Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 10, 2012

State Prosecution Support Staff

Stan Gunter
Executive Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Resource Coordinator

Gary Bergman
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Todd Hayes
Traffic Safety Resource Prosecutor

THIS WEEK:

Assisted Suicides; Freedom of Speech

Final Exit Network Inc. v. State of Georgia, S11A1960 (2/6/12)

Appellants were indicted on charges of offering to assist and assisting in the commission of suicide in violation of OCGA § 16-5-5 (b). They challenged the indictment, claiming that the statute was an unconstitutional impediment to their rights of free speech. The trial court upheld the statute.

OCGA § 16-5-5 (b) provides that any person "who publicly advertises, offers, or holds himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide and commits any overt act to further that purpose is guilty of a felony." The Court held that by its plain language, § 16-5-5 (b) proscribes speech based on content because it restricts anyone who "publicly advertises, offers, or holds himself or herself out as offering that he or she will intentionally and actively assist another person in the commission of suicide." As a content based restriction on speech, § 16-5-5 (b) will stand only if it satisfies a strict level of constitutional scrutiny. Under the strict scrutiny test, a statute is deemed unconstitutional unless the State can demonstrate it is justified by a compelling interest and is narrowly drawn to serve that interest. While a State's interest in preserving human life would be compelling, the Court held that §16-5-5 (b) is not narrowly tailored to promote this asserted interest. Therefore, the Court concluded, § 16-5-5 (b) restricts speech in violation of the free speech clauses of both the United States and Georgia Constitutions.

Identification; Commenting on Right to Remain Silent

Hill v. State, S11A1914 (2/6/12)

Appellant was convicted of felony murder. He contended that no evidence was presented at trial that the person who was arrested and tried is the same as the person named in the indictment and identified by witnesses as someone named Benjamin Hill who shot and killed the victim. The Court found that appellant could not be directly identified in person by any witness at trial because after jury selection, he voluntarily absented himself from his trial. The Court found that he should not be allowed to profit from this action by winning a reversal of the conviction because he was not there. Since appellant made positive identification impossible by absenting himself from trial, the Court declined to create a rigid legal standard for identification that would encourage defendants to violate their release conditions by failing to appear. The Court also concluded that he was sufficiently identified as the person who shot the victim and that there was ample evidence to enable a rational trier of fact to find him guilty beyond a reasonable doubt of felony murder.

Appellant also contended that the State commented on his right to remain silent. The evidence showed that after being advised of his *Miranda* rights, appellant gave an oral statement but did not reduce it to writing. The alleged comment came when on re-direct, the prosecutor asked the officer whether he had given appellant the opportunity to make a written statement and what his response was. The officer testified that he did give appellant that opportunity and that appellant did not want to sign a written statement or make a recorded statement but would nevertheless tell his story.

The Court stated that a contention that a law enforcement officer improperly commented on the accused's right to remain silent by testifying that he refused to give or sign a written statement is inapposite where, as here, the accused waived his rights pursuant to *Miranda* and made an oral statement. Citing law from other jurisdictions, the Court held that a mere refusal to reduce an oral statement to a written statement does not amount to the invocation of the right to remain silent. Moreover, even if the officer's testimony could be considered a comment on appellant's invocation of the right to silence, defense counsel opened the door to the questioning, and the prosecutor was well within his rights to follow up on the cross-examination of the officer.

Armed Robbery; Asportation

Gutierrez v. State, S11G0344 (2/6/12)

Appellant was indicted for armed robbery. He was 16 years old at the time of the offense. He moved to have his case transferred to juvenile court, alleging that under the facts of the case, he could not be convicted of armed robbery because of a lack of asportation.

The evidence showed that appellant and four co-defendants entered a restaurant, armed with a handgun and other weapons, and demanded one of the victims to open the cash register. The victim complied by opening the drawer, and lifting the flap that held the money in place. While one of the armed assailants was hunched over the cash register, an undercover police officer shot at him through the front window. The perpetrators ran out the back door, where they were arrested.

