Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 20, 2015

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THIS WEEK:

O.C.G.A. § 40-6-2; "Lawful Orders"

Williams v. State, A15A1484 (10/19/15)

Appellant was convicted of violating O.C.G.A. § 40-6-2 and two other misdemeanors offenses. He contended that the trial court erred in denying his motion to suppress. The evidence showed that officers set up a safety checkpoint at an intersection in a residential neighborhood. The officers flagged down all vehicles passing through the intersection to check drivers' licenses and vehicle registrations. Two officers stood on the north side of the intersection motioning for southbound motorists to halt just before a stop sign, while a third officer stood on the south side of the intersection intercepting northbound motorists. Appellant approached the intersection traveling southbound and failed to heed the commands of the two officers there to stop. He proceeded to the stop sign, stopped there, and then continued through the intersection. The officer on the south side of the intersection saw appellant fail to stop for his colleagues on the north side. The south-side officer also saw appellant manipulating a device that appeared to be a camera as he drove through the intersection. The officer stepped in front of appellant's car and gestured for him to stop, which appellant did. The officer approached the car and asked appellant for his driver's license, but appellant did not provide it. Instead, he continued to manipulate the device (which was, indeed, a camera), asked the officer for the legal basis of the stop and whether he was free to leave, and refused to answer questions without his attorney present. The officer consulted his supervisor, who ordered a computer check of appellant's license plate. That check showed that the license plate was valid and the car was registered to appellant, who had a valid driver's license. After establishing appellant's identity, the officers allowed him to leave. However, later that night, the officers obtained warrants and arrested appellant at his apartment. He was charged with failure to carry a driver's license; failure to drive with due care, in that he was holding a camera that distracted him; failure to obey a person directing traffic; and obstruction.

Appellant contended that the trial court erred because the roadblock was unconstitutional. The Court, however, found that the officers had reasonable suspicion to stop appellant independently of the roadblock because the officer saw him commit two crimes — driving past officers who had directed him to stop, and driving while distracted. The Court noted that a police officer may initiate a traffic stop if the defendant commits a traffic violation in his presence. The south-side officer testified that he stopped appellant because he saw him fail to obey an officer directing traffic.

That crime is codified at O.C.G.A. § 40-6-2, which is titled "Obedience to authorized persons directing traffic," and which provides that "[n]o person shall fail or refuse to comply with any lawful order or direction of any police officer … invested by law with authority to direct, control, or regulate traffic." The two officers on the north side of the intersection were wearing police uniforms with "high-visibility traffic vests," carrying flashlights, and directing all south-bound vehicles approaching the intersection to stop. Thus, they were performing a lawful police function within the meaning of O.C.G.A. § 40-6-2. Accordingly, appellant was obligated to comply with any "lawful order" the officers gave him.

In so holding, the Court further noted that the statute does not define "lawful order." In looking at other jurisdictions, the Court concluded that a "lawful order" means "an order within the officer's scope of responsibility in directing traffic." Applying this definition, the Court concluded that appellant violated O.C.G.A. § 40-6-2 by ignoring the "stop" commands of the officers on the north side of the intersection who were performing the police function of directing traffic. The south-side officer's observation of this violation justified his stop of appellant's vehicle.

Furthermore, the south-side officer also claimed to have seen appellant violate O.C.G.A. § 40-6-241, which provides that "[a] driver shall exercise due care in operating a motor vehicle on the highways of this state and shall not engage in any actions which shall distract such driver from the safe operation of such vehicle." As appellant proceeded through the intersection, he was manipulating "some sort of device in his hands," which the south-side officer believed "was contributing to him not stopping" for the north-side officers. This second observed traffic violation also justified the south-side officer's stop of appellant. Thus, the trial court did not err by denying appellant's motion to suppress evidence obtained a result of his stop and detention.

Statements; Miranda

Thomas v. State, A15A0907 (10/19/15)

Appellant was convicted of two counts of armed robbery and two counts of possession of a firearm during the commission of a crime. He argued that the trial court erred by admitting his custodial statement, which he contends violated his *Miranda* rights. The Court agreed, but found the admission harmless.

