

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 15, 2010

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THIS WEEK:

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Gambling; Video Gaming Machines

Ultra Telecom Inc. v. State, S09G1946, S09G1948 (10/4/10)

The Court granted certiorari in these cases to address whether seven video game machines were illegal gambling devices subject to condemnation by the State, as found by the Court of Appeals based on the interpretation it gave to the phrase “a single play” pertaining to the non-cash redemption options set forth in OCGA § 16-12-35, *State of Ga. v. Damani*, 299 Ga. App. 112 (2009), or whether the game machines met the definition in OCGA § 16-12-35 for coin operated games or devices designed and manufactured for bona fide amusement purposes only. The Court, in a 4-3 decision, reversed and found the machines to be legal under OCGA § 16-12-35 and OCGA § 16-12-20.

First, the Court of Appeals determined that these seven machines were illegal gambling devices because they violated the non-cash redemption option in OCGA § 16-12-35(d)(2) by exceeding the statutory \$5.00 cap placed on non-cash merchandise, prizes, toys, gift certificates, or novelties “received . . . for a single play.” The Supreme Court noted, however, that the Legislature recently amended OCGA § 48-17-1, the definitional statute for the revenue chapter governing the taxation of bona fide coin operated amusement machines. That amendment, which became effective July 1, 2010, contained the following definition: “(7.1) ‘Single play’ or ‘one play’ means the completion of a sequence of a game, or replay of a game, where the player receives a score and from the score the player can secure free replays, merchandise, points, tokens, vouchers, tickets, or other evidence of winnings as set forth in subsection (c) or (d) of Code Section 16-12-35. A player may, but is not required to, exchange a score for rewards permitted by subparagraphs (A), (B), (C), and (D) of paragraph (d) (1) of Code Section 16-12-35 after each play.” The Court stated that “[w]ith this amendment to OCGA § 48-17-1, which specifically defines the language in OCGA § 16-12-35 at issue in these appeals, the Legislature clarified its intent as to the meaning of ‘a single play’ both as it pertains to the statutory \$5.00 cap placed on rewards of non-cash merchandise, prizes, toys, gift certificates, or novelties in OCGA § 16-12-35 (d) (1) (B) and as to that term’s usage in the non-cash redemption provision in OCGA § 16-12-35 (d) (2). . . . It thus appears, by the plain language of this definition, that the Legislature rejected the construction given to the previously-undefined term “a single play” by the majority in the Court of Appeals, i.e., as requiring a player

who has accumulated sufficient points to either “cash out” upon completion of a single play or else forfeit any non-cash merchandise and additional accumulated points in order to obtain another single play of the game.”

Second, the Court held the seven game machines did not constitute illegal gambling devices based on the language in OCGA § 16-12-35 (d) (2). The Court found that two reasonable interpretations exist for the language in subsection (d) (2): one which requires players to be successful in each single game played and the other which allows players to accumulate winnings for the successful play of one single game and then carry over those winnings to subsequent plays without regard to the player’s success or lack thereof in those games. Since § 16-12-35 is a criminal statute, it must be construed strictly against criminal liability and, if it is susceptible to more than one reasonable interpretation, the interpretation most favorable to the party facing criminal liability must be adopted. Moreover, this rule applies even though a criminal statute is being construed in a civil context. Therefore, applying the most favorable interpretation, the Court held that OCGA § 16-12-35 (d)(2) does not require success in every single play of the game in order for a player to carry over and redeem points accumulated during an earlier successful play of the machine or device.

Third, the Court rejected the State’s contention that OCGA § 16-12-35 is not applicable to the game machines at issue because the machines are illegal slot machines as defined in OCGA § 16-12-20 (2)(B). The Court found that the trial court did not err as a matter of law by holding that a slot machine, as defined in OCGA § 16-12-20 (2)(B), is limited to those types of slot games in which a player wins rewards through “pure chance.”

Finally, the Court rejected the State’s argument that the machines were not bona fide amusements because no actual skill is involved in the playing of these games. Although the skill level involved in the play of these game was “unquestionably low,” it met the level of skill requirement defined in OCGA § 16-12-35(a). “Our Constitution prohibits gambling... and our statutes outlaw illegal gambling devices... The Legislature, however, has chosen to exclude from these constitutional and statutory bans certain poorly-defined games and deem them ‘bona fide amusement’ games that are legal to play notwithstanding the

questionable amusement value of the games, the low level of skill required to play them and the players’ potential to amass multiple “rewards” each worth \$5.00 for very little consideration.... Because the machines at issue in these appeals meet the definition in OCGA § 16-12-35 for coin operated games or devices designed and manufactured for bona fide amusement purposes only, the Court of Appeals erred by reversing the trial court’s holding that these machines are not subject to condemnation by the State.”

