Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 1, 2010

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THIS WEEK:

Jury Array

Guzman v. State, S10A0739 (9/20/10)

Appellant was convicted of malice murder. He contended that the trial court erred in denying his challenge to the jury array. The record showed that after the jury was selected and after appellant's *Batson* challenges were denied, appellant made two oral and one written motion challenging the jury array as having an insufficient number of Latinos. Under OCGA § 15-12-162, any challenge to the composition of a panel of traverse jurors must be made when the panel is first "put upon" the accused, or there shall be a waiver of the right to contest its composition. A jury is "put upon" a defendant at the time that the jury array is seated and voir dire commences. "[I]n the absence of a timely trial court directive to the contrary, a challenge to the traverse jury array is timely filed any time before the voir dire begins." Here, there was nothing in the record reflecting a timely trial court directive to the contrary. Therefore, appellant's two oral challenges and his written challenge, all made after the jury was selected, were untimely.

Search & Seizure; Confessions

Turner v. State, S10A1063 (9/20/10)

Appellant was convicted of murdering his wife. He contended that his statements were inadmissible because he was arrested without probable cause. He also contended that his statements were not freely and voluntarily given. The evidence showed that after the police found the body of appellant's wife, they went to his house to notify him of the death. Appellant argued that he was arrested at that time and because the officers lacked probable cause for the arrest, any statements he thereafter made were inadmissible. However, the Court found, the evidence showed that once informed of the death, appellant asked to accompany the investigating officers to the station and voluntarily got in their car. He was never handcuffed, there was no cage in the car, and the door handles and locks were accessible from the backseat. The officer in charge of the investigation testified that appellant was not considered to be under arrest at that time. Once at the sheriff's office, appellant was placed in an interrogation room where he was given the *Miranda* warnings, and thereafter knowingly waived his constitutional rights in

writing and freely made his inculpatory statements. Thus, the evidence as found by the trial court supported the conclusion that the encounter between appellant and the investigating officers remained entirely consensual and that a reasonable person would have felt free to end the questioning and leave at any time. Moreover, the encounter never escalated into a seizure that would have triggered appellant's Fourth Amendment rights.

Appellant also contended that the trial court violated his Fifth Amendment right against self-incrimination by admitting his statements even though they were not freely and voluntarily given. Specifically, appellant contended that he was questioned for eight hours and the door to the investigation room remained locked. He also claimed that his statement "if y'all are going to try to do me like that, I don't want to talk no more," was an invocation of his right to remain silent. The Court found that appellant was high school educated, not under the influence and could read and write. The interrogating officers testified that appellant voluntarily accompanied them to the sheriff's office, he was never handcuffed, and he was free to leave at any time. Although there was evidence that the door to the interview room may have been locked when the officers were not present, locked doors do not indicate an in-custody arrangement where there is no evidence that the suspect could not have left had he so requested. Finally, the Court held that appellant's statement was an equivocal invocation of his right to remain silent, and therefore, the interrogating officers had no obligation to stop questioning him.

Jury Charges; Battered Person Syndrome

Demery v. State, S10A1189 (9/20/10)

Appellant was convicted of felony murder. She contended that the trial court erred in failing to give her requested charge on involuntary manslaughter found in OCGA § 16-5-3(b) (lawful act done in an unlawful manner). At trial, appellant raised the defense of justification arising from battered person syndrome. The Court held that one who seeks to justify homicide as having been committed in self-defense is not entitled to an additional instruction on involuntary manslaughter resulting from the commission of a lawful act in an unlawful manner. This is so because a defendant who seeks to justify homicide under the "self-defense" statute (OCGA § 16-3-21) is not entitled to an additional instruction on involuntary manslaughter in the course of a lawful act (OCGA § 16-5-3 (b)), whatever the implement of death. For if she is justified in killing under OCGA § 16-3-21, she is guilty of no crime at all. If she is not so justified, the homicide does not fall within the "lawful act" predicate of OCGA § 16-5-3 (b), for the jury, in rejecting the claim of justification, has of necessity determined thereby that the act is not lawful. The fact that appellant presented evidence of battered person syndrome did not affect this point of law since battered person syndrome is not a separate defense but is "an evidentiary component of the defense of justification." Therefore, trial court did not err when it declined to give a charge on lawful act/unlawful manner involuntary manslaughter.

