

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JANUARY 3, 2014

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## THIS WEEK:

- **Jury Charges; Lesser Included Offenses**
- **Obstruction; Jury Charges**

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### ***Jury Charges; Lesser Included Offenses***

*Franks v. State, A13A0118, A13A0932 (12/16/13)*

Appellants, Franks and Long, were convicted of attempted trafficking by manufacturing methamphetamine. Appellant Long contended that the trial court erred by not giving his written requests to charge on the lesser included offenses of possession of a drug-related object and possession of pseudoephedrine, and thus that it erred in denying his motion for new trial on this ground. In its order denying his motion, the trial court acknowledged that these crimes were lesser included offenses, and that “it was error for the court to fail to give the charges requested by [appellant],” but the court determined that its error was harmless.

The Court stated that in determining whether one crime is a lesser included offense of another crime for purposes of requests to charge, the Court must apply the “required evidence” test set out in *Drinkard v. Walker*, 281 Ga. 211 (2006). Under the “required evidence” test, the question is not whether the evidence actually presented at trial establishes the elements of the lesser crime, but whether each offense requires proof of a fact which the other does not. As indicted in this case, the trafficking statute, O.C.G.A. § 16-13-31(f) required proof that

the defendants manufactured a mixture of methamphetamine. Under the pertinent provisions of O.C.G.A. § 16-13-30.3(b)(2), the crime of possession of pseudoephedrine requires proof of possession of “any amount” of pseudoephedrine with the intent to manufacture methamphetamine. And the crime of possession of a drug-related object under the pertinent language of O.C.G.A. § 16-13-32.2(a) requires proof that a defendant used, or possessed “with the intent to use, any object or materials of any kind for the purpose of . . . manufacturing, compounding, converting, producing, processing, preparing . . . a controlled substance.”

Thus, the Court found, as indicted in this case, the trafficking statute required proof of at least one element that the other two statutes did not; the manufacture of a mixture of methamphetamine. And O.C.G.A. § 16-13-30.3 requires proof that the trafficking statute does not; the possession of pseudoephedrine. And neither the trafficking statute nor the indictment make any reference to that drug. Similarly, O.C.G.A. § 16-13-32.2 also requires proof of an element not required for the crime of trafficking as charged in this case. The trafficking statute, as indicted, does not require proof that a defendant possessed drug-related objects with the intent to use them for manufacture. Therefore, the Court found, the crimes set out in O.C.G.A. §§ 16-13-30.3(b)(2) and 16-13-32.2(a) are not lesser included offenses of the crime of trafficking in methamphetamine as indicted in this case. Accordingly, the trial court’s decision not to give the requested charges was not error, and thus, the trial court properly denied the motion for new trial.

## ***Obstruction; Jury Charges***

*Hickey v. State*, A13A2365 (12/16/13)

Appellant was convicted of felony obstruction of a law enforcement officer. The testimony showed that appellant, a detainee in a county detention center, struck an officer in the face. He contended that the trial court erred in giving the jury an additional charge on obstruction of an officer that applied only to misdemeanor obstruction. Specifically, appellant argued that the additional charge allowed the jury to convict him for actions other than intentionally doing violence to the officer.

The Court initially noted that because appellant failed to object to the charge at trial on this basis, the Court must review the jury charge for plain error only. Under this standard, the Court must determine whether there was an error that had not been affirmatively waived, was clear and obvious, affected the defendant's substantial rights, and seriously affected the fairness, integrity or public reputation of the judicial proceedings.

The record showed that with regard to felony obstruction, the trial court charged the jury as follows: "[C]ount 1 of this indictment is obstruction of an officer. This is the definition. A person commits the offense of obstruction of an officer when that person knowingly and willfully resists, obstructs, or opposes any prison guard in the lawful discharge of the official duties by doing violence to the person of the officer." The trial court then gave the following additional charge: "Now, this offense may be committed by actions that while not otherwise unlawful have the effect of obstructing or hindering the officer while carrying out his duties. This definition does not make criminal any actions that incidentally hinder an officer. The accused must have knowingly and willfully obstructed or hindered the officer. Whether or not the actions of the defendant did hinder or impede the officer in carrying out his assigned duties, that's for you, the jury, to decide."

Appellant argued that the additional charge applies only to misdemeanor obstruction. But, the Court noted, he cited no authority and the Court found none that prohibits the use of this additional charge in felony obstruction cases. Moreover, the Court views jury charges as a whole in determining whether the jury was fully and fairly instructed

on the law of the case. Here, the Court found, the charge as given, closely tracked the language of the Code section and was substantially identical to the suggested pattern charges on obstruction. See O.C.G.A. § 16-10-24(b); Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, §§ 2.44.10-2.44.30 (4th Ed. 2013). The trial court also instructed the jury on the State's burden of proving each element of the charged crime, as well as intent, beyond a reasonable doubt. Viewing the charge as a whole, along with the pattern charges and the applicable code section, the Court found no plain error.