The evidence showed that after his arrest he was placed in a six foot by six foot room, and his feet were shackled to the floor. At 4:20 p.m., Sergeant Rogers entered the room, told appellant that he was a suspect in their investigation of two robberies and that they needed to interview him, and then elicited from appellant basic information including his name and date of birth. Rogers then read appellant his *Miranda* rights. Appellant responded "that he did not want to make a statement." Rogers "then spoke with him a couple — a little bit further[,] and [appellant] basically said he had no knowledge of any robberies and that [the police] could just put him in jail." Rogers then left the room. Appellant remained alone in the small interview room for more than three hours, during which time his feet were shackled to the floor, and he was not offered food, water, or the opportunity to use the restroom. Around 8:00 p.m., Rogers approached Investigator Kelly, advised him that appellant was in the interview room and had refused to speak with him, and asked Kelly to go in and attempt to speak with appellant. Kelly entered the interview room at 8:20 p.m. and began speaking with appellant, and Kelly told appellant that appellant's wife had made a statement to police incriminating appellant. When appellant responded that he did not believe Kelly, Kelly left the room, retrieved the audio recording of appellant's wife's statement, and played a small portion of it for appellant. Appellant then agreed to speak with the other investigators about the robbery, signed a *Miranda* waiver form, and gave a recorded statement detailing his involvement in the two robberies.

The Court found that appellant unequivocally invoked his right to remain silent when he told Rogers that he "was not making a statement and that [the police] could just put him in jail." However, that invocation itself did not automatically require suppression of appellant's statement because an accused's assertion of his right to remain silent effects neither a permanent immunity from further interrogation by the police nor a blanket prohibition on later statements made voluntarily by the accused. Rather, the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on whether his right to cut off questioning was scrupulously honored by law enforcement authorities.

The Court noted that factors in determining whether a defendant's assertion of his right to remain silent was scrupulously honored include whether police immediately ceased all questioning upon assertion and the time interval between the assertion and the subsequent police-initiated questioning. After applying these factors, the Court concluded that appellant's statement was improperly obtained. First, Rogers admitted at the suppression hearing that after appellant told him that he would not make a statement, Rogers "spoke with him a couple — a little bit further." And less than four hours transpired before Rogers sent Kelly in to speak with appellant. Thus, this short time interval weighed in favor of suppression. Secondly, there was no evidence that appellant initiated the conversation with Kelly. Instead, Kelly went into the room, without any communication from appellant during the break after Rogers left the room, and Kelly immediately advised appellant to cooperate and then began advising appellant of his wife's statement incriminating him. Under these circumstances the State failed to satisfy its burden to establish an effective initiation by appellant. Accordingly, Appellant's statements made after he invoked his right to remain silent were improperly obtained.

Nevertheless, the Court found the error harmless in light of the overwhelming evidence of appellant's guilt, including the victim's identification of him, the video surveillance footage of the two robberies, the multitude of items found in his bedroom linking him to the robberies, and the fact that his wife, who participated in one of the robberies, was a disgruntled former employee of the business that was robbed.

Kidnapping; Garza

Howard v. State, A15A1296 (10/23/15)

Appellant was convicted in 2007 for kidnapping, armed robbery, four counts of aggravated assault, and two counts of aggravated battery. He contended that there was insufficient evidence of asportation to support his kidnapping conviction. The Court agreed.

The evidence, briefly stated, showed that the victim, a pastor, had just finished a live broadcast on a radio station when appellant

and his codefendant came up behind him, and grabbed him by the throat, pulling him to the ground. They proceeded to tie him up with duct tape and wires and began torturing him. Appellant and his codefendant eventually left, taking the victim's car keys and wallet. The victim was later able to free himself and call the police.

In *Garza v. State*, 284 Ga. 696 (2008) the Supreme Court overruled prior law regarding the need for only slight movement to satisfy the asportation element of kidnapping and set out four factors to determine whether the asportation element was met: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. The *Garza* test was designed to determine whether the movement was one serving to substantially isolate the victim from protection or rescue — or merely a "criminologically insignificant circumstance" attendant to some other crime.