Jury Charges; Credibility

Donald v. State, S10A1118 (9/20/10)

Appellant was convicted of felony murder. He contended that the trial court erred in giving the following charge: "I charge you that when the accused testifies, he at once becomes the same as any other witness, and his credibility is to be tested by and subjected to the same test[s] as are legally applied to any other witness. In determining the degree of credibility that should be afforded his testimony, the jury may take into consideration the fact that he is interested in the result of the prosecution. *I charge you that juries are not bound to believe testimony as to facts incredible, impossible, or imperatively improbable.*" (Emphasis supplied).

The Court found that this charge stems from language in *Patton v. State*, 117 Ga. 230 (1903), which held that "Courts and juries are not bound to believe testimony as to facts incredible, impossible, or inherently improbable. Great physical laws of the universe are witnesses in each case, which can not be impeached by man, even though speaking under the sanction of an oath." The Court held that this exception applies only in extraordinary cases, and only for statements which run contrary to natural law and the universal experience of mankind (e.g. testimony that the earth is flat). Moreover, this charge tends to discredit a witness's testimony in the eyes of the jurors and can confuse the jury as to the real issues. Here, appellant's allegation of self-defense may have been contradicted by other testimony but, it did not contradict the "great physical laws of the universe." Furthermore, the trial court's instruction to the jury likely confused the jury by discrediting appellant's testimony. By immediately giving the instruction regarding incredible or impossible testimony after the charges addressing appellant's self-interest and credibility, the trial court appeared to single out appellant's testimony as the target for the impossibility charge in the eyes of the jurors, thereby discrediting this testimony. Because the error could not be considered harmless, as appellant's testimony that he acted in self-defense was his sole defense at trial, his conviction was reversed.

Impeachment Evidence

Cannon v. State, S10A1005 (9/20/10)

Appellant was convicted of felony murder, aggravated assault, and possession of a firearm during the commission of a crime. He contended that the trial court erred in denying his motion for mistrial after the State improperly impeached the defense's main witness, appellant's father, by asking him if he was currently in jail. The Court held that the fact that the witness was currently incarcerated had no relevancy to the crimes on trial, and the State proffered no other reason for the evidence. If the State was attempting to impeach the witness by introducing evidence of a conviction of a crime of moral turpitude, the fact of that conviction should have been shown by record evidence and not by testimony. Therefore, the State's question was an improper attempt to impeach the defense's witness. Nevertheless, unlike *Polk v. State*, 202 Ga. App. 738, 740 (2) (1992), the admission of the evidence was harmless. In *Polk*, the error was not harmless because 1) the witness was crucial to the defense in that he was the only eyewitness to testify, and he corroborated the defendant's claim of self-defense; and 2) the trial court had not issued a curative instruction. Here, however, the witness was not crucial to the defense as he was not an eyewitness to the crime and could not bolster any self-defense claim since he was not present when the crime occurred. Furthermore, the trial court instructed the jurors to disregard the question and struck it from the consideration of the jury.

Appellant also contended that the trial court erred in failing to a grant a mistrial

after a female witness testified that she was afraid of appellant and his friends. The Court stated that although this testimony clearly put appellant's character in evidence, her testimony was admissible as it was relevant to her credibility as a witness and was being used to show "that she was testifying by reason of duress or fear." The witness had previously stated to the police as well as to others, that she had witnessed appellant shoot the victim and then search his pockets. She also had identified appellant as the shooter from a photographic lineup. However, when the State called her as a witness at trial, she denied that she witnessed the shooting and claimed that her previous statements and identification of appellant as the shooter were untrue. Thus, her testimony concerning her fear of appellant and his friends was relevant to explain why she had changed her story, and thus constituted evidence material to the case that was not inadmissible because it incidentally puts appellant's character in issue.

Similar Transactions

Hall v. State, S10A0692 (9/20/10)

Appellant was convicted of malice murder and aggravated assault in the shooting death of her husband. She contended that the trial court erred in admitting similar transactions. The evidence showed that the victim was shot by appellant during a time in their marriage when they were under severe financial stress. The State introduced as similar transaction evidence the testimony of her two former husbands regarding acts of violence she perpetrated against them. These acts, each of which occurred over tens years prior, consisted of incidents in which appellant during times of stress struck or kicked her then-spouse. Appellant argued that these prior batteries were inadmissible because they were not sufficiently similar.

