Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 9, 2016

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THIS WEEK:

Double Jeopardy; Issue Preclusion

Bravo-Fernandez v. US, No. 15-537 (USSC 11-29-16)

Petitioners were convicted by a jury of bribery in violation of 18 U.S.C. § 666. Simultaneously, the jury acquitted them of conspiring to violate § 666 and traveling in interstate commerce to violate § 666. Because the only contested issue at trial was whether petitioners had violated § 666 (the other elements of the acquitted charges — agreement and travel — were undisputed), the jury's verdicts were irreconcilably inconsistent. Subsequently, petitioners' convictions were later vacated on appeal because of error in the judge's instructions unrelated to the verdicts' inconsistency. On remand, petitioners moved for judgments of acquittal on the standalone § 666 charges. They argued that the issue-preclusion component of the Double Jeopardy Clause barred the Government from retrying them on those charges because the jury necessarily determined that they were not guilty of violating § 666 when it acquitted them of the related conspiracy and Travel Act offenses. The District Court denied the motions, and the First Circuit affirmed.

The U. S. Supreme Court stated that the issue-preclusion component of the Double Jeopardy Clause bars a second contest of an issue of fact or law raised and necessarily resolved by a prior judgment. The burden is on the defendant to demonstrate that the issue he seeks to shield from reconsideration was actually decided by a prior jury's verdict of acquittal. When the same jury returns irreconcilably inconsistent verdicts on the issue in question, a defendant cannot meet that burden. The acquittal, therefore, gains no preclusive effect regarding the count of conviction. Issue preclusion does, however, attend a jury's verdict of acquittal if the same jury in the same proceeding fails to reach a verdict on a different count turning on the same issue of ultimate fact.

Here the Court found, because petitioners' trial yielded incompatible jury verdicts, petitioners cannot establish that the jury necessarily resolved in their favor the question whether they violated § 666. In view of the Government's inability to obtain review of the acquittals, the inconsistent jury findings weigh heavily against according those acquittals issue-preclusive effect. The subsequent reversal of petitioners' bribery convictions did not alter this analysis. The critical inquiry is whether the jury actually decided that petitioners did not violate § 666. Courts must approach that task with "realism and rationality," and in particular, examine the trial record with an eye to all the circumstances of the proceedings. The jury's verdicts convicting petitioners of violating § 666 remain relevant to this practical inquiry, even if the convictions are later vacated on appeal for unrelated trial error.

Thus, the Court noted, petitioners could not be retried if the Court of Appeals had vacated their § 666 bribery convictions because of insufficient evidence, or if the trial error could resolve the apparent inconsistency in the jury's verdicts. But, the Court found, the evidence here was sufficient to convict petitioners on the bribery charge. And the instructional error could not account for the jury's inconsistent determinations, for the error applied equally to every § 666-related count. Thus, the district court properly denied petitioners' motion for judgments of acquittal.

Other Acts Evidence; Prior Convictions

Parks v. State, S16A1001 (11/30/16)

Appellant was convicted of malice murder and related charges stemming from a shooting death. The evidence showed that appellant shot the victim 18 times in a dispute over a parking space. Appellant's defense at trial was justification.

Prior to trial, the State sought under Rule 404 (b) to admit evidence of appellant's 1990 conviction for aggravated assault. Like the facts in this case, the aggravated assault occurred in a parking lot of an apartment complex and the weapon used was a 9mm handgun. The State argued the evidence was admissible to show motive, intent, knowledge, identity and the absence of mistake or accident. The trial court admitted the evidence for all of the reasons asserted by the State; and, in accordance with O.C.G.A. § 24-4-403, concluded the probative value of the evidence outweighed any unfair prejudice. At trial, the trial court gave a limiting instruction to the jury before any 404 (b) evidence was introduced. The 404 (b) evidence consisted of the testimony of two victims who said they were shot during the incident which involved a dispute over drugs and money; the testimony of the investigating officer who testified his investigation found appellant and one other person were the main shooters during the incident; and a certified copy of the conviction which showed appellant pled guilty to the crime.

Appellant contended that the trial court erred when it admitted his 1990 conviction. The Court agreed. The Court stated that no argument could be made for introducing the 1990 aggravated assault to show appellant's knowledge and absence of mistake or accident as to the crimes charged here; his knowledge was not at issue where the defense was justification, and he made no claim that he accidentally or mistakenly shot the victim. Identity and motive were equally inapplicable under the federal Rule 404 (b) case law that it recently endorsed in *Brooks v. State*, 298 Ga. 722 (2) (2016). In fact, the Court stated, identity and motive were particularly inapposite here because appellant claimed self-defense, thereby admitting that he was the person who shot the victim, and the motive for the prior aggravated assault was a dispute over drugs and money 24 years earlier, which had nothing to do with why appellant shot the victim in this case in a dispute over a parking place.