Double Jeopardy

Williams v. State, S10G0310 (10/4/10)

Appellant was acquitted of malice murder but found guilty of felony murder while in the commission of an aggravated assault, voluntary manslaughter, and aggravated assault. She was convicted and sentenced on the voluntary manslaughter charge. The jury’s verdict on the felony murder charge was vacated pursuant to *Edge v. State*, 261 Ga. 865 (1992), and the aggravated assault conviction was merged into the conviction for voluntary manslaughter. The trial court subsequently granted appellant’s motion for new trial. Appellant then filed a plea in bar on double jeopardy grounds seeking to preclude a second prosecution on the charges of felony murder and aggravated assault. The trial court denied the plea and right before trial, appellant pled guilty to aggravated assault. She then appealed the judgment and sentence, as well as the denial of her plea of double jeopardy.

First, the Court found no waiver of the right to plead double jeopardy. As a general rule, re-prosecution for the same crime based upon the same facts is not barred if subsequent proceedings resulted in the setting aside, reversal, or vacating of the conviction, unless the accused was adjudged not guilty or there was a finding that the evidence did not authorize the verdict. This rule, however, had no application here because appellant successfully appealed her conviction for voluntary manslaughter and faced retrial not only for the voluntary manslaughter charge but also for the greater offense of felony murder.

Appellant contended, citing *Edge*, that her double jeopardy rights were violated when the State sought to retry her on charges of felony murder and aggravated assault because she was implicitly acquitted of these charges at the

first trial. The Court agreed. Citing *Green v. United State*, 355 U.S. 184 (1957), and *Price v. Georgia*, 398 U.S. 323, (1970), the Court held that the State’s re-prosecution of appellant for felony murder was barred by double jeopardy after the jury found her guilty of the voluntary manslaughter of the same victim. A second prosecution on the aggravated assault charge was barred by double jeopardy because it served as the underlying offense to the felony murder charge and is a lesser included offense of felony murder. In so holding, the Court rejected the State’s contention that any harm caused by the double jeopardy violation was negated by her voluntary guilty plea to the charge of aggravated assault after the first trial and while she was facing a second trial on charges of felony murder, voluntary manslaughter and aggravated assault. “The consequences in terms of both penalty and stigma to [appellant] as she faced a second trial on charges of felony murder, voluntary manslaughter, and aggravated assault are significantly different than those had she faced retrial only on the charge of voluntary manslaughter, and under these circumstances we cannot determine whether the additional charges induced [appellant] to plead guilty to the lesser offense of aggravated assault.”

Sufficiency of Evidence; Prosecutorial Misconduct

Cooper v. State, S10A1053 (10/4/10)

Appellant was convicted, as a party to the crime, of malice murder and numerous other offenses stemming from a burglary at the home of the victim. He contended that the evidence was insufficient to convict him for tampering with evidence in regard to the gun that was used during criminal enterprise. The indictment alleged that appellant “with the intent to obstruct the prosecution of another, did knowingly conceal physical evidence, to wit: a gun. . . .” At trial, there was evidence that appellant had a gun on his person at the victim’s home. However, the State did not present any evidence as to what, if anything, appellant did with the gun. In the absence of any evidence that appellant intentionally and “knowingly destroy[ed], alter[ed], conceal[ed], or disguise[d] physical evidence,” (OCGA § 16-10-94 (a)), the Court held that he could not be convicted for tampering with evidence. The State’s reliance on the mere fact that the

police did not recover the gun was insufficient to prove appellant tampered with evidence in order to obstruct the prosecution of another as alleged in the indictment. Accordingly, appellant's conviction for tampering with evidence regarding his gun was reversed.