The Court disagreed. It held that when considering the admissibility of similar transaction evidence, the proper focus is on the similarities, not the differences, between the separate crimes and the crimes in question. Here, the victims in the similar transactions were current or former spouses of appellant; the crimes all occurred when appellant was under stress; and they involved acts of violence that were either entirely unprovoked or disproportionate to any provocation. Moreover, in cases of domestic violence, prior incidents of abuse against family members or sexual partners are more generally permitted because there is a logical connection between violent acts against two different persons with whom the accused had a similar emotional or intimate attachment. Finally, contrary to appellant's further assertion, the 15 and 13 year lapses of time between the prior incidents and the crimes at issue here did not require exclusion of the evidence.

Spoliation; Exculpatory Evidence

State v. Miller, S09G1828 (9/20/10)

The Court granted certiorari to the Court of Appeals (*State v. Miller*, 298 Ga. App. 584 (2009)), to consider the proper standard for analyzing when the destruction of potentially exculpatory evidence rises to a violation of due process and whether that standard was met in this case. The general facts, briefly stated, are as follows: Appellant was stopped for a tag violation. The officer learned of outstanding warrants on appellant for robbery and battery. The officer arrested appellant and seized his cell phone, believing it to be evidence. The tag violation and the arrest warrants were separated out and the cell phone remained with the tag violation. After the tag violation was resolved, a letter was sent to the wrong address of appellant notifying him to pick up the cell phone. When appellant failed to respond, the police obtained and executed an order through the abandoned property statute, OCGA § 17-5-54, to destroy the cell phone as unclaimed property. Thereafter, appellant was indicted on robbery and battery charges. He claimed that the cell phone held phone numbers of two witnesses who could provide him an alibi defense and another who could corroborate defense evidence.

Citing *California v. Trombetta*, 467 U.S. 479 (1984), *Arizona v. Youngblood*, 488 U.S. 51 (1988), and *Walker v. State*, 264 Ga. 676 (1994), the Court held that the threshold inquiry in addressing whether a defendant's constitutional right to due process has been violated when the police destroy potentially exculpatory evidence is whether the subject evidence is so material to the defense that it is of constitutional import. Evidence is constitutionally material when its exculpatory value is apparent before it was lost or destroyed and is of such a nature that a defendant would be unable to obtain other comparable evidence by other reasonably available means.

Therefore, the fact that evidence may be "potentially useful" in a defendant's attempt at exoneration is insufficient to sustain a claim that the defendant has suffered an abridgment of due process of law due to the destruction or loss of the evidence. The key is the "apparent exculpatory value" of the evidence prior to its destruction or loss and "apparent" in this context has been defined as "readily seen; visible; readily understood or perceived; evident; obvious."

Applying these guidelines, the Court concluded that appellant failed to show a violation of due process as the result of the destruction of his cell phone. There were simply no circumstances from which it could be concluded that the exculpatory value of the cell phone was obvious or evident to police or any other State actor before the cell phone was destroyed. In fact, the facts pointed to a conclusion quite the contrary. The cell phone was initially seized because police believed that it was potentially inculpatory, as displaying a picture of a gun, for possible use by the State at trial for what was believed to be an armed robbery charge against appellant. What followed in regard to the cell phone and its fate could only be characterized as an unfortunate series of mishandlings, mistakes, and negligence by the police, but in no manner did the scenario permit the conclusion that it was apparent to law enforcement or anyone else involved in the seizure, custody, or disposition of the cell phone that it could possibly aid appellant in the defense of any criminal charges. Consequently, the evidence was not constitutionally material.