Here, the Court found, the movement occurred after the victim was grabbed by the throat from behind and he began to fight back. After the victim shot back in the chair, one of the assailants pulled him out of the chair. The victim explained that he "was trying to take both [assailants] out of the studio into the foyer[, and his] ultimate goal … would have been to get to the door … [b]ecause [it] was still unlocked." After the assailants forced the victim to the ground, he "ma[de his] move to the doorway … [,] and he was part-way across the doorway into the other room when" one of the men brought him to the ground.

The Court found that the victim's movements during his attempt to reach the doorway and escape were not performed by the assailants, who immediately returned him to the studio room. And although the assailants bound the victim's wrists and ankles and forced him to the floor, the movement was of minimal duration, and thus, the Court could not say that the movement served to "substantially isolate" the victim from protection or rescue; rather, it appeared that it was merely a "criminologically insignificant circumstance" attendant to the assaults being committed against him. Thus, the Court found, it agreed with appellant that the movement here did not constitute asportation under the applicable test as enunciated in *Garza*, and his conviction for kidnapping must be reversed.

Search & Seizure

Elvine v. State, A15A1340 (10/23/15)

Appellant was charged with VGCSA based on a drug sting operation. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed. The evidence showed that while arresting another individual, a drug enforcement officer observed the suspect's cell phone receive a text message from a person identified as "Skeet." Skeet initiated a text message dialogue that the officer interpreted as inquiring about purchasing $325 worth of marijuana from the suspect. The officer texted Skeet back from the suspect's cell phone and arranged to meet him at a certain convenience store to consummate the sale. The officer did not specify a time to meet. Upon arrival at the store, the officer chose a vehicle he saw parked in the parking lot and texted Skeet that he would be in that vehicle waiting for Skeet to arrive. Shortly thereafter, as the officer observed appellant (whom he did not know) drive past the specified vehicle to park, the officer immediately texted Skeet that he was inside the store. Appellant parked next to the specified vehicle, exited his own vehicle, and began walking into the store. Before appellant entered the store, the officer, along with a uniformed officer, stopped appellant, informed him he had been texting with police, and arrested him. The officer then took possession of appellant's cell phone and accessed its contents to confirm that the phone appellant possessed included the text message exchange he had just had with the contact identified as Skeet. Thereafter, the officer used the information obtained from the phone to get a search warrant to search the phone.

The Court found from the officer's testimony that at some time after the officer texted Skeet, appellant showed up at the convenience store, parked, and began walking to the store entrance when he was arrested. But, the Court noted, it was daytime, the store was open to the public, appellant parked in a public area, and the officer testified he did not recall seeing appellant reading or operating his cell phone at any time. Also, there was no evidence that appellant attempted to flee when he saw the officers, scanned the area for police, or otherwise engaged in any furtive movements or nervous behavior. Further, there was no evidence that the timing of appellant's conduct demonstrated that he was the person receiving text messages. The officer did not arrange the meeting at a specific time, which could have linked appellant's timely arrival with an intent to buy marijuana, nor did the officer explain how long it took appellant to arrive at the meeting location.

Thus, the Court found, while the circumstances described by the officer could give rise to the suspicion or possibility that appellant was the person sending incriminating text messages about a drug transaction, the record was insufficient as a matter of law to constitute probable cause to arrest appellant for attempting a drug transaction. In fact, the Court stated, under the officer's logic, any person of any description who parked in that area around that general time (whether or not they were using their cell phone) and attempted to enter the convenience store would be subject to arrest. Accordingly, the trial court erred by concluding that the State carried its burden to demonstrate probable cause to arrest appellant.

The Court also found that the subsequent search warrant obtained to search appellant's cell phone was tainted by the illegal arrest. Here, the State made no argument that appellant consented to turning over his cell phone or allowing its search, so it was clear that the officers could not have seized appellant's cell phone absent the arrest. Further, with respect to the warrant to search the contents of the cell phone, the affidavit considered by the issuing magistrate relied on evidence obtained by police pursuant to the unlawful arrest. Thus, the affidavit stated that "[p]art of the [current drug] investigation involved the interception of text messages between [appellant] and law enforcement." But, before searching appellant's phone during the arrest, the officer did not know who he was texting, nor did he know appellant; therefore, the officer could not have known that the incriminating text messages were "between [appellant] and law enforcement," as averred in the warrant affidavit. Therefore, the Court found, because the warrant was premised on information obtained through the unauthorized arrest, the trial court erred by denying appellant's motion to suppress the

evidence obtained pursuant to the arrest or the warrant.