Thus, the Court stated, the only arguable permissible purpose of the other act evidence in this case was to show appellant's intent. Intent is put at issue any time a defendant pleads not guilty and so evidence that goes to prove intent would be relevant. However, in this case, the evidence really had no purpose other than to show appellant's propensity towards violence. Since appellant admitted the shooting and claimed only that in doing so he acted in self-defense, the only factual issue in the case was whether that was the reason for the admitted act. The fact that appellant committed an assault on another person 24 years earlier had nothing to do with his reason for — his intent in —shooting the victim. All that the evidence of the prior conviction of assault could possibly show was appellant's propensity to commit assaults on other persons or his general propensity to commit violent crimes. And, the Court stated, this is exactly the kind of propensity inference that Rule 404(b)'s built-in limitation was designed to prevent. Accordingly, the Court concluded, the admission of the other acts evidence under the circumstances of this case was erroneous.

Nevertheless, the Court found that any error was harmless in this case given the substantial evidence of appellant's guilt. It was undisputed appellant shot the victim, appellant himself testified he wrested the gun away from the victim and admitted the victim was unarmed and was not posing a deadly threat when appellant opened fire 18 times. In such circumstances, the Court stated, "the claim of self-defense falls flat." Therefore, the admission of appellant's 1990 conviction for aggravated assault had no substantial influence on the outcome of this case.

Appellant also argued that the trial court erred when it admitted his other prior convictions based on his testimony during direct examination. More specifically, appellant argued his testimony did not open the door to allow evidence of his character to be admissible. At trial, appellant testified as follows: "Q. And how have you, as a person, changed since 2000 -- I mean, since 1990? A. Overall changed to be a man and learn responsibility and raise my kids." The trial court ruled this colloquy was sufficient to allow the State to introduce appellant's four other felony convictions from 1993 (unknown felony), 1997 (aggravated assault and burglary), 2003 (receiving stolen property), and 2006 (breach with intent to defraud).

The Court stated that "[i]t is a close call as to whether this testimony opened the door to appellant's character." But, the Court noted, appellant also testified as follows on direct: "Q. Now you've also, you know, been in some other trouble throughout your life, correct? A. Correct." Thus, the Court found, given the fact appellant testified he had become more responsible since his 1990 conviction while also admitting he had been in "other trouble throughout [his] life," appellant's other felony convictions since 1990 became relevant evidence which the State was entitled to explore on cross-examination, see O.C.G.A. § 24-6-611(b), regardless as to whether his character was implicated.

Release from Sexual Offender Registration Requirements; O.C.G.A. § 42-1-19(a)(4)

Yelverton v. State, S16A1043 (11/30/16)

Appellant was convicted in 1990 for molestation of his daughter stemming from acts occurring when his daughter was between the ages of 9 and 13. At trial, the court admitted as similar transaction evidence a sexual encounter with an adult woman (aged 19 or 20) who testified that the encounter was not consensual. Appellant testified at trial that the encounter with the adult woman was in fact consensual.

In 2015, appellant filed a petition to be released from the Sexual Offender Registry pursuant to O.C.G.A. § 42-1-19(a)(4). In pertinent part, this statute provides "[a] individual required to register pursuant

to Code Section 42-1-12 may petition a superior court for release from registration requirements . . . if the individual . . . [h]as completed all prison, parole, supervised release, and probation for the offense which required registration pursuant to Code Section 42-1-12 and meets the criteria set forth in subparagraphs (c)(1)(A) through (c)(1)(F) of Code Section 17-10-6.2." If the court finds that the petitioner satisfies these conditions and is, therefore, eligible for release, the court then must consider the likelihood that the petitioner will commit additional sexual offenses. If the court "finds by a preponderance of the evidence that the individual does not pose a substantial risk of perpetrating any future dangerous sexual offense," the court has discretion to release the petitioner from the registration requirements. O.C.G.A. § 42-1-19(f).

The trial court found that appellant was not eligible for release under O.C.G.A. § 42-1-19(a)(4) because he did not meet all of the criteria set forth in O.C.G.A. § 17-10-6.2(c)(1). Specifically, the court found that, the fact that evidence of the sexual encounter with an adult woman was admitted against appellant as a "similar transaction" at his criminal trial also qualified as a "similar transaction" under O.C.G.A. § 17-10-6.2(c)(1)(C). Appellant contended that the trial court misconstrued O.C.G.A. § 17-10-6.2(c)(1)(C), as that provision is incorporated by reference in O.C.G.A. § 42-1-19(a)(4). The Court agreed.