The Court noted that since the current criminal code was enacted in 1968, both the robbery and armed robbery statutes in Georgia have required, among other elements, that the accused, "take[] property of another from the person or the immediate presence of another . . . ." OCGA § § 16-8-40 (a), 16-8-41 (a). For the offense of armed robbery to be complete under OCGA § 16-8-41 (a), the slightest change of location whereby the complete dominion of the property is transferred from the true owner to the trespasser is sufficient asportation. And it is not necessary that the property taken be permanently appropriated. Thus, Georgia has consistently required the conjunction of both the "slightest change of location" and the transfer of "complete dominion" over the property. Therefore, the Court held, it is inappropriate to focus only on whether complete dominion of the property shifted, as the Court of Appeals did in *Sharp v. State*, 255 Ga. App. 485, 488(2) (2002) and thus, that case must be overruled.

Here, the armed intruder threatened the victims and demanded money and the opening of the cash register. The victims complied by opening the drawer which contained the money and thereby moved it from its secured location in the cash register to an unsecured location which was easily accessible to the intruder, who immediately took up a physical position close above it. The single act of pulling a cash drawer out from the register constitutes the requisite slightest change of location. It is not necessary that the property be taken into the hands of the robber or that the robber physically touch the property. Furthermore, the slightest movement is sufficient to meet the element of asportation so long as it is a movement away from the area where the object was intended to be. In this case, the money was removed from its original position or place where the victims wanted it to be and instead was placed and uncovered in front of the armed intruder in the place where he wanted it to be, and in this way, the money came within the dominion and control of appellant and his accomplices, and the asportation, or taking, was complete.

Ineffective Assistance of Appellate Counsel; Juror Excusals

Walker v. Hagins, S11A1970 (2/6/12)

Appellant was convicted of voluntary manslaughter. On direct appeal, he challenged the trial court's denial of a motion to dismiss the jury panel due to alleged errors by the clerk in excusing possible jurors as permitted by OCGA § 15-12-1.1 (a) (1). The Court of Appeals affirmed, but on motion for reconsideration, ordered the trial court clerk's office to send up a transcript of the motion hearing within five days. When the transcript was not sent, the motion for reconsideration was denied.

Appellant then filed a habeas petition contending that his appellate counsel rendered ineffective assistance by not having the transcript sent up within the time stated by the Court of Appeals. The habeas court agreed, stating as follows: "Petitioner's counsel failed to ensure that the transcript was received by the Appellate Court, and, thereby, effected deficient performance. Therefore, the Petitioner's case was prejudiced by counsel's failure in that, ultimately, the outcome of his appeal may have been different." The Warden appealed.

The Supreme Court reversed the grant of habeas corpus. The Court held that pretermitting whether the facts support the habeas court's conclusion that appellate counsel was deficient, the habeas court erred by simply presuming prejudice from the alleged deficiency.

With regard to the prejudice prong of an ineffective assistance of counsel claim, there are only three instances in which a defendant or a petitioner would be authorized to rely upon a presumption to meet his burden of establishing prejudice: (1) an actual or constructive denial of counsel, (2) government interference with defense counsel, and (3) counsel (who) labors under an actual conflict of interest that adversely affects his performance. As none of the three instances applied, the habeas court erred in simply presuming prejudice from appellate counsel's alleged deficiency. The habeas court should have issued findings explaining how the outcome of Hagins' appeal may have been different if the transcript at issue would have been available for review by the appellate court. The burden was on Hagins to show prejudice, and the habeas court failed to explain how this burden was met.

But, the Court held, Hagins had failed to fulfill his burden of showing prejudice. The evidence presented at the hearing on the motion to dismiss the jury panel showed that 500 potential jurors were ultimately drawn. Out of the total 500 jurors drawn, only 30 were given statutory or discretionary excusals. Out of this 30, Hagins challenged the excusal of only eleven, either on the basis that an affidavit was not filed or that the proffered excuse did not neatly fit into the statutory scheme of OCGA § 15-12-1.1. In short, Hagins asserted that his conviction should be reversed due to alleged clerical errors regarding 11 jurors out of a total of 500. "We refuse to countenance such an argument by holding that it may have had an effect on the outcome of Hagins' appeal or that there is a reasonable probability that it would undermine confidence in the outcome."