Search & Seizure

Holsey v. State, A10A1978 (9/14/10)

Appellant appealed from his misdemeanor marijuana conviction, contending that the trial court erred in denying his motion to suppress. The evidence showed that a police officer received a dispatch indicating that two individuals (a male and a female) had been seen peering into and pulling door handles of vehicles parked in a large shopping center parking lot. As an officer pulled her patrol vehicle into the shopping center parking lot, she saw appellant and a female companion, both of whom matched the description in the dispatch,

standing near appellant's parked vehicle. The officer asked appellant to move away from his vehicle and come toward her, which he did. While appellant was being questioned by the female police officer, another officer arrived and joined in the questioning. Believing that appellant was attempting to break into parked vehicles, the second officer arrested him for loitering. After arresting appellant, the second officer searched the interior of appellant's vehicle and found the marijuana.

The Court reversed appellant's conviction. Under *Arizona v. Gant*, __U. S.__ , 129 SC 1710, 173 LE2d 485 (2009), police may search a vehicle incident to a recent occupant's arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of an arrestee's vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. Here, there was no evidence that appellant was within reaching distance of the passenger compartment and no reason to believe that appellant's vehicle contained evidence of the loitering offense for which he was arrested. In fact, the officer conducting the search stated that he was looking for evidence that appellant had committed the crime of entering an automobile with the intent to commit theft.

The Court also held that the officers lacked probable cause to search the vehicle because there was no evidence that appellant had been breaking into automobiles in the shopping center parking lot. The officer conceded that this general belief was based solely on the dispatch report that appellant had allegedly been seen pulling on the door handles of parked vehicles, but, "[m]ere suspicion does not amount to probable cause."

Search & Seizure

Price v. State, A10A1766 (9/13/10)

Appellant was charged with VGCSA. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed. The evidence showed that the police were called to a domestic dispute. When they arrived, they were met outside the house by appellant and the complainant, who told the police that appellant and she "were in a short struggle and that he had put his hands on her" while they were in the living room. The police then entered the house to look for evidence of the battery and discovered marijuana in plain view. Appellant owned the home and the complainant was a visitor.

The Court noted that it was undisputed that the officers did not ask appellant for consent to enter his residence and that he never gave the officers express permission to enter his residence. It was further undisputed that the officers did not have a warrant to enter the residence. As such, the State was required to prove that exigent circumstances existed in order to justify the warrantless entry into appellant's residence.

The Court found no such evidence of exigent circumstances. First, law enforcement officers may not conduct a warrantless search of a known crime scene simply because they are lawfully present and a crime recently occurred there. Even while on location to investigate a known crime scene, without a warrant or consent there must be exigent circumstances to allow law enforcement to enter someone's residence. Second, there was no testimony from the officers reflecting that the entry was necessary to prevent evidence from being removed or destroyed before they could obtain a warrant. Both participants in the alleged domestic disturbance were outside the house, and there was no evidence that any one else was inside the house. Finally, the fact that the officers were never told they could not enter the residence and that appellant did not object when he saw them entering the residence did not provide grounds to enter. Mere acquiescence to the authority asserted by a police officer cannot substitute for free consent.

Search & Seizure; Recidivism

Baker v. State, A10A1039 (9/16/10)

Appellant was convicted of possession of marijuana with intent to distribute and sentenced under OCGA § 17-10-7 as a recidivist. He argued that the trial court erred in denying his motion to suppress. The evidence showed that appellant was a passenger in a vehicle that was stopped for a tag violation. The officer ran a check on the driver's license and appellant's identification. He then returned to the car and explained the tag problem. He also asked the men a few questions about, among other things, their status as parolees and whether they had any drugs in the car, and he indicated that he wanted them to step out of the car. They complied, and the deputy performed a pat-down search of them. The officer then obtained consent to search the car. At that point, approximately six minutes had passed since the initiation of the traffic stop. In the course of searching the car, the deputy found marijuana that appellant admitted belonged to him.

The Court held that there was no dispute that the initial traffic stop for the tag violation was valid. Pending completion of a valid traffic stop, an officer may question the driver or occupants of a vehicle on topics related or unrelated to the stop, request consent to conduct a search, or order the driver or occupants to get out of the vehicle. However, a seizure that is justified solely by the interest in issuing a citation or warning ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. Once that purpose has been fulfilled, the continued detention of the vehicle and its occupants is constitutional only if the officer has a reasonable articulable suspicion of other illegal activity or when the valid traffic stop has de-escalated into a consensual encounter. The Court held that the traffic stop had not already ended when the officer instructed him and the driver to get out of the car and then sought consent to search. Rather, these actions occurred contemporaneously with the officer's return to the car after checking the occupants' identification and his discussion with the driver about the tag violation. The officer testified that when he asked for consent to search he had a basis for issuing a warning for the tag violation but had not done so. After receiving consent to search, he informed the driver that he was not going to issue a citation or warning for the tag violation. Therefore, the traffic stop had not ended before the officer instructed the men to get out of the car and sought consent to search the car.