The Court found that as it is used in O.C.G.A. § 17-10-6.2(c)(1)(C) and incorporated by reference in O.C.G.A. § 42-1-19(a)(4), "evidence of a relevant similar transaction" does not simply mean evidence of an independent act that is admitted pursuant to the *Williams* standard (under the old Evidence Code) — or O.C.G.A. § 24-4-404(b) (under the new Evidence Code) — in a case in which the defendant is charged with a sexual offense. Indeed, not all "similar transaction" evidence admitted pursuant to the *Williams* standard is, in fact, evidence of an independent sexual offense, inasmuch as similar transaction evidence was not limited to a defendant's previous illegal conduct. Here, the evidence offered by the State against appellant at his 1990 molestation trial about the encounter with an adult woman potentially demonstrates an independent and similar sexual offense, inasmuch as the woman testified that appellant touched her sexually and without her consent. Nevertheless, appellant claimed that the encounter was consensual, and the Court stated, it does not know how the jury assessed that evidence, if at all. Nor can it know what the criminal trial court thought of the evidence. To admit it as a "similar transaction" at the 1990 molestation trial, the criminal trial court did not have to find that appellant actually touched the woman without her consent. Rather, the criminal trial court only had to find that the State had made a prima facie showing, such that the jury could find by a preponderance of the evidence that appellant had done so (even if the judge did not believe the witness). Consequently, neither the verdict nor the evidentiary ruling in the 1990 molestation trial can be interpreted as a definitive determination that appellant touched the woman without her consent and thereby committed a sexual offense. Accordingly, neither the verdict nor the evidentiary ruling conclusively establishes that the encounter with the woman is a "relevant similar transaction" for the purposes of O.C.G.A. §§ 17-10-6.2(c)(1)(C) and 42-1-19(a)(4).

Therefore, the Court concluded, in these circumstances, it was for the court below — the court hearing the petition for release — to determine for itself whether there is "evidence of a relevant similar transaction" that would render appellant ineligible for release. The court below erred when it failed to make such a determination, and so, the Court reversed its judgment and remanded the case for further proceedings consistent with this opinion.

Perjury; Other Acts Evidence

Ellis v. State, S16A1246 (11/30/16)

Appellant is a former County Chief Executive Officer ("CEO"). This case arose out of his criminal convictions for perjury and attempt to commit theft by extortion. The charge for attempted extortion stemmed from appellant's alleged efforts to procure a $2,500 political campaign contribution from a County vendor by threatening to cut the vendor's contract with the County if the vendor did not contribute to appellant's campaign, and the perjury charges stemmed from appellant allegedly lying to a Special Purpose Grand Jury about his role in cutting the contract of the County vendor. At trial, one of the State's main witnesses was Walton, the County's Director of Purchasing and Contracting. Walton, at the DA's request, had taped conversations between himself and appellant and these tape recordings were admitted at trial.

Appellant contended that the trial court erred in allowing a Special Purpose Grand Juror to testify at trial in connection with the State's efforts to prove the perjury charges against him. The Court agreed.

O.C.G.A. § 16-10-70(a) provides that "[a] person to whom a lawful oath or affirmation has been administered commits the offense of perjury when, in a judicial proceeding, he knowingly and willfully makes a false statement *material* to the issue or point in question." (emphasis supplied). The Court found that the State introduced the testimony of the Special Purpose Grand Juror in an effort to prove that appellant's false statements to the Special Purpose Grand Jury were material to the Grand Jury's investigation. However, whether a false statement was material is normally an issue for the jury. Furthermore, the question whether appellant's alleged false statements to the Special Purpose Grand Jury were material to the Grand Jury's investigation was central to the trial jury's determination of whether or not appellant was guilty of perjury. The Special Purpose Grand Juror testified that the Grand Jury's decision could have been affected if appellant had given different answers in his testimony to the Grand Jury than the answers that he actually gave. Such testimony went directly to the issue of whether appellant's alleged false statements were material to the issues being investigated by the Special Purpose Grand Jury, and served as a direct invitation for the jurors at appellant's trial to resolve the issue of materiality consistent with the "opinion" of the individual Special Purpose Grand Juror. And this, the Court found, was inappropriate.