Moreover, the Court stated, even if the juror excusals at issue constituted a substantial number of the total, the Court could not find such disregard of the essential and substantial provisions of the statute as would vitiate the array. Neither the transcript nor any other evidence showed that the excusals or deferrals were allowed in such a manner as to alter, deliberately or inadvertently, the representative nature of the jury lists. Finally, the jury panels which were put upon Hagins contained 115 veniremen, substantially more than required by OCGA § 15-12-160. Accordingly, as the trial court did not err in denying the motion to dismiss the jury panel, Hagins failed to show how the outcome of his appeal may have been different if the transcript of the hearing on the motion to dismiss the jury panel had been available for the Court of Appeals to consider.

Murder; Intervening Causation

Neal v. State, S11A1663 (2/6/12)

Appellant was convicted of malice murder of his fiancée. He contended that the evidence was insufficient to prove beyond a reasonable doubt that the cause of the victim's death was any act or omission by him. The evidence showed that appellant manually strangled the victim. Emergency personnel who came to the aid of the victim punctured the victim's jugular vein while attempting to start an I.V. line. Appellant contended it was the emergency personnel who caused the victim's death.

The Court noted that the testimony showed that such a puncture was normal in the circumstances. There was no evidence that the medical treatment by emergency personnel was negligent. Even if it were negligent, it would not normally constitute an intervening cause unless, unlike here, it was a gross mistreatment. Contrary to appellant's summary of the medical examiner's testimony, that witness testified that blood in the victim's neck muscles may have come from the punctured vein, but that the blood in her lungs did not. Although the medical examiner did not "think" that the bleeding from that vein contributed to the victim's death, he testified that there was not enough blood from the vein for the victim to bleed to death. Based on the medical examiner's testimony, the Court found that a rational jury could conclude that appellant's strangulation of the victim either caused or directly and materially contributed to her death and that the emergency treatment was at most a secondary, rather than intervening, cause of death. In short, the jury was authorized to reject the theoretical possibility of causation offered by appellant.

Venue

State v. Prescott, S11G1407 (2/6/12)

The Court granted a writ of certiorari to the Court of Appeals in *Prescott v. State*, 309 Ga. App. 541 (2011), to determine whether that Court correctly concluded that the State failed to prove venue in this child molestation case. The Supreme Court found that the evidence, albeit circumstantial, was sufficient to prove venue beyond a reasonable doubt and reversed the decision of the Court of Appeals.

Prescott was convicted of child molestation based on an incident that occurred in a restroom at Screven County High School. During the trial, the State failed to introduce any direct evidence that the crime occurred in Screven County. Prescott appealed his conviction, and the Court of Appeals reversed. Relying primarily upon the holding in *Thompson v. Brown*, 288 Ga. 855 (2011), the Court of Appeals concluded that, in the absence of evidence that Screven County High School is located in Screven County, evidence of venue was lacking.

The Court noted that *Thompson* was inapposite because there was testimony that the crime was committed within a city and the city was located within two different counties. Here, however, the venue question focused on whether a factfinder can infer that a crime which was committed in the Screven County High School actually took place in Screven County. "We think such an inference is reasonable in this case. Nevertheless, we take this opportunity to reiterate that venue must be proved beyond a reasonable doubt and that prosecutors must commit themselves to doing so." Moreover, the Court noted, there was additional evidence of venue: The crime was investigated by a school resource officer who was an employee of the Screven County Sheriff's Office and Screven County Sheriff's Office forms were used for *Miranda* waiver purposes.

Jury Charges

Dukes v. State, S11A1775 (2/6/12)

Appellant was convicted of murder. He contended that in response to a question during jury deliberations, the trial court erred by instructing the jury as follows: "Yes, the jury must reach a unanimous verdict on all charges. The verdict must be freely and voluntarily agreed upon by all twelve jurors."