Appellant also contended that the State was guilty of prosecutorial misconduct. At the motion for new trial hearing, Murphy, a co-defendant who pled guilty and testified for the State, testified that his trial testimony as to appellant's involvement in the crimes charged was false and procured by the prosecutor in order to obtain a plea bargain. Appellant contended that this, along with the revocation of another co-defendant, Simmons,' plea deal after she made statements in contradiction of her plea hearing testimony and appellant's assertion that he refused to give false testimony to the prosecutor in exchange for a plea deal, proved that the prosecutor knowingly allowed false evidence to be presented to the jury in violation of due process. The Court disagreed. A post-trial statement purporting to state that trial testimony was false is merely impeaching of the trial testimony and insufficient to require a new trial in the absence of evidence that the trial testimony was of the purest fabrication. Murphy's testimony at the motion for new trial hearing not only carried less weight because it is post-trial, but was also suspicious as he only recanted when appellant came to be in the same prison cell block as him. Moreover, since Simmons was not privy to what occurred in the victim's home after she ran out and appellant did not present any evidence at trial that Simmons' testimony was false, the revocation of her plea deal was inapposite as was appellant's rejection of his plea deal offer. The trial court therefore did not err in finding there was no misconduct warranting a new trial.

Speedy Trial

Brown v. State, S10A1332, S10A1333 (10/4/10)

Appellants, Brown and Waters, both contended that the trial court erred in denying their respective pleas in bar on constitutional speedy trial grounds. In examining an alleged denial of the constitutional right to a speedy trial, courts must engage in a balancing test with the following factors being considered: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the

right to a speedy trial; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U. S. 514 (1972). The existence of no one factor is either necessary or sufficient to sustain a speedy trial claim, and a trial court's findings of fact and its weighing of disputed facts will be afforded deference on appeal. As to Brown, the Court found that he was arrested on August 16, 2006; his motion to dismiss was filed on November 9, 2009, 39 months later. This delay was presumptively prejudicial. The trial court refused to attribute the delay of the first 38 months to either party, and the Court found that the undisputed evidence supported that finding. As to the last month of delay, the Court determined that it may have been attributed to the State, but the delay was not intentional and relatively benign. As to the assertion of the right, because Brown waited more than three years after his arrest to assert his demand, this factor was weighed heavily against him.

Finally, as to the prejudice prong, Brown argued that he was precluded from working with his attorneys during his seven months of pre-trial incarceration and that his defense of alibi had been materially impaired because he relied on the State's assertions that it was obtaining his cell phone records to establish his whereabouts at the time of the crime, but the State never followed through and the records are no longer available. The Court, however, found that Brown's claim regarding his ability to work with his attorneys was without evidentiary support. As to his other claim of prejudice, the State was under no obligation to obtain the records from a third party and consequently, Brown failed to establish that it acted in bad faith. Also, Brown's alibi defense was not impaired as a result of the delay because his alleged alibi witness was still available and capable of giving testimony. Therefore, the trial court did not err in denying the plea in bar.

Merger

Long v. State, S10A1322 (10/4/10)

Appellant was convicted of felony murder, armed robbery and aggravated assault and other crimes relating to two victims. He contended that the trial court erred in not merging his armed robbery convictions with his aggravated assault convictions. The record showed that appellant was charged with two counts of armed robbery (one as to each

victim) and two counts of aggravated assault (one as to each victim by striking the victim with a gun).

To determine if the aggravated assaults were lesser included offenses of the armed robberies, the courts apply the "required evidence" test set forth in *Drinkard v. Walker*, 281 Ga. 211 (2006). Under that test, merger is not required if each offense requires proof of a fact which the other does not. Citing *Lucky v. State*, 286 Ga. 478 (2010), the Court noted that it has already held that aggravated assault with intent to rob merges into an armed robbery conviction. But here, the Court had to determine if aggravated assault with a deadly weapon merges into armed robbery. Because *Lucky* established that the assault requirement of aggravated assault is the equivalent of the "use of an offensive weapon" requirement of armed robbery, the controlling issue here was whether the "deadly weapon" requirement of this form of aggravated assault is the equivalent of the "offensive weapon" requirement of armed robbery. For purposes of armed robbery, the term "offensive weapon" includes not only weapons which are offensive per se, such as firearms loaded with live ammunition, but also embraces other instrumentalities not normally considered to be offensive weapons in and of themselves but which may be found by a jury to be likely to produce death or great bodily injury depending on the manner and means of their use. Therefore, the Court concluded, there was no element of aggravated assault with a deadly weapon that was not contained in armed robbery and that appellant's aggravated assault convictions merged into his armed robbery convictions.