Furthermore, the error in allowing the Special Purpose Grand Juror to testify in this manner was not harmless. The main evidence against appellant to prove that his statements to the Special Purpose Grand Jury were false consisted of the inconsistencies between his testimony before the Special Purpose Grand Jury and the statements that he made in his tape recorded conversations with the County vendor who was allegedly the victim of appellant's attempted extortion and Walton. However, the main evidence showing that those alleged false statements were material to the Special Purpose Grand Jury's investigation

— which was, again, an essential element of the crime of perjury — was the testimony of the Special Purpose Grand Juror stating his personal opinion about the impact of the alleged false statements on the Grand Jury's investigation. Such testimony potentially caused significant prejudice to appellant, as it very well could have been interpreted as a grand juror giving the petit jurors advice on how to determine the central issue of the case. Accordingly, the Court reversed appellant's conviction for perjury to allow for a new trial on the perjury counts against him.

As to appellant's conviction for attempted theft by extortion, appellant contended that the trial court erred by prohibiting him from presenting any evidence of his interactions with several other vendors who were not named in the indictment and from whom he attempted to solicit campaign contributions. The Court agreed, concluding that, pretermitting the question whether this evidence was admissible under O.C.G.A. § 24-4-404(b), it nevertheless should have been admitted at trial, as the State opened the door to the admission of this evidence.

Thus, the Court found, after reviewing the evidence presented at trial, that while the defense had been limited to speaking only about the vendors who were the subject of the indictment against appellant, the State was permitted to go beyond the boundaries that had been imposed on the defense. By doing so, the State created an implication that appellant had a general policy of pressuring vendors to contribute to his campaign and that appellant was being dishonest when he stated in one of the recordings that he did not have a problem with, or seek retaliation against, vendors who did not contribute to his campaign. In fact, the Court noted, it was apparent from the recordings and Walton's testimony that appellant was talking about vendors in general, and not just those who were the subject of the eventual indictment against him. Walton, as the Purchasing Director for the County, worked with appellant on numerous contracts with vendors beyond those listed in the indictment. When the State made implication through questions to Walton about vendors in general, the State opened the door for appellant to defend himself against that implication by presenting evidence of his own about his interactions with other vendors besides those listed in the indictment.

And, like the admission of the perjury evidence, the Court found that the trial court's decision to exclude the evidence about other vendors despite the State opening the door to such evidence was not harmless. Appellant was acquitted of all other extortion charges against him, and the Court stated, it could not say the jury's consideration of the only attempted extortion charge upon which he was found guilty may not have been affected by its inability to consider evidence relating to other vendors that could have rebutted the implication by the State that appellant attempted to extort County vendors as a matter of general practice. Accordingly, the Court also reversed appellant's conviction for attempt to commit theft by extortion to allow for a new trial on this charge as well.

Immunity; Sufficiency of the Evidence

State v. Hall, A16A1704 (10/28/16)

Hall, a police officer, was indicted on simple battery based on his use of force during an encounter with a homeowner whom he believed might be a burglar. He filed a motion seeking immunity from prosecution under O.C.G.A. § 16-3-24.2, arguing that his use of force was reasonable and justified in light of the homeowner's resistance to being handcuffed and detained. Following an evidentiary hearing that included witness testimony and cell phone video footage of most of the incident, the trial court granted Hall's motion for immunity, resulting in this appeal by the State.

The evidence, very briefly stated, showed that Hall and other officers responded to a 911 call of a burglary in progress at a newly-constructed residence. When they arrived, they encountered a 70-year-old man, who claimed to be the homeowner. The homeowner was belligerent and uncooperative at times. He told the officers no one else was in the home. Unbeknownst to the officers outside, including Hall, one of the officers went inside to clear the house. An officer in the back of the house reported that he saw someone at a window peeking out. Believing that another suspect was in the house and that the homeowner had deceived the officers by claiming that no one else was there, Hall decided to place the homeowner in handcuffs to more securely detain him on the porch while the inside of the house was secured. Hall testified that at that point, he did not know "if somebody was going to come running outside the house … and now I'm dealing with two people on the front porch."

Hall testified that after deciding to handcuff the homeowner, he told the homeowner that he was being detained and to put his hands behind his back. However, according to Hall, as he took the homeowner's left wrist to handcuff it, the homeowner pulled his left arm away from Hall, turned his body, and began to stand. In response to the homeowner's actions, Hall testified that he attempted to use an arm bar technique as a defensive tactic to bring the homeowner down on the porch so that he could be handcuffed. Hall further testified that the homeowner's position on the steps and the homeowner's movement made it difficult for him to apply the arm bar technique, and the homeowner fell to the ground and struck his head and shoulder on the front wall of the house as Hall attempted to use the technique on him.