The Court stated that while a court should not instruct a jury that it is absolutely required to reach a verdict, it is permissible to instruct a jury that any verdict that it does agree on must be unanimous. Thus, the first sentence of the trial court's recharge was questionable. In the second sentence, however, the trial court stated that the verdict must be voluntary. In addition, in its initial charge, the trial court instructed

the jury: "Whatever your verdict is in this case, it must be unanimous, and that means that all 12 of you will have to freely and voluntarily agree to any decision you make in this case." The trial court also stated: "[T]he law does not require that you should ever surrender an honest opinion based on the evidence and my instructions just to be congenial or well-liked by everybody or to reach a verdict solely because of the opinions of what everyone else on the panel thinks." Therefore, viewing the charges as a whole, the Court found that it appeared the jury was adequately and properly instructed that any voluntary verdict that they reached had to be unanimous.

Inconsistent Verdicts; Jury Charges

Ingram v. State, S11A1917 (2/6/12)

Appellant was convicted of felony murder, aggravated assault, and possession of a knife during the commission of a felony. He contended that the trial court committed reversible error when, after the jury delivered the first verdict finding him guilty of both voluntary manslaughter and felony murder, it instructed the jury to go back and re-deliberate without publishing the verdict to the defense and the prosecution.

The record showed that the jury sent this note to the judge, "If we find the defendant guilty of felony murder, do we have to find him not guilty of voluntary manslaughter?" After discussion with counsel, the trial court stated to the jury that "[m]y answer to you is no, provided you have considered all of the charges as I have previously instructed you." The jury then came back and convicted him on both counts. Without publishing the verdict, the court had a conversation with the foreman in open court, regarding, in very general terms, lesser included offenses. Afterward, the jury retired to re-deliberate and then returned a verdict finding appellant guilty of felony murder and not guilty of voluntary murder.

The Court found that the trial court properly refused to accept the initial verdict finding appellant guilty of both felony murder and voluntary manslaughter. Here, the same aggravated assault charge was both the predicate felony for the felony murder charge and the act underlying the voluntary manslaughter charge. Where the jury renders a verdict for voluntary manslaughter, it cannot also find felony murder based on the same underlying aggravated assault. Therefore, the jury could not find appellant guilty of both felony murder and voluntary manslaughter because, as charged, the crimes were subject to the modified merger rule, and the first verdicts were therefore ambiguous When an ambiguous verdict is returned by a jury, the trial court may refuse to accept the verdict and require the jury to continue its deliberations.

The proper procedure is normally for the trial court and counsel to review the verdict prior to its publication in open court, and if the verdict is not proper, the trial court should return the jury for further deliberations. Appellant argued that because both the trial court and counsel should review the verdict prior to its publication, the trial court committed reversible error by not reviewing the verdict with counsel prior to returning the jury for further deliberations. The Court stated that assuming that the trial court should have shown the first verdict to counsel, did not demand a reversal as ultimately the defense has no right to insist that the court accept a return of ambiguous verdicts or to insist on a particular instruction. Consequently, appellant failed to show that he sustained any legal prejudice because the trial court at all times had the discretion to return the jury to the jury room for additional deliberations to clarify their verdict.

Appellant also contended that the trial court's instructions to the jury were confusing and argued that the defense, if made aware of the first verdict, could have requested that the trial court recharge the jury on voluntary manslaughter and more fully explain how to consider felony murder and voluntary manslaughter. However, the Court found, the trial court had already denied a request by appellant to recharge the jury on voluntary manslaughter after the jury submitted its question, and the court's denial was within its discretion as it explicitly stated that it would address only the jury's specific question and the jury had not requested a recharge on voluntary manslaughter. Moreover, with respect to whether the trial court should have explained to the jurors that they could not find appellant guilty of both felony murder and voluntary manslaughter, appellant opposed the giving of this exact instruction to the jury before the first verdict was rendered. A party cannot complain of a judgment, order, or ruling that his own conduct produced or aided in causing. In addition, appellant's contention that the jury instructions insufficiently instructed the jury with regard to voluntary manslaughter also failed because a review of the record showed that the trial court gave the exact jury charge that was requested by appellant.