Linson v. State, S10A1225 (10/4/10)

Appellant was convicted of malice murder, felony murder, and cruelty to children. She contended that cruelty to children, which was the predicate offense for felony murder, merged into felony murder and that the felony murder merged into malice murder. The Court held, and the State conceded, that the felony murder did in fact merge into the malice murder count. However, because the felony murder conviction must be vacated by operation of OCGA § 16-1-7, the cruelty to children charge would not merge into felony murder and would be vacated only if it merged into malice murder as a lesser

included offense thereof. The Court found that under the “required evidence” test of *Drinkard v. Walker*, 281 Ga. 211 (2006), the two did not merge. Malice murder, but not cruelty to children, requires proof that the defendant caused the death of another human being whereas cruelty to children, but not malice murder, requires proof that the victim was a child under the age of 18 who was caused cruel or excessive physical or mental pain. Therefore, each crime required proof of at least one additional element which the other did not and the crimes of malice murder and cruelty to children were not so closely related that multiple convictions are prohibited under other provisions of OCGA § § 16-1-6 and 16-1-7.

Justification; Right of State to Appeal

State v. Green, S10A0639 (10/4/10)

The State appealed from an order finding that Green was immune from prosecution under OCGA § 16-3-24.2. The trial court’s order, however, did not quash or dismiss the indictment. Instead the court placed the indictment on the dead docket.

The Court found that the right of appeal is legislatively granted and the State does not have a right to appeal from a decision in a criminal proceeding except as provided by statute. OCGA § 5-7-1(a)(1) authorizes an appeal by the State “[f]rom an order, decision, or judgment setting aside or dismissing any indictment, accusation, . . . or any count thereof[.]” The Court found that the determination that Green was immune from prosecution under OCGA § 16-3-24.2 “in effect dismissed the entire indictment” and therefore, the State was authorized to appeal from the order under OCGA § 5-7-1(a)(1).

The State contended the trial court erred as a matter of law in concluding Green was immune from prosecution because Green did not establish a prima facie case of justification under OCGA § 16-3-21. The Court agreed. In reaching its conclusion that Green was immune from prosecution, the trial court made no finding that Green was justified under OCGA § 16-3-21 (a) in using force which was intended or likely to cause death or great bodily harm because he reasonably believed that such force was necessary to prevent death or great bodily harm to himself. Instead, the trial court

ruled that Green was immune from prosecution because he did not commit any of the acts that statutorily preclude a finding of justification under OCGA § 16-3-21 (b). The Court found that while the commission of any of the three acts listed in § 16-3-21(b) does preclude a finding of justification, the converse of that statement—that the lack of the commission of any of the three acts demands a finding of justification—is not legally sound. Subsection (a) of OCGA § 16-3-21 requires that the person claiming justification in a murder prosecution establish that he held a reasonable belief that the use of deadly force against the decedent was necessary to prevent the defendant’s death or great bodily injury. Because the trial court did not take into account subsection of § 16-3-21(a) when it concluded that Green was immune from prosecution, the case was remanded in order that the trial court employ the proper legal standard.

Prior Difficulties; Accident

Mills v. State, S10A0844 (10/4/10)

Appellant was convicted of malice murder and other crimes. He contended that the trial court erred in admitting hearsay testimony from the victim’s sister concerning his prior difficulties with the victim. Under Georgia law, there are three basic requirements for the admission of hearsay under the necessity exception: (1) the declarant of the statement is unavailable; (2) the declarant’s statement is relevant to a material fact and more probative on that material fact than other evidence that may be procured and offered; and (3) the statement exhibits specific indicia of reliability. Appellant argued that even if the first two requirements were proven, the victim’s statements to her sister were not reliable because no testimony was elicited from the sister about her relationship with the victim and no evidence that the sisters were “close.” The Court found that his first argument—that the victim’s sister did not testify about the closeness of her relationship with the victim—was factually accurate but legally irrelevant. The specific indicia of reliability need not be established by the testifying witness alone. His second argument—that there was no evidence that the sisters were close—was legally relevant but factually inaccurate. Here, appellant testified in his own defense and described the relationship between the victim and her sister as “real close.” Thus,

the trial court did not abuse its discretion in admitting the sister’s testimony.