The homeowner testified that, without warning, Hall pulled him up from a seated position on the porch, threw him to the ground, and handcuffed him after receiving the radio transmission that someone else was in the house. The homeowner denied that he attempted to pull away from Hall, turn, or stand up when being handcuffed, and he testified that, contrary to the testimony of the officers, he had not been belligerent towards them and had answered all of the questions that they posed to him.

The State argued that the trial court erred by granting Hall's immunity motion because Hall failed to prove by a preponderance of the evidence that his use of force in handcuffing and detaining the homeowner was justified. The Court disagreed. The right of law enforcement officers to conduct an investigatory detention of a suspect necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it, but an officer may not use more force than is reasonably necessary under the circumstances. A suspect has no right to resist the use of reasonable force by an officer effectuating a lawful investigatory detention, and, conversely, an officer is entitled to protect himself from attack or resistance by a hostile suspect and may lawfully detain the suspect in a manner reasonably necessary to protect his

personal safety and to maintain the status quo.

The Court found that in light of the testimony of Hall, the other three responding officers, and Hall's experts in the use of force (the State presented no expert opinion), there was some evidence to support the trial court's finding that the homeowner was physically resisting being handcuffed and detained by Hall, and that Hall's application of the arm bar technique as a defensive measure to bring the homeowner to the ground and handcuff him was a use of force that was reasonable and proportionate to the resistance offered.

Nevertheless, the State argued, the cell phone video contradicted Hall's version of events and showed that the homeowner did not resist being handcuffed and detained, and that the trial court therefore erred in finding that Hall proved justification by a preponderance of the evidence. The Court noted that it is true that the Court owes no deference to a trial court's factual findings gleaned from a review of a videotape that are not the subject of testimony requiring the trial court's weighing of credibility or resolving of conflicts in the evidence. But where the trial court's resolution of the factual issues turns in part on an assessment of conflicting witness testimony, rather than exclusively on what is shown in a videotape, the Court will defer to the trial court's factual findings under the "any evidence" standard of review.

And here, there was no audio included in the cell phone video, and thus the video did not resolve the conflict in the testimony regarding whether the homeowner was argumentative and belligerent towards the officers, and regarding whether Hall told the homeowner that he was being detained and to put his arms behind his back before attempting to handcuff him. Furthermore, resolution of the central factual dispute in this case — whether the homeowner pulled his left arm away from Hall, turned, and attempted to stand when Hall sought to handcuff him, or whether Hall without warning pulled the homeowner up from a seated position on the porch and threw him to the ground — was based in part on the conflicting testimony of the witnesses rather than exclusively on a review of the cell phone video. Therefore, because resolution of the immunity issues in this case turned in part on witness testimony, the Court deferred to the trial court's factual findings. Accordingly, the Court affirmed the court's ruling that Hall established by a preponderance of the evidence that his use of force was reasonable and justified under the circumstances, entitling him to immunity from prosecution.

Rule 404 (b) Evidence; Knowledge

Green v. State, A16A1059 (10/31/16)

Appellant was convicted of battery and obstruction of a law enforcement officer. The evidence showed that appellant hit his neighbor in the face. The neighbor called 911. When an officer arrived, appellant was standing in his driveway. Three times the officer told appellant to come speak with him, and three times appellant refused. Appellant then ran into his house and closed his garage door behind him. When the officer banged on appellant's front door, appellant jumped out a rear window and fled.

Appellant argued that the trial court erred in admitting other acts evidence regarding two earlier instances in which he obstructed a law enforcement officer. In both instances, law enforcement officers were dispatched to appellant's house in response to calls from his mother complaining of his behavior. In one instance, appellant refused to answer the officers' questions and walked away from them, despite being told several times that he was not free to leave. He was arrested for obstruction of an officer. In the other instance, appellant initially refused to comply with an officer's commands and made a threatening gesture and comment to the officer; then, after a physical altercation with the officer, he ran from the scene. Officers chased and apprehended him. The trial court admitted evidence of these incidents under O.C.G.A. § 24-4-404(b) to show appellant's knowledge, but refused to admit the evidence for any other purpose, including intent.