Recidivist Sentencing; Misdemeanors

Hobbs v. State, A15A1374 (10/23/15)

Appellant was convicted of making terroristic threats, improperly backing a vehicle, failing to stop at or return to the scene of an accident, and reckless driving. The State filed a pretrial notice of its intent to seek recidivist sentencing pursuant to O.C.G.A. § 17-10-7(a). The trial court then sentenced appellant to confinement for five years for making terroristic threats, twelve months for improper backing, twelve months for failure to stop at or return to the scene of an accident, and twelve months for reckless driving. The court also ordered that all counts were to run consecutively to each other.

Appellant argued that the sentences were improper because the court failed to exercise its discretion when it announced that, pursuant to the recidivist statute (O.C.G.A. § 17-10-7), it was required to sentence him to the maximum sentence on each count, and indeed sentenced him accordingly, when that statute is not applicable to sentencing on misdemeanor counts. The Court agreed. O.C.G.A. § 17-10-7(a), pertinently provides that "any person who, after having been convicted of a felony offense in this state … commits a *felony* punishable by confinement in a penal institution shall be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense of which he stands convicted."(Emphasis supplied) The statute specifies felony offenses, and makes no reference to misdemeanor offenses. Yet here, the trial court stated that the State's recidivism notice required it to impose the maximum sentence on each count (and sentenced appellant accordingly), when the recidivist statute does not require such sentencing as to misdemeanor crimes. Thus, the Court found, the trial court's failure to exercise its discretion as to the three misdemeanors was error, which it further found could not be considered harmless under these circumstances. Therefore, the Court vacated appellant's sentences as to the three misdemeanors and remanded the case to the trial court for resentencing as to those counts. Nevertheless, the Court also noted that in exercising its discretion, the trial court could reimpose the maximum penalty as well consecutive sentencing.

State's Right to Appeal; Collateral Order Doctrine

State v. Cash, S15A0720 (11/16/15)

Cash and her daughter, Washington, were convicted of malice murder, felony murder and related charges. Prior to the hearing on their motion for new trial, the State filed a motion to recuse the trial court judge. The judge denied the motion and the State appealed. The trial court deemed the appeal frivolous and went forward with the motion for new trial. The court then granted the motion finding they received ineffective assistance of counsel at trial and that the verdicts were contrary to the principles of justice and equity and decidedly and strongly against the weight of the evidence. The State again filed an appeal.

The Court found that the State did not have the authority to appeal the denial of its motion to recuse. The Court noted that the State may not appeal *any* issue in a criminal case, whether by direct or discretionary appeal, unless that issue is listed in O.C.G.A. § 5-7-1. O.C.G.A. § 5-7-1(a)(9) was amended in 2005 to permit the State to appeal "from an order, decision, or judgment denying a motion by the state to recuse or disqualify a judge made and ruled upon *prior* to the defendant being put in jeopardy." (Emphasis supplied). But, here, the Court found, because the motion was made *after* conviction, the State had no statutory right to appeal.

Nevertheless, the State argued, the Court had jurisdiction over the appeal under the Collateral Order Doctrine. The Court disagreed. In reviewing the doctrine and the statutory basis from which the State has the right to appeal, the Court found that "the State has no right to appeal the order denying its motion to recuse under the collateral order doctrine even if the order were determined to satisfy the requirements of the doctrine."

Defendant's Character; Motions for Mistrial

Smallwood v. State, A15A1373 (10/22/15)

Appellant was convicted of trafficking in methamphetamine. The evidence showed that he was travelling in a car with 3 other individuals. Based on consent to search, a trafficking amount of meth was found underneath the car. At trial, all three of the other passengers testified against appellant.