Moreover, where an officer requests consent to search contemporaneously or nearly so, with the moment the purpose of a traffic stop is fulfilled, a trial court is authorized to conclude that the request did not unreasonably prolong the detention. Here, the driver consented to the search while appellant was still legally detained, and the search occurred shortly thereafter.

Appellant also contended that his three prior felony convictions should have been treated as a single conviction for sentencing under OCGA § 17-10-7, which provides, in pertinent part, that "conviction of two or more crimes charged on separate counts of one indictment or accusation, or in two or more indictments or accusations consolidated for trial, shall be deemed to be only one conviction" for purposes of sentencing thereunder. If separate offenses are charged under separate charging instruments and a defendant is sentenced under separate orders, the offenses are generally not consolidated for trial within the meaning of OCGA § 17-10-7 (d). The record reflected that on February 24, 2004, appellant pleaded guilty to various counts of entering an automobile and theft by receiving, which were alleged in three separate indictments on which three separate orders of sentence were entered. Each indictment alleged crimes that occurred on different days, and the mere fact that he entered the guilty pleas and received the orders of sentence on the three convictions in a single day, and that the sentences imposed the same amount of time served for each conviction did not show that his convictions were "consolidated for trial" within the meaning of the recidivist statute. Accordingly, the trial court did not err in sentencing him as a recidivist.

Search & Seizure; DUI

Waters v. State, A10A1348 (9/16/10)

Appellant was convicted of DUI and failing to maintain lane. She contended that the trial court erred in denying her motion to suppress. The evidence showed that officers received a BOLO on a vehicle that had just left a bar after a disturbance in which the occupants (a male and a female) were seen arguing. The officer stopped the vehicle matching the BOLO. When the officer asked the driver, appellant, if she had been drinking, she responded yes and also stated that she was on Prozac and Xanax. The officer called for a HEAT unit to assist. The HEAT officer received the call at 11:27 p.m., left to go to the scene at approximately 11:36 p.m., and arrived at the scene at approximately 11:39 p.m. The HEAT officer conducted field sobriety tests of appellant and then arrested her for DUI and read appellant her implied consent rights immediately thereafter.

Appellant contended that she had been taken into custody by the first office and that therefore the field tests given by the HEAT officer were improper because she had not been Mirandized and that the implied consent rights were not read when she was arrested. The Court disagreed. The test for determining whether a detainee is in custody for *Miranda* purposes is whether a reasonable person in the detainee's position would have thought the detention would not be temporary. As a general rule, although a motorist is deprived of his freedom of action during a traffic stop, such detention is insufficient to trigger the rights set forth in *Miranda*. Here, although appellant was not free to leave the scene, she was not handcuffed or placed in the patrol car during the pending investigation. The first officer testified that there had been no initial determination of whether she was intoxicated or whether her prescribed medications had impaired her ability to drive. In addition to informing appellant of the reason for the stop, the officer told her that they had to wait for a HEAT officer to determine whether she was too impaired to safely operate her vehicle. Moreover, the delay between the time of the stop and the arrival of the HEAT officer was not unreasonable and did not cause her detention to ripen into a custodial arrest. Because a reasonable person in appellant's position would believe that her freedom of action was only temporarily curtailed pending further investigation during the traffic stop, the officers therefore were not required to advise her of her *Miranda* rights prior to the field sobriety testing. Similarly, because appellant was not under arrest before the HEAT officer arrived, the implied consent rights were timely given.

Nevertheless, the failure to maintain lane conviction was reversed. The State relied solely on the videotape of the stop without any testimony concerning this offense. The Court reviewed the videotape and found no evidence to support the conviction.