The Court stated that a defendant's knowledge may be at issue where, as here, it is an element of the charged crime; that is, when knowledge itself is part of the statutory definition of the crime, and thus must be proven by the prosecution. Knowledge is part of the statutory definition of misdemeanor obstruction of an officer, which offense occurs when "a person … *knowingly* and willfully obstructs or hinders any law enforcement officer in the lawful discharge of his official duties." O.C.G.A. § 16-10-24(a) (emphasis supplied). Nevertheless, appellant argued, his knowledge was not at issue here because he admitted at trial that he knew the person from whom he ran was a law enforcement officer. But, the Court stated, there are other types of knowledge relevant to a misdemeanor obstruction charge, e.g., a defendant's knowledge that he did not have the right to flee the encounter; a defendant's knowledge that the officer was pursuing him; or a defendant's knowledge that the officers had come to effectuate his arrest.

Thus, the Court found, the other acts evidence was relevant to the knowledge issue raised by appellant's defense. It established that, on past occasions, appellant had encountered officers under similar circumstances and been apprehended or accused of obstructing them when he fled. This evidence tended to show that, on this occasion, appellant knew that the officer's command that he talk with him was made in the lawful discharge of the officer's official duties and that he was not free to flee. Moreover, the evidence was not substantially outweighed by prejudice. Therefore, the trial court did not abuse its discretion in admitting this evidence.

Guilty Pleas; Right of Allocution

Seagraves v. State, A16A0951 (10/31/16)

Appellant entered a non-negotiated guilty plea to aggravated assault, aggravated battery, and reckless driving. Thereafter, he filed a timely motion to withdraw his plea. Following a hearing, the trial court denied the motion. Appellant argued that the trial court erred by denying his motion to withdraw his guilty plea because he was denied his right of allocution (to speak before the trial court imposes sentence). The Court disagreed.

First, the Court stated, it was not clear that appellant had any constitutional right of allocution since he entered a guilty plea. But, the Court found, it did not need to decide whether appellant had a constitutional right to allocution, since his plea was non-negotiated, because any such right was satisfied when counsel argued on his behalf.

Thus, the Court found, a statutory right of allocution is embodied in O.C.G.A. § 17-10-2, which, among other things, grants the defendant or his attorney the right to speak before the trial

court imposes sentence. Pretermitting whether the statute applies when a defendant has entered a non-negotiated guilty plea and whether there is a common law right of allocution in such circumstances, any right of allocution is satisfied by compliance with O.C.G.A. § 17-10-2(a), which provides in pertinent part that "[t]he judge shall … hear argument by the accused *or* the accused's counsel and the prosecuting attorney, as provided by law, regarding the punishment to be imposed." O.C.G.A. § 17-10-2(a)(2) (emphasis supplied). Here, the trial court complied with the statute when he gave counsel the opportunity to speak on behalf of appellant.

Nevertheless, appellant argued, the right of allocution is personal and cannot be satisfied by counsel's speaking on his behalf. But, the Court noted, our Supreme Court has rejected that argument. See *Guyton v. State*, 281 Ga. 789, 794-795 (10) (e) (2007). And, the Court noted, the case upon which appellant relied for the proposition that the right can be satisfied only when the defendant himself is given the opportunity to speak is a federal case interpreting Federal Rule of Criminal Procedure, which explicitly requires the defendant personally to be given the right to speak.

Double Jeopardy

Holt v. State, A16A1360 (10/28/16)

Appellant appealed after the trial court denied his plea in bar on double jeopardy grounds. The record showed that appellant robbed a woman at gunpoint, taking her cell phone, purse, and other items and driving away in her car. On October 17, 2014, appellant was indicted for theft by receiving stolen property. The indictment alleged that on October 8, 2014, appellant had received and retained a stolen 2003 Chevrolet Impala. On October 27, 2014, he pleaded guilty to the charge. He was then indicted for the armed robbery and theft of the cellphone and cash. Appellant appealed after the trial court denied his plea in bar on double jeopardy grounds.

Appellant argued that because he previously was convicted of theft by receiving of the stolen vehicle, he could not be prosecuted for the armed robbery of the woman who had been driving that vehicle. He noted that the current indictment, in charging him with armed robbery, accused him of unlawfully taking money and a cell phone from the victim's person through the use of a handgun. He then argued that the record showed those allegedly stolen items were located inside the vehicle at the time of the alleged robbery. Consequently, he argued, he could not be found to be the "forceful taker" of the cell phone and money because he already has been adjudicated the "passive receiver" of the car.