First, appellant contended that the trial court erred by failing to grant a mistrial when character evidence regarding his criminal history came out in an audio/video recording the State played during trial. The record showed that before trial, both parties stipulated that appellant's criminal history would not come into evidence. The State planned to show the audio/video recording of the traffic stop and agreed to redact any mention of appellant's past criminal history including where the arresting officer asked the driver of the vehicle about appellant's parole status. At trial, the State played the video during the officer's testimony but failed to mute the tape before the officer asked about appellant's parole status. Appellant objected and moved for a mistrial on the presumption that the jury heard the officer. The parties agreed the jury never heard a response from the driver because the State immediately muted the recording, right before appellant's objection. Since the audio/video recording could not be entered into the record, the trial court was unsure if the jury heard the full word "parole", as appellant claimed, or just the beginning of the word, as the State claimed. It was also unsure if the question pertained to appellant or to another person and ultimately denied the motion for mistrial. The trial court offered to either sustain the objection, move to strike the material, or provide curative instructions, but appellant declined all of these options.

The Court found no abuse of discretion. Here, the Court found, the jury heard the word briefly during a line of questioning with a third person witness on an audio/video recording which the State immediately muted. The jury's exposure to the word "parole" was brief, the question was out of context, misleading, unanswered, and the State's failure to mute the recording was "clearly inadvertent." Furthermore, the mere mention of a defendant's criminal history fell short of placing his character at issue.

Appellant also contended that the trial court erred by failing to grant a mistrial when improper character evidence was introduced during witness testimony regarding the fact defendant had been in prison. The Court again

disagreed. The record showed that during trial, the State asked the driver of the vehicle to explain his relationship with appellant by establishing they attended junior high school together and they were still acquainted. When asked if he still remained in contact with appellant the witness replied "[W]e lost contact till he got out of prison two-and-a-half or three years ago or something like that." Appellant objected and moved for a mistrial based on admission of improper character evidence from both the recording and the witness.

The Court stated that motions for mistrial are largely in the discretion of the trial judge, especially where the cause of the motion lies in the voluntary remark of a witness not invited by court or counsel, and, where the jury is properly instructed and the remark is not so flagrantly prejudicial as to violate the fair trial rights of the defendant. Here, the trial court ruled that the State did not elicit a response about the defendant's past criminal history, but that the witness volunteered the information. The court then supplied curative instructions.

Citing *Morgan v. State*, 303 Ga.App. 358, 361 (2) (2010) as support, the Court stated that an unresponsive answer that impacts negatively on a defendant's character does not improperly place the defendant's character in issue. Additionally, any error that arose from the jury having heard these unsolicited passing references to appellant's previous criminal entanglements was harmless in light of the overwhelming evidence against him. Therefore, the Court concluded, the trial court did not abuse its discretion in denying appellant's motion for mistrial because the witness's comment was nonresponsive and brief, the trial court provided curative instructions, and because the evidence against him was overwhelming.

Evidence; Admissions of Third Parties

Owens v. State, A15A1177 (10/20/15)

Appellant was convicted of VGCSA after hydrocodone pills were found in his vehicle during a consent search. He attempted to prove that the drugs were planted in his car by a woman named Bannister, who he claimed was motivated to set him up by a desire to get favorable treatment in an unrelated criminal case pending against her. The defense called Bannister herself as a witness, but she invoked her Fifth Amendment right not to testify. Appellant's ex-wife took the stand, however, and testified that Bannister had confessed to her that she had placed the drugs in appellant's truck.

Appellant also attempted to introduce the transcribed testimony of Bannister's aunt, who was questioned outside of the jury's presence due to her conflicting court obligations. The crux of the aunt's testimony was that "[Bannister] didn't tell me how she did it or anything herself, but she just told me that she did it, did do it." The aunt explained further, "[W]e were just standing and talking and … [Bannister] said 'all this stuff with [appellant], yeah, I did it,' but she said, … 'I ain't worrying about it.' That's exactly what she said. She said, 'yeah, I did it.'" Because the witness never clarified what "it" was, however, the trial court excluded the testimony as "too indefinite."

Appellant argued that the trial court erred in excluding the transcribed testimony of Bannister's aunt. The Court disagreed. As a general rule, the exclusion of evidence on the ground of relevancy lies within the sound discretion of the trial court, whose decision will not be disturbed on appeal absent a clear abuse of discretion. The trial court explained that the aunt's failure to define "it" as related to Bannister's alleged admissions rendered the proposed testimony "vague and non-specific," and thus inadmissible because "it was not probative of any issue before the jury. The Court found no abuse of discretion in the trial court's decision to exclude the transcribed testimony.