Venue; Theft by Receiving

Mock v. State, A10A1038 (9/16/10)

Appellant was convicted of burglary, criminal attempt to commit burglary, and two counts of theft by receiving a stolen firearm. He contended that the evidence was insufficient to support his conviction. As to the burglary charge, the Court held that the State failed to prove venue. At trial, the victim testified that she lived on Union Church Road and, in response to the prosecutor's question regarding whether her residence was in Screven County, she responded, "Three miles out of Newington." The Court held that this nonresponsive answer did not prove venue in the county. Similarly, a street name, standing alone, is never sufficient to establish venue, because streets frequently run through more than one county and there was no evidence here as to the location of either Newington or Union Church Road vis a vis the county. Finally, the fact that the responding officers were employed by the county sheriff's department could not serve as the exclusive proof that the crimes occurred in that county.

The Court also held that the State failed to prove the theft by receiving beyond a reasonable doubt. Here, the police found the stolen guns in a bathtub in a "dilapidated," "abandoned" trailer, which was located on the property where appellant lived with his mother. At trial, the investigating officer testified that there did not appear to be anything stored in the trailer, and that the furniture, if any, "was dilapidated, too." Appellant's co-defendant, who told the police about the trailer, had been staying with appellant and his mother for some period of time. At most, therefore, the Court found that the State had established that the stolen guns were located in a separate building on property where appellant lived. But there was no evidence that appellant had any knowledge, control, or possession of the trailer. Similarly, there was no evidence that he was ever in possession or control of the weapons which is a necessary element of theft by receiving. Thus, the evidence was insufficient to sustain his conviction for theft by receiving.

Indictments; Demurrers

State v. Corhen, A10A1600 (9/15/10)

The State charged appellant and a number of codefendants with ten counts of residential mortgage fraud and three counts of felony theft by deception. The trial court granted appellant's general and special demurrers to the indictment, stating that it did not put appellant or his codefendants on notice of what they did wrong and that the indictment was a "mess." The State appealed and the Court reversed.

A general demurrer challenges the sufficiency of the *substance* of the indictment,

whereas a special demurrer challenges the sufficiency of the *form* of the indictment. An indictment shall be deemed sufficiently technical and correct to withstand a general demurrer if it "states the offense in the terms and language of this Code or so plainly that the nature of the offense charged may easily be understood by the jury." OCGA § 17-7-54 (a). By contrast, by special demurrer, an accused claims, not that the charge in an indictment is fatally defective and incapable of supporting a conviction, but rather that the charge is imperfect as to form or that the accused is entitled to more information.

The trial court dismissed the entire indictment based upon language that the State had inserted between Count 1 and Count 2. The Court found that such language was unnecessary to any of the counts and, thus, was mere surplusage that did not invalidate the indictment. The record showed that Count 1 of the indictment charged appellant, Davis, Dewitt, Lovvorn and Taylor with committing residential mortgage fraud, OCGA § 16-8-102 (2), through the use of fraudulent appraisals. Immediately following Count 1, the State inserted the language at issue: "The crime[s] set forth herein in this Count One and all subsequent counts of this indictment [are] part of a pattern of residential mortgage fraud as to Antinino Lauray [appellant], Sylas Y. Dewitt and Joshua Davis." This language suggested that the State may have intended to charge appellant, Dewitt and Davis with participating in a pattern of residential mortgage fraud pursuant to OCGA § 16-8-105 (b). But, the Court stated, pretermitting whether the language at issue was even sufficient to such a charge, it was not set out as a separate count, nor could it be incorporated into Count 1 or any other count, because those counts did not contain language incorporating the charge. Further, the language was not essential to charge an offense under Count 1 or any other count in the indictment, so it may be omitted without affecting the validity of the individual charges. Finally, to the extent that the language was confusing to the named defendants because it failed to notify them as to what charges they must defend against, disregarding or omitting the language as surplusage resolved that confusion. Accordingly, the language at issue was mere surplusage that did not invalidate the indictment and that may be omitted without affecting the remaining charges.