The Court found that appellant was correct that a conviction for theft by receiving a particular item of property is necessarily premised on a determination that someone other than the defendant took that item. Therefore, the State's prior prosecution of appellant for theft by receiving necessarily determined that he did not steal the Impala. But he was charged with stealing different items, specifically the victim's money and cell phone, as well as using a firearm to do so. Although appellant suggested that the prior determination that he did not steal the car meant he cannot be said to have stolen the cell phone and money, either, because they were not taken from the victim's person but were taken by virtue of their location in the vehicle when it was stolen, the trial court made a contrary factual determination, concluding that it "guess[ed]" the armed robbery took place "at the ATM or on the street." And, the Court found, this finding was not clearly erroneous. The State represented to the trial court its understanding that the victim was accosted on the street and that the evidence at trial would show that the armed robbery was completed *before* appellant made contact with the vehicle she had been driving. Thus, the Court found, it could not conclude that the prior proceedings definitely determined anything with respect to who stole the victim's phone and money and as a consequence, collateral estoppel did not bar the current prosecution.

Appellant also made a procedural double jeopardy claim on the basis that the current charges should have been prosecuted in the same proceeding as the theft by receiving prosecution. The Court, however, rejected this claim as well. Assuming without deciding that the pending charges against appellant arose from the same conduct, appellant's procedural double jeopardy claim failed because he did not meet his burden to show that the pending crimes were known to the proper prosecuting officer when the earlier charge was brought.

Thus, the Court noted, the trial court found that, in prosecuting appellant for theft by receiving, the prosecutor was not aware of the facts giving rise to the crimes charged now. This finding was not clearly erroneous. The record showed that, when the judge in the 2014 proceeding said she assumed appellant was not the carjacker, the assistant prosecutor replied, "We have no idea as to that fact[.]" And, although there appeared to be no dispute that the same district attorney's office handled both prosecutions, there was no evidence in the record that anyone in that office was aware — at the time of the first prosecution — of appellant's involvement in the crimes charged now. Moreover, the record contained no evidence as to what any arrest report or warrant associated with the theft by receiving prosecution said. A warrant for the current charges was obtained on October 15, 2014, but it was not executed until April 2015, and there was no evidence that anyone in the DA's office saw that warrant prior to the resolution of the theft by receiving prosecution. Similarly, electronic records from the police department indicated that the victim on October 13, 2014, identified appellant as the man who robbed her, but there was no evidence that anyone in the DA's office saw those records — from a different police department than that which apprehended appellant driving the victim's vehicle — prior to resolving the theft by receiving charge. Accordingly, the Court held, appellant failed to meet his burden of showing that the crimes currently charged were known to the proper prosecuting officer when he was prosecuted for theft by receiving. This failure was fatal to his procedural double jeopardy claim.

Opening Arguments; Closing Arguments

Gaines v. State, A16A1150 (11/1/16)

Appellant was convicted of child molestation, but acquitted of statutory rape. The evidence showed that appellant, who was 20-years-old, brought V. W., the 15-year-old victim to his house to "hang-out". There were several people in the living room when they arrived. The victim went into a back bedroom to do her homework. Appellant came in and forced her to have sexual intercourse, during which he bit the victim on the nipple.

Appellant argued that the trial court erred in failing to declare a mistrial during the state's opening statement. Specifically, he

argued that the State improperly injected his character into evidence and suggested that he was guilty by association when the prosecutor made the following remark: "[V. W.], fearing that no one will believe her if she reports what happened, she realizes now she put herself in a dangerous position because she is naive, she is the child, he is the adult, she thinks to take the condom . . . and quickly goes out the front door. She doesn't say anything to anybody. Remember those are his people. She doesn't know what they're going to do to her if she reports this. She figures correctly that they will be on his side. She doesn't know if they're dangerous. She doesn't know anything about it. And by the way, one of those people in the room was later convicted of murder. So perhaps young [V. W.] was at least that smart."

Initially, the Court noted that the trial court denied the motion and gave curative instructions. Thus, because appellant did not object to the instructions or renew his motion for mistrial, his right to appellate review of this issue was waived. Nevertheless, the Court stated, the trial court properly exercised its discretion in determining that a curative instruction was adequate here. Although the prosecutor referenced a "murderer" in the house, she did not connect that reference to appellant's character or assert that appellant was guilty by association with this individual. On the contrary, the prosecutor used the presence of this person to explain why V. W. left appellant's home without reporting the assault to other occupants. Thus, the Court concluded, given these circumstances, as well as the trial court's admonition to jurors that statements by counsel do not constitute evidence, a mistrial was not necessary to preserve appellant's right to a fair trial.