Sentencing; Merger

Daniels v. State, S15A1428 (11/16/15)

Appellant was convicted of the following charges: Count (1)—malice murder; Count (2)—felony murder while in the commission of aggravated assault; Count (3)—felony murder while in the commission of rape; Count (4)—aggravated assault; and Count (5)—rape. Appellant argued that the evidence was insufficient to support his convictions, but the Court found otherwise.

Nevertheless, the Court stated, even though the evidence was sufficient to support the guilty verdicts, there was error with regard to the trial court's merger for judgment and sentencing of Count (4), aggravated assault, with Count (2), felony murder while in the commission of aggravated assault, and of Count (5), rape, with Count (3), felony murder while in the commission of rape. The error stemmed from the trial court's failure to recognize that the alternative felony murder counts did not merge but rather stood vacated by operation of law as simply surplusage. Thus, there were no felony murder counts into which the underlying felonies could merge, and the trial court erroneously determined that the aggravated assault and the rape merged as a matter of law into such counts. Instead, the Court stated, the trial court should have determined whether such underlying felonies merged, as a matter of fact, into the malice murder count.

Here, the Court found, Count (1) of the indictment charged appellant with the malice murder of the victim by strangling her with a ligature. Count (4) charged appellant with aggravated assault "with an object" by strangling the victim with a ligature. Therefore, the aggravated assault merged as a matter of fact into the malice murder. However, Count (5) of the indictment, which charged appellant with the rape of the victim, did not so merge; therefore, appellant should have been sentenced on this count. Accordingly, the Court remanded the case for resentencing.

Conflicts of Interest; Public Defenders

Thomas v. State, S15A0777 (11/16/15)

Appellant was convicted of malice murder and numerous other crimes in connection with four armed robberies. The record showed that appellant and Lee were originally indicted together, with appellant charged with the other crimes as well, and both men were represented by lawyers from the same Public Defender's Office. On May 14, 2010, appellant's trial counsel filed a motion to withdraw on the ground that a conflict of interest could arise if the State called Lee to testify against appellant. The trial court never ruled on the motion. On October 27, 2010, Lee pled guilty to robbery and aggravated assault and was sentenced to serve 13 concurrent years for each crime. On May 24, appellant was re-indicted alone.

Appellant contended that his trial counsel rendered ineffective assistance by failing to obtain a ruling on her motion to withdraw. The Court noted that trial counsel's motion was based on a possible conflict of interest due to the representation of appellant's then co-indictee by another lawyer in her office. But,

the Court found, at the time trial counsel filed her motion, there was the potential that the representation of appellant and his co-indictee by lawyers from the same public defender's office would cause a conflict of interest. However, by the time appellant's trial began, there was no conflict. The record showed that when trial counsel filed her motion in May 2010, she presumed that the State would call Lee to testify against appellant at trial. Before the trial began in June 2011, however, the situation changed significantly: Lee pled guilty and was sentenced; appellant was re-indicted alone; the prosecutor notified appellant's counsel that the State would not call Lee at trial; and counsel decided that appellant would call Lee as a witness because Lee's testimony would benefit his defense. Appellant then called Lee as a defense witness, and Lee corroborated appellant's testimony that he was not present for the crimes against two of the victims.

Quoting *In re Formal Advisory Opinion 10-1*, 293 Ga. 397, 400 (2013), the Court stated the imputed conflict rule "does not become relevant or applicable until *after* an impermissible conflict of interest has been found to exist." Thus, the Court concluded, had trial counsel pursued a ruling on her motion to withdraw at trial, the court would have been entitled to deny the motion for failure to establish that an impermissible conflict of interest existed at that time. Accordingly, appellant failed to show that his trial counsel was ineffective.