Appellant also argued that the trial court erred in refusing to instruct on his affirmative defense of accident. The evidence showed that appellant climbed into bed with a loaded pistol and placed it against the victim’s head. He contended that in his testimony, he stated that he kept the gun at his side, did not know it was loaded, and did not point it at the victim, and that the gun went off accidentally when the victim smacked it as he was getting back out of the bed. OCGA § 16-2-2 provides that “[a] person shall not be found guilty of any crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, intention, or criminal negligence.” The Court found that even if the jury believed his trial testimony, it could not have found in his favor on an affirmative defense of accident because death caused by criminal negligence is not an accident. Although appellant said that he did not fire the gun intentionally, he also testified that he climbed into bed with the victim and her two-year-old son holding a loaded handgun with his finger on the trigger because he wanted the victim to understand the seriousness of his concerns about infidelity. He also admitted that he did point the gun at the victim’s head and that it went off when she smacked it away. Misuse of a firearm in the manner described by appellant showed a degree of culpability that constitutes criminal negligence. Therefore, the trial court did not err in giving a charge on accident.

Speedy Trial

Jackson v. State, A10A1486 (9/28/10)

Appellant appealed from the denial of his motion for discharge and acquittal based on a violation of his statutory right to a speedy trial. The record showed that the State filed an accusation against appellant on February 17, 2009. On June 18, 2009, appellant filed a demand for a speedy trial under OCGA § 17-7-170. On February 10, 2010, appellant moved the trial court for discharge and acquittal of the charges, arguing that the State had failed to comply with his speedy-trial demand. The trial court denied his motion and he appealed.

The Court affirmed. OCGA § 17-7-170 (a) provides: “Any defendant against whom a true bill of indictment or an accusation is filed

with the clerk for an offense not affecting the defendant's life may enter a demand for speedy trial at the court term at which the indictment or accusation is filed or at the next succeeding regular court term thereafter; or, by special permission of the court, the defendant may at any subsequent court term thereafter demand a speedy trial." Here, the Court determined, on June 18, 2009, a date on which the demand was filed, the term at which appellant was accused and the succeeding term had already past. Since appellant did not have special permission from the trial court to file an untimely demand, the trial court denial his motion because of the untimely demand was proper.

Motion to Withdraw Guilty Plea

Lavendar v. State, A10A1577 (9/29/10)

Appellant entered a non-negotiated plea of guilty to aggravated assault. She thereafter filed a timely motion to withdraw her plea which the trial court denied. Appellant contended that the trial court erred in refusing to allow her to testify at the motion hearing that the victim was the initial aggressor and that she had done everything she could to mitigate the damage she caused. The Court held that although appellant contended that the trial court denied her the "fundamental constitutional right to testify on her own behalf," a defendant's right to testify applies to a trial on the question of guilt or innocence, not to a hearing on a motion to withdraw a guilty plea.

The Court also held that a defendant may challenge the validity of a guilty plea by showing it was not entered voluntarily and intelligently, or that she did not understand the nature of the charges against her and the consequences of the plea. Here, the Court found that the record showed appellant had read and fully understood the charges pending against her, and understood that by pleading guilty she gave up her right to trial by jury. She understood the maximum sentence and that while her attorney would make a sentence recommendation, the judge could sentence her up to the maximum permitted by law. She also understood the State's recommendation (which the trial court followed). She testified that no one used force, threats, or promises to make her plead guilty against her will, that she was satisfied with the services of her attorney, that her decision to plead

guilty was made freely and voluntarily, that she in fact committed the offenses charged against her, and that the facts outlined by the State were accurate. Given this evidence, the Court determined, the State met its burden by showing from the record that appellant was cognizant of the rights she was waiving and of the possible consequences of her plea. Therefore, the trial court did not err in denying his motion to withdraw her plea.

Search & Seizure

Prado v. State, A10A1335; A10A1368 (9/29/10)

The Court granted appellants an interlocutory appeal to review the denial of their motion to suppress. The facts, briefly stated, showed that officers were watching a house while awaiting a search warrant. They noticed a Ram pickup truck towing a large recreational trailer emerge from the back yard, followed by a white Chevrolet Tahoe. The officers stopped the vehicles. Appellants were the driver and passenger of the Tahoe. After the officers stopped the vehicles, they observed two men walk around from the back of the house, enter the garage, close the door, and then flee into the woods. Officers chased and arrested the men; one was barefoot and the other was carrying large amounts of cash. Meanwhile, a K-9 officer was summoned to the scene of the vehicular stop. He arrived within 20 minutes and the officer's drug detection dog alerted to the vehicles. Officers detained appellants while awaiting the arrival of the search warrant for the residence. Once the warrant arrived, a search of the house revealed a sophisticated marijuana growing operation. The Dodge Ram and the Tahoe were impounded, and the police obtained and executed search warrants for the vehicles. Although officers did not find any contraband in the appellants' Tahoe, they discovered 900 pounds of marijuana and over \$99,000 in cash hidden in the trailer attached to the Dodge.