Appellant also contended that he was denied a fair trial when the State argued as follows: "There was his DNA on her nipple where he bit her on the nipple. Have we heard his explanation for that? No. Because he doesn't have one. Because there isn't one except that he had sex with her." Appellant argued that this portion of the State's argument improperly commented on his right to remain silent and his decision not to testify. The Court disagreed.

The Court found that the record showed that shortly before the prosecutor made the comment at issue, defense counsel asserted in his closing argument that the evidence did not support V. W.'s testimony that appellant had assaulted her. Focusing on the DNA found on the condom, defense counsel argued that such evidence established only that "both of them had contact with that condom, or a little piece of it." According to defense counsel, the DNA on the condom was "not enough" to prove that sexual intercourse had occurred. In response, the prosecutor stated that defense counsel had "to get up here and say something, the most ridiculous stuff." Urging the jury not to "disregard the actual scientific evidence," she asserted that there was "conclusive scientific evidence of [appellant's] sperm, his semen" on the condom, proving that "[h]e had sex with her." She then turned to the DNA identified on V. W.'s breast, asserting that the jury had not "heard [appellant's] explanation for" that DNA because "he doesn't have one."

Thus, the Court found, viewing the State's argument in context, the prosecutor did not comment upon appellant's failure to testify. She merely suggested that appellant had not rebutted the DNA evidence on V. W.'s breast, as opposed to the DNA on the condom, which defense counsel had tried to explain in his closing argument. This claim of error, therefore, presented no basis for reversal.

Search & Seizure

State v. Vickers, A16A0792 (11/1/16)

Jones, Vickers, and Sims were charged by accusation with two counts of VGCSA. The State appealed from the trial court's grant of their motions to suppress evidence obtained in a warrantless search of a vehicle parked in the driveway of Sims' home. The Court affirmed.

The evidence showed that officers were executing an unrelated arrest warrant when they noticed a car parked in the driveway of the house next door. The car was wholly inside the boundaries of the private property, "fairly closely parked to the actual garage of the home." A plainclothes officer testified that as he walked through the side yard of the neighboring house, about 10 or 15 feet from the car, he smelled a strong odor of marijuana and observed heavy smoke inside the vehicle. He also testified that he saw individuals in the car passing "something" back and forth, but that he did not know what it was. Asked, "You never saw them passing a marijuana cigarette or joint?" he responded, "No," and that "as far as what they were passing, I don't know." He testified that he "*assumed* that it was marijuana," (emphasis supplied), and the trial court so found. And the trial court also found that, other than the odor of marijuana, even after approaching the vehicle "the officers still could not see any contraband in plain view to seize within the car.

A police sergeant testified that he observed the car for over an hour. As he walked up the driveway, he could smell the odor of marijuana, but did not see anyone in the vehicle smoking and did not see any marijuana in plain view. He further testified that he did not observe any traffic offense and did not "witness[] any criminal activity out of the car or the occupants of the car prior to approaching the driveway." He could not even see how many people were inside until he was "actually right at the vehicle" and "could actually touch it." The sergeant determined that four individuals were in the car and "decided to just detain the individuals in the car until I could get my officers back. Because at that point we were outnumbered, and it became a safety issue for me." He testified, "I didn't do an investigation. I decided to detain and hold what I've got." Police removed the four occupants of the vehicle but saw no illegal substances or other evidence "in plain view." No search warrant was ever obtained, as the officers testified that they relied upon the "automobile exception." Once the occupants were removed, officers searched the vehicle and found 1.4 grams of suspected marijuana and alprazolam under the front passenger seat. No evidence of burnt marijuana was found. The State did not elicit and the officers did not testify to any exigent circumstances or consent to search, and the trial court found that neither existed.

The Court stated that a defendant has a reasonable expectation of privacy in a vehicle parked within the curtilage of his home. The vehicle was not on a street or a roadway and the incriminating evidence was not plainly visible, but required a search of the interior of the vehicle to discover. No evidence was presented that the officers intended to engage in a "knock and talk" at the residence or its curtilage. They simply approached the car, opened the doors, and removed the occupants. Thus, the Court concluded, when the officers searched the interior of the vehicle without a warrant, consent, or exigent circumstances, their discovery of the drugs under the seat was illegal and was correctly suppressed.

Nevertheless, the State argued, the search was permissible under the "automobile

exception" to the warrant requirement imposed by the Fourth Amendment. Specifically, the State contended, the exception applies to searches "on private property." The Court disagreed. The Court distinguished the persuasive authority cited by the State and noted it will not "alter the established Georgia rule that vehicles, like any other item or location within the curtilage of a residence, are not to be searched without a warrant, consent, or exigent circumstances."