The trial court also erred to the extent it sustained a demurrer as to Count 1 on the basis that the count was duplicitous. OCGA § 16-1-7 (a) (2) prohibits multiple prosecutions, including the defect of duplicity. An accusation is duplicitous if it joins separate and distinct offenses in one and the same count. If an indictment is duplicitous, it is subject to demurrer. The Court found that Count 1 charged each of the named defendants with committing one offense, a violation of OCGA § 16-8-102 (2), to wit: intentionally and knowingly using or facilitating the use of a deliberate misstatement or misrepresentation regarding the value of a single property during the mortgage lending process with the intention that it be relied on by a mortgage lender, a borrower, or others. The fact that the count referred to the use of more than one fraudulent document by the defendants did not render the count invalid and subject to demurrer on the basis of duplicity when the count itself charged only one offense.

As to the remaining counts of the indictment, the trial court erred in sustaining the defendants' general and special demurrers. Each count was sufficient to sustain a general demurrer because it stated the offense in the statutory language or so plainly that the nature of the offense charged may easily be understood by the jury, and each of the named defendants would be guilty of the crime charged if the facts as alleged in the count are taken as true. Further, each count was sufficient to sustain a special demurrer because it contained the elements of the offense intended to be charged and sufficiently apprised each of the named defendants of what he or she must be prepared to defend against. Moreover, the State was not required to specify in each count of the indictment whether each of the named defendants was being charged as the actual perpetrator or as a party to the crime, as that merely presented an issue of fact for resolution by the jury.

Jury Charges; Cross-Racial Eyewitness Identification

Wallace v. State, A10A1501, A10A1506 (9/16/10)

Appellants were convicted of burglary and/or armed robbery. They contended that the trial court erred in giving their requested charge on the reliability of cross-racial eyewitness identification. This jury charge stated as follows: "In this case, the defendants are of a different race from that of a witness who has identified him [sic]. You may consider, if you think it is appropriate to do so, whether the fact that a defendant is of a different race from that of the witness has affected the accuracy of the witness's original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race. You may also consider whether there are other factors present in this case which overcome any such difficulty of identification."

The Court held that a refusal to give a requested jury charge is not error unless the request is entirely correct and accurate; is adjusted to the pleadings, law, and evidence; and is not otherwise covered in the general charge. Here, the trial court gave the jury Georgia's pattern charge on assessing the reliability of eyewitness testimony. That charge instructed the jury to consider the possibility of mistaken identity and whether the witness's identification may have been influenced by factors other than the view that the witness claimed to have. The trial court also charged the jury on the State's burden to prove all elements of the charged offense beyond a reasonable doubt. The jury thus was informed that it was required to determine whether the eyewitness identification was sufficiently reliable to help satisfy the State's burden of proof that each appellant perpetrated the alleged offenses. Moreover, the Court noted that the appellants pointed to no Georgia authority that required the trial court to give a more specific charge on assessing the reliability of a cross-racial identification and that the cases from other states were unavailing.

DUI; Implied Consent

Ritter v. State, A10A1492 (9/16/10)

Appellant was convicted on DUI in Dawson County. He contended that the trial court erred in admitting the results of the Intox 5000 test because his request for an additional test of his own choosing was not reasonably accommodated. The evidence showed that the arresting officer stopped appellant's vehicle at 8:00 p.m. and subsequently arrested him for DUI. It was undisputed that appellant requested an

independent blood test and that that the test be conducted at his doctor's office in Alpharetta on the following morning; that Alpharetta was 30 to 45 minutes away; that the officer informed appellant that the test would have to be done that night; that he offered to take appellant to a closer facility in a neighboring county; and that he offered appellant a phone book to find a facility. The officer also testified that appellant insisted on going to his personal physician but never provided him with a name or number to contact him.

Where an officer has failed to obtain an additional test requested by the accused person, the trial court must decide if, under the totality of the circumstances, the officer made a reasonable effort to accommodate the accused who seeks the independent test. The factors to be considered by the trial court in making the determination, include, but are not limited to, the following: (1) availability of or access to funds or resources to pay for the requested test; (2) a protracted delay in the giving of the test if the officer complies with the request; (3) availability of police time and other resources; (4) location of the requested facilities, [e.g., whether the requested facility is in a different jurisdiction]; and (5) opportunity and ability of accused to make arrangements personally for the testing.