Appellants first contended that the trial court erred in determining that officers had reasonable suspicion to stop the Tahoe and the Ram while awaiting a search warrant for the residence. The Court stated that a law enforcement officer may make a brief, investigatory stop of a vehicle when he has a reasonable, articulable suspicion that the person stopped has been, or is about to be, engaged in criminal activity. Here, the trial court found that the

officers had articulated a reasonable suspicion that the persons stopped were, or were about to be, engaged in criminal activity, based on the following facts: (1) a search warrant for the residence was pending based on probable cause to believe that an active marijuana growing operation was being conducted inside; (2) the officers had information from multiple sources that the residence was in fact a marijuana grow house; (3) the sources included an intelligence report prepared as a result of the Florida traffic stop, which indicated that special lighting equipment used in marijuana growing operations was being delivered to the residence; (4) the house exhibited the physical characteristics of other grow houses that had been recently discovered, of which the officers were aware based on their personal observations and their knowledge and experience; and (5) the officers observed appellants driving away from the residence in tandem with a truck and large recreational trailer, which had been obscured in the back yard behind a privacy fence. The Court stated that appellate courts "will not reverse a trial court's factual findings in the absence of evidence of a record *demanding* a finding contrary to the judge's determination." Since nothing in the record demanded a finding contrary to the trial court's determination, it was not error.

Second, appellants argued that the search warrant for the residence was not supported by probable cause. The trial court relied on the following facts set forth in the affidavit: similar investigations and seizures had taken place in several grow houses in the greater Atlanta area within the prior 72 hours; the house under surveillance had characteristics similar to those houses; an officer heard supplemental air conditioning units, which were concealed, running at the house, and neighbors told him that they did not believe anyone lived there; two men fled from the residence and were apprehended with large amounts of cash; two vehicles were stopped leaving the residence; and a drug detection dog alerted to the scent of narcotics coming from those vehicles. Based on these facts, the trial court did not err in finding that under the totality of the circumstances, the affidavit in support of the search warrant for the residence gave the magistrate a substantial basis for concluding that probable cause existed for the warrant.

Next, appellants contend that the search warrants for the vehicles were not supported

by probable cause. The Court disagreed. The Court found that the alert by the trained and certified drug dog was sufficient probable cause to search the vehicles. But in any event, the affidavit in support of the warrant recited the positive alert by drug dog, as well as the marijuana growing operation in the residence from which the vehicles drove away. Based on the totality of the circumstances, the affidavit provided the magistrate with a substantial basis for concluding that probable cause existed to believe that contraband would be found in the vehicles.

Finally, appellants argued that the search warrant for the vehicles was invalid because a second original of one of the affidavits was not signed by the attesting officer. The record showed that the affidavit in the magistrate's office lacked the affiant's signature. But, the affiant explained that he took three identical search warrants to the magistrate; that he signed two of the affidavits but inadvertently failed to sign the third one; and that he served appellants with the warrant by leaving a copy for them at the jail. The Court found that this evidence, construed most favorably to uphold the trial court's judgment, supported its finding that the warrant actually served contained the affiant's signature. Therefore, the absence of a signature on the affidavit left in the magistrate court's file did not invalidate the warrant.

Judicial Comment

Ward v. State, A10A1359 (9/30/10)

Appellant was convicted of possession of a firearm by a convicted felon. He contended that the trial court erred in "complimenting" a witness for the State following the witness' testimony. The evidence showed that, as the witness, Pollard, was leaving the stand after testifying, he spontaneously said to the judge, "May I shake your hand and thank you for the courtesy?" The judge responded, "Thank you, it's always a pleasure to have you." After Pollard thanked the judge again, the judge said, "All right. Members of the jury, you may or may not know Mr. Pollard, a longtime resident of Columbia County and public servant." Although defense counsel did not object to the judge's comments or move for a mistrial, the Court stated that appellant would be entitled to a new trial if the judge's comments violated OCGA § 17-8-57, because such a violation

always constitutes plain error as a matter of law. However, in view of the limited nature of Pollard's testimony when compared to the rest of the evidence presented, the circumstances surrounding the judge's comments, the brevity of the judge's comments, and the fact that those comments in no way concerned the facts of the case, the Court concluded that the judge's spontaneous comments, when viewed in context, did not constitute an impermissible expression of his opinion regarding the evidence presented or appellant's guilt in violation of OCGA § 17-8-57.