Motions to Recuse Judge

Post v. State, S15A1189, S15A1190, S15A1193 (11/16/15)

Appellants, Post, Fripp and Brown, were convicted of felony murder and armed robbery. They were indicted on December 9, 2009. On October 6, 2010, the Governor appointed Reuben M. Green, who was campaigning for election to the Cobb County State Court, to fill a vacancy on the Cobb County Superior Court, and appellants' cases were assigned to him. On April 18, 2011, two months before the scheduled trial date, Post filed a motion for recusal on the grounds that Judge Green was employed by the Cobb County District Attorney's Office when Post's case was being handled by that office and that the Cobb County District Attorney, Patrick H. Head, was serving as the treasurer for "Judge Green's election campaign." At the final motions hearing six weeks later, Judge Green engaged the parties in a lengthy discussion about his possible recusal before orally denying Post's motion. After the hearing, Fripp and Brown filed motions for recusal on the ground that Judge Green had created an appearance of impropriety by defending himself against the recusal allegations. On September 2, 2011, Judge Green denied appellants' recusal motions, and the judge also denied their requests for a certificate of immediate review. Appellants proceeded to trial in March 2012.

The Court first reviewed in detail the basic procedural and substantive rules governing motions to recuse superior court judges in Georgia. It then turned to consideration of the motions filed by appellants. As to Post's motion to recuse, the Court found that Post's April 18, 2011 recusal motion was timely, he substantially complied with the accompanying affidavit requirement, and the motion included an allegation — that the district attorney prosecuting him was serving as treasurer for the trial judge's election campaign — that was potentially sufficient to warrant the judge's recusal. Accordingly, Judge Green was required to refer the motion for reassignment to another judge who could then decide the recusal motion on its merits, after an evidentiary hearing or other development of the record, based on facts found to be true as opposed to facts merely assumed to be true. The Court therefore vacated Post's convictions and Judge Green's order denying his recusal motion, and remanded the case to the trial court to be referred for the assignment of a judge other than Judge Green to decide the recusal motion. The Court further stated that if the judge assigned to decide the recusal motion denies it, then Judge Green will continue to preside over the case, the judgments of conviction against Post should be re-entered, and he may file a new appeal enumerating the denial of the recusal motion as error along with the enumerations of trial error that he raised in this appeal. If the recusal motion is granted, however, Post's case must be reassigned, all proceedings and orders after the filing of the motion would be void as to Post, and his case would start over from that point before the new judge assigned to the case.

The Court next turned to the motions to recuse filed by Fripp and Brown based on the appearance of impropriety of Judge Green during the last motions hearing on the motions to recuse. The Court quoted the transcript at length concerning the Judge's statements challenging the allegations in the motions to recuse. The Court stated that a judge cannot become actively involved in presenting evidence or argument against a motion seeking his recusal without that defense itself becoming a basis for recusal. This is so because a judge has no interest in sitting on a particular case; at most, his interest lies in protecting his own reputation. His efforts at defending himself against a motion to recuse will inevitably create an appearance of partiality. One reason is that if he defends himself he becomes an adversary of the movant for recusal. This adversarial posture may create an antipathy which persists after the motion to recuse is denied. The Court recognized that judges may be sorely tempted to respond to motions to recuse which they perceive as gratuitously defamatory. It also recognized that a judge who actively resists recusal may be fully capable of even-handedly presiding if the motion is denied. Nevertheless, the Court stated, "we think that these factors are heavily outweighed by the necessity of preserving the public's confidence in the judicial system."

Therefore, the Court concluded, Fripp's and Brown's recusal motions based on Judge Green's statements during the May 31, 2011 hearing should have been referred for reassignment to another judge to decide. But, the Court found, there is no need to remand these two cases for such reassignment as in Post's case, because the relevant facts supporting Fripp's and Brown's recusal motions — Judge Green's statements at the hearing — were presented in the hearing transcript, and the judge to whom the motion should have been referred would have had no choice based on those facts but to grant the motion and order Judge Green's recusal from Fripp's and Brown's cases. Accordingly, the Court reversed the orders denying Fripp's and Brown's recusal motions, vacated their convictions, and remanded their cases to the trial court with direction that the cases be reassigned to a new judge to continue with pretrial proceedings from the point at which Brown and Fripp filed their meritorious recusal motions. All proceedings and orders after that point are void as to Fripp and Brown and have no legal effect.