Here, the Court held, there is no bright line defining at what point the distance to the requested facility renders the suspect's request unreasonable or when the time factor becomes too onerous. The trial court found that complying with appellant's request to drive to Alpharetta would have taken the officer out of his jurisdiction, as Alpharetta was 30 to 45 minutes away; that the police department was short of staff on the evening in question, and that there were facilities in neighboring jurisdictions, which the officer offered to appellant as an alternative. Additionally, no evidence was presented that appellant had made arrangements to be tested at his personal physician's office. Accordingly, the evidence supported the trial court's finding that appellant's request was reasonably accommodated.

DUI; Similar Transactions

Steele v. State, A10A0955 (9/16/10)

Appellant was convicted of DUI (less safe). He contended that the trial court erred in admitting evidence of a prior DUI as a similar transaction. The Court held that the trial court properly found that the State made out the proper showing for admission of the prior DUI. First, appellant did not contest that he committed the earlier DUI offense. Second, bent of mind and course of conduct are proper purposes for the admission of similar transaction evidence in cases involving allegations of less safe DUI. Finally, the record showed sufficient similarity or connection between the prior DUI conviction and the DUI offense for which appellant was charged. "Contrary to [appellant]'s assertion that the similar transaction evidence had no specific relevance to the charge against him, we have held that a prior act of driving under the influence is relevant to prove the defendant's bent of mind or course of conduct in a subsequently-charged DUI offense. Likewise, there is no requirement that the trial court make an express determination that the probative value of the similar transaction evidence outweighed its prejudicial impact."

Appellant also made a similar argument to that made in *Wade v. State*, 295 Ga. App. 45 (2008): The admission of the evidence was error because using similar transaction evidence to show bent of mind or course of conduct in a less safe DUI case, where such evidence was not needed to supply a "missing element" in the State's case, was inherently so prejudicial that it violated "both Georgia common law and statutes regarding the admission of character evidence." The Court held that "[t]he reasons set forth in *Wade* regarding the bent of mind rationale are also applicable to [appellant]'s objection to the course of conduct rationale. For those reasons, we are constrained to affirm the trial court's judgment."

Similar Transactions; Res Gestae

Pelowski v. State, A10A1708 (9/13/10)

Appellant was convicted of aggravated assault, possession of a firearm during the commission of a felony, and acquitted of influencing a witness. He argued that the trial court erred in allowing the State to introduce evidence that he had been previously convicted of aggravated assault. During the victim's testimony, the State played recordings of three telephone conversations between appellant and the victim that formed the basis of the allegation that appellant had sought to influence the victim's testimony. During one of these recorded conversations, the victim stated that appellant had previously shot "at least two other people" and that he had two prior convictions for aggravated assault. Appellant replied that these claims were not true, but the victim asserted that he had been informed of these prior convictions by the district attorney's office. The trial court denied appellant's request to redact these statements from the recording.

The Court held that this evidence was not properly admitted as similar transaction evidence because the State did not follow Uniform Superior Court Rule 31.3 (B). At trial, the State sought admission of the evidence as impeachment under OCGA § 24-9-84.1 (a) (2). However, the Court found, the impeachment rules apply only where a defendant testifies. Here, appellant did not testify, and it was uncontroverted that he did not otherwise place his character into evidence. In addition, the State did not present evidence that the probative value of the evidence of appellant's prior conviction substantially outweighed its prejudicial effect, as required by OCGA § 24-9-84.1 (a) (2); nor did the trial court ever make an express finding of such. Alternatively, the State sought to introduce the victim's claims regarding appellant's prior offenses as res gestae evidence pursuant to OCGA § 24-3-3. But, the Court found, the recorded phone calls were made several months after the victim was shot, and the State claimed that the "act" connected with the victim's statements on the recording at issue was appellant's alleged attempt to influence the victim's testimony. The victim admitted, however, that he recorded the phone calls because he hoped that appellant "would say things that would be damaging to his case[,]" Thus, the victim had both the time and opportunity to deliberate about what he would say on the recordings. As a result, if the trial court admitted the recordings pursuant to the res gestae rule, such admission was error. Finally, the evidence was not harmless. The Court never gave a curative instruction, the State did not clear up the fact that appellant had not been convicted of any prior aggravated assault convictions through the victim's testimony, or that of any other witness, and the evidence was not overwhelming. Therefore, appellant's conviction was reversed.