Finally, the Court rejected appellant's contention that the trial court, during its colloquy with the jury foreperson after the first verdict was rendered, intimated an opinion to the jury in violation of OCGA § 17-8-57 as to what the verdict should be. Here, the trial court did not intimate to the jury his opinion on any facts or any of the evidence. The trial court specifically admonished the jurors that they were authorized to find appellant guilty of the lesser or the greater offense and that the court was "not in any way, shape, or form telling [them] how the verdict should read, because [they were] authorized to do anything [they] want to based upon what…[the court had given them.]" Because these comments were limited to a clarification of procedures and did not address the credibility of witnesses or any fact at issue in the trial, they did not constitute a basis for reversal.

Child Hearsay Statute; Crawford

Hatley v. State, S11A1617 (2/6/12)

Appellant was convicted of aggravated child molestation, aggravated sodomy and two counts of sexual battery against a three year old victim. Appellant contended that the Child Hearsay Statute, O.C.G.A. § 24-3-16, was unconstitutional because it violated the Confrontation Clause under *Crawford v. Washington*, 541 U.S. 36, 124 SC 1354, 158 LE2d 177 (2004) and *Melendez-Diaz v. Massachusetts*, __U.S.__, 129 SC 2527, 174 LE2d 314 (2009). The Court noted that in *Sosebee v. State*, 257 Ga.298 (1987), it had previously construed O.C.G.A. § 24-3-16 to require the trial court 1) at the request of either party, to cause a child molestation victim to take the stand before the State rests; and 2) inform the jury that the court called the child as a witness. However, the Court concluded, *Sosebee* and its progeny "cannot now pass constitutional muster because it fails to put the onus on the prosecution to put the child victim on the witness stand to confront the defendant… [and a]ny cases suggesting the contrary are hereby overruled."

Nevertheless, the Court did not declare O.C.G.A. § 24-3-16 to be unconstitutional. Instead, the Court found that *Melendez-Diaz* recognized that the right of confrontation may be waived by the failure to object and that states may adopt procedures governing the exercise of such objections. Therefore, to avoid finding O.C.G.A. § 24-3-16 unconstitutional, the Court held that the following procedure must be used: 1) the prosecutor must notify the defendant within a reasonable period of time prior to trial of its intent to use a child victim's hearsay statements and to give the defendant an opportunity to raise a Confrontation Clause objection; 2) if the defendant objects, and the prosecutor wishes to introduce the statements under O.C.G.A. § 24-3-16, the prosecutor must present the child witness at trial; 3) if the defendant does not object, the prosecutor can introduce the hearsay statements subject to the trial court's determination that the circumstances of the statements provide sufficient indicia of reliability; and 4) the trial court should take reasonable steps to ascertain, and put on the record, whether the defendant waives his right to confront the child witness. The Court noted that these general guidelines will assure a defendant's right of confrontation is protected until a more detailed procedure is provided by either a uniform superior court rule or a statutory amendment.

Miranda; Right to Counsel

Walker v. State, S11A1492 (2/6/12)

Appellant was convicted of malice murder. Appellant raised an insanity defense, contending that he suffered from a persecutory delusional disorder and had an expert to testify on his behalf. Appellant was required under OCGA § 17-7-130.1 to submit to a State-appointed psychiatric examination. He contended that the trial court erred by allowing the State's expert to testify regarding the statements made by him to the expert, arguing that these statements were inadmissible because his *Miranda* rights were not re-read to him prior to the psychiatric interview and because his counsel was not present.

The Court initially held that because appellant chose to call an expert to testify regarding his mental state at the time of the crime, the State had a statutory right to call an expert in rebuttal. The Court then found that appellant did not have a constitutional right to the presence of counsel during the state's psychiatric examination. He asserