think the jury would have been misled by the definition of criminal negligence given as part of the charge on accident or misfortune. Rather, the trial court's instruction simply followed OCGA § 16–2–2 (Code Ann. § 26–602). Death caused by accident is not a crime. Death caused by criminal negli-

1. Other evidence indicated the couple had quarreled in the past over methods of raising and disciplining the defendant's son.

gence is not an accident. The trial court quite properly defined criminal negligence to enable the jury to apply the charge on accident to the facts as they might be found to exist. We find no error.

[3-6] 3. Prior to trial the trial court granted the State's motion in limine to prevent the defendant from referring, at any time during trial, to the victim's past specific acts of violence toward the defendant, until the defendant had made a prima facie case of present assault by the victim from which the defendant sought to defend herself. Subsequently defense counsel sought a ruling on whether he could refer in his opening statement to specific acts of violence perpetrated by the victim on the defendant which counsel expected to prove at trial. The trial court ruled that in his opening statement defense counsel could make general references to acts of violence committed by the victim, but precluded him from disclosing the details of these incidents until a proper foundation was laid under *Milton v. State*, 245 Ga. 20, 262 S.E.2d 789 (1980).[2]

Defendant complains that this restriction denied her the right to a fair trial. We agree with defendant's assertion that the opening statement is of no small significance in that it outlines for the jury what a party intends to show at trial. However, we hold that the trial court has a sound discretion to control the content of the opening statement of either party, particularly with regard to matters of questionable admissibility. *Poteat v. State*, 251 Ga. 87, 303 S.E.2d 452 (1983); *American Employer Insurance Co. v. Johns*, 122 Ga.App. 577, 178 S.E.2d 207 (1970). See also, *Brown v. State*, 250 Ga. 862(2), 302 S.E.2d 347 (1983); Shulman, *Georgia Practice and Procedure* (4th Ed.) § 14-5, pp. 224-7. We do not find that the trial court abused its discretion in this case.

4. Prior to trial defendant filed, under OCGA § 24-10-26 (Code Ann. § 38-801),[3] a notice to produce, inter alia, "all photographs, physical evidence and documents (or other writings) in the possession of and intended for use by the prosecution as evidence at trial." The defendant argues that the State's failure to disclose diaries and certain crime scene photographs under this notice to produce violated due process.

[7, 8] While the notice to produce provisions of OCGA § 24-10-26 (Code Ann. § 38-801) are applicable to criminal cases, *Brown v. State*, 238 Ga. 98, 101, 231 S.E.2d 65 (1976), a "notice to produce cannot be used to enable defense counsel to examine, in advance of trial or evidentiary hearing, the contents of the district attorney's file." *Wilson v. State*, 246 Ga. 62, 64-5, 268 S.E.2d 895 (1980). In a criminal case a notice to produce pursuant to OCGA § 24-10-26 (Code Ann. § 38-801) may compel the production of books, documents or tangible things in the State's possession "where such books, etc., would be admissible and are *needed for use as evidence on behalf of the defendant.*" 246 Ga. at 64, 268 S.E.2d 895. [Emphasis supplied.]

[9] (a) The diaries which defendant claims were wrongfully withheld from her were used by the State on cross-examination to impeach the defendant's testimony. It is clear from the record that the defendant's diaries were not needed by her as evidence in support of her defense. The defendant's motion to suppress the diaries demonstrates this lack of necessity. Further, when the State made it known, during cross-examination of the defendant, that it was in possession of the diaries, the trial court recessed the trial so that defense

2. While the reputation of a victim for violence is generally irrelevant and inadmissible, when there is a prima facie showing that the deceased was the assailant, the deceased assailed the defendant and the defendant was honestly seeking to defend himself, the deceased's general reputation for violence may be admitted. *Milton v. State*, 245 Ga. 20, 22, 262 S.E.2d 789.

3. OCGA § 24-10-26 (Code Ann. § 38-801) provides, in pertinent part, "Where a party desires to compel production of books, writings or other documents or tangible things in the possession, custody or control of another party ... the party desiring the production may serve a notice to produce upon counsel for the other party..."

counsel could have an opportunity to examine the diaries overnight.

[10] (b) Nor did the notice to produce reach those crime scene photographs which the State did not offer in evidence. By its terms defendant's notice to produce requested only those "photographs ... intended for use by the prosecution as evidence at trial." Those photographs which the State offered in evidence were given to the defendant. We point out that, pursuant to the defendant's Brady motion, the trial court conducted an in-camera inspection of these photographs and determined they were not exculpatory.

[11] (c) Nor do we find that defendant had a right to independent expert examination of either the diaries or photographs under *Sabel v. State*, 248 Ga. 10, 282 S.E.2d 61 (1981). *Sabel* permits a criminal defendant "on motion timely made to have an expert of his choosing, bound by appropriate safeguards imposed by the court, examine critical evidence whose nature is subject to varying expert opinion." 248 Ga. at 17-18, 282 S.E.2d 61. At trial the defendant admitted she had made each entry in the diaries. On appeal she raises no issue necessitating an expert opinion as to their validity. We decline to extend *Sabel* to the examination of photographs unless there is some showing that an expert analysis of the photographs relates to a critical matter which is subject to varying expert opinion. It is not enough to assert that expert analysis might produce evidence helpful to the defense, i.e., to embark on a "fishing expedition."

[12, 13] 5. Defendant argues the trial court erred in refusing to allow a psychiatrist to testify to statements made by the victim during joint counseling sessions which both the defendant and the victim attended. Defendant maintains that her presence, as a third party, vitiates the otherwise privileged communications between the victim and psychiatrist. Communications between husband and wife and between psychiatrist and patient are protected under OCGA § 24-9-21 (Code Ann. § 38-418). While it is true, as defendant suggests, that the presence of a third party will sometimes destroy the privileged nature of communications, see *Richards v. The State*, 56 Ga.App. 377, 192 S.E. 632 (1937)[4] and *Knight v. The State*, 114 Ga. 48, 39 S.E. 928 (1901),[5] we join the weight of authority from other jurisdictions in holding that there is a strong public policy in favor of preserving the confidentiality of psychiatric-patient confidences where a third party is present as a necessary or customary participant in the consultation and treatment. McCormick, *Evidence*, (2nd Ed.) 6 101, p. 216; *Ellis v. Ellis*, 63 Tenn.App. 361, 472 S.W.2d 471 (1971); *Grosslight v. Superior Court of Los Angeles*, 72 Cal.App.3d 502, 140 Cal.Rptr. 278 (1977). See also, *Basil v. Ford Motor Co.*, 278 Mich. 173, 270 N.W. 258 (1936); 107 ALR 1491, 1493. The public policy in favor of protecting these confidences is strengthened when the third party is the communicant's spouse, in which case the communicant may also invoke the marital privilege under OCGA § 24-9-21(1) (Code Ann. § 38-418).

[14, 15] It is clear from the defendant's testimony that she and the victim were jointly seeking psychiatric counseling for marital problems.[6] As such we find that the victim was a necessary participant in the psychiatric sessions and his communications to the psychiatrist were entitled to protection. This privilege survives the death of the communicant. *Boggess v. Aetna Life Insurance Co.*, 128 Ga.App. 190, 196

4. Here it was held that a special prosecutor present during a conference between the defendant and his attorney could testify to their communications.

5. In this case a witness who overheard a wife exclaim to her husband that the husband had killed a man was permitted to testify against the husband on the trial of the murder case.

6. The defendant testified that she sought private counseling for depression and treatment of her marital problems. At times the victim would accompany her to these sessions for joint treatment of the couple's marital difficulties.

S.E.2d 172 (1973); Agnor, *Georgia Evidence*, § 6-4 (1976).[7] The presence of the victim's spouse, also a necessary participant in the treatment, does not destroy the privilege. The trial court did not err in refusing to allow the psychiatrist to testify to the victim's communications.

6. Defendant argues the trial court erred in denying her motion to suppress her diaries. Following the victim's death a G.B.I. agent obtained permission from one of the victim's former law partners and owner of the building to search the building in which the victim's body was found. During a search of a storage room in the law firm, the agent found defendant's diaries in an uncovered basket on the floor of the storage area. On top of the basket were some newspaper clippings. The agent testified that the storage area was in "disarray." Other than defendant's diaries the room held "boxes of materials, old chairs, desks, lumber, pieces of wood ... old pictures lying on the floor, newspapers, just a lot of everything." There was testimony indicating that this area was used by members of the firm to maintain "abstract files, retired files and supplies." Defendant testified she had received permission from the victim to store some of her personal belongings there.

Defendant concedes that the G.B.I. had authority, pursuant to the law partner's consent, to search the storage area. She maintains, however, that her husband's former law partner had no authority to consent to a search of her diaries.

[16] The U.S. Supreme Court has held that in determining whether the Fourth Amendment applies to suppress the fruits of a search, the courts must ask "not merely whether the defendant had a possessory interest in the items seized, but whether he had an expectation of privacy in the area searched." *United States v. Salvucci*, 448 U.S. 83, 93, 100 S.Ct. 2547, 2553, 65 L.Ed.2d 619 (1980). Factors to be considered in evaluating whether a justifiable expectation of privacy exists include whether the accused has a right to exclude others from the place searched; whether he has a possessory interest in the items seized; and whether he took normal precautions to maintain the privacy and security of the items seized. *Rawlings v. Kentucky*, 448 U.S. 98, 100 S.Ct. 2556, 65 L.Ed.2d 633 (1980); *U.S. v. Haydel*, 649 F.2d 1152 (5th Cir.1981). See also, LaFave, Search and Seizure, § 2.1 (1978). Defendant here points out that "[c]ommon experience of life, clearly a factor in assessing the existence and the reasonableness of privacy expectations, surely teaches all of us that the law's 'enclosed spaces'—mankind's valises, suitcases, footlockers, strong boxes, etc.—are frequently the objects of his highest privacy expectations...." *U.S. v. Block*, 590 F.2d 535 (4th Cir.1978). With this statement we concur. See, *U.S. v. Wilson*, 536 F.2d 883 (9th Cir.1976); *U.S. v. Blok*, 188 F.2d 1019 (D.C.Cir.1951). We agree that one has a reasonable expectation of privacy in the contents of a covered shoebox hidden under a bed in his parents' home. *U.S. v. Haydel*, 649 F.2d 1152 (5th Cir.1981). We also agree that one who deposits a package in the United States Mail has a reasonable expectation of privacy in the nondisclosure of its contents. *Walter v. U.S.*, 447 U.S. 649, 100 S.Ct. 2395, 65 L.Ed.2d 410 (1980).

[17] These cases differ, however, from the situation where a person places an unlocked diary in an open box[8] on the floor of a storage area to which an undetermined number of persons have access. The defendant did not secure her diaries in an "enclosed space" such as a valise, footlocker or strong box. Rather the diaries were

7. The issue of the State's standing to assert the privilege is not raised. There is authority for the proposition that only the personal representative of the communicant or the psychiatrist may assert the privilege after the communicant's death. 81 Am.Jur.2d § 236, p. 265; Federal Practice Standard 504. Other jurisdictions hold that the trial court has a discretion to invoke the privilege on its own motion in the communicant's absence, McCormick, Evidence (2d Ed.), § 102, p. 218.

8. The G.B.I. agent testified the box in which the diaries were found had open, latticework sides.

casually placed[9] in an unenclosed space. Nor did the diary itself have a lock which would shield it from the uninvited eye. Under these circumstances we find the defendant had no reasonable expectation of privacy in the content of the diaries. They were made available for the perusal of any person who entered the storage area. Therefore, we find that the trial court did not err in denying the motion to suppress.

Judgment affirmed.

All the Justices concur, except HILL, C.J., disqualified.

251 Ga. 850

In the Matter of CAMPBELL.

Disciplinary No. 356.

Supreme Court of Georgia.

Jan. 5, 1984.

Petition for reinstatement was filed. The Supreme Court held that where conviction forming basis of temporary suspension is reversed reinstatement is appropriate subject to disciplinary investigation of the facts giving rise to conviction.

Petition granted.

Attorney and Client ⇐61

Where conviction forming basis of temporary suspension is reversed, reinstatement is appropriate subject to disciplinary investigation of the facts giving rise to conviction. State Bar Rules and Regulations, Rules 4–106, 4–106(d).

Omer W. Franklin, Jr., Gen. Counsel, George E. Hibbs, Asst. Gen. Counsel, Atlanta, for the State.

PER CURIAM.

By order of this court of June 21, 1983, pursuant to Rule 4–106 of Part IV, Chapter 1 of the State Bar Rules and pursuant to his petition for voluntary suspension, John W. Campbell, II, was temporarily suspended from the practice of law in Georgia pending his appeal from his conviction of arson in the first degree in Douglas Superior Court on January 28, 1983.

On October 25, 1983, the conviction was reversed for insufficiency of evidence to support the verdict and judgment. *Campbell v. State*, 169 Ga.App. 112, —— S.E.2d ——. On November 9, 1983, Campbell filed with the State Disciplinary Board a petition for reinstatement under Rule 4–106(d), waiving his right to the hearing provided by that rule. On December 5, 1983, the Court of Appeals denied the state's motion for rehearing in *Campbell v. State*, supra.

On December 8, 1983, the State Disciplinary Board issued its report, finding that no decision on the motion for rehearing had been issued by the Court of Appeals as of that date, and recommending that Campbell be reinstated to the practice of law pursuant to the provisions of Rule 4–106(d), with the special master and the Board retaining jurisdiction over this matter in the event that subsequent legal proceedings concerning the petitioner's conviction result in the reversal or modification of *Campbell v. State*, supra.

We have reviewed the file, and accept, concur in, and adopt the recommendation of the State Disciplinary Board, including the retention of jurisdiction. It is hereby ordered that, pursuant to the provisions of Rule 4–106(d), Campbell "be reinstated while the facts giving rise to the conviction are investigated and, if proper, prosecuted under regular disciplinary procedures in these rules."

All the Justices concur.

9. The G.B.I. agent testified the diaries appeared to have been "thrown-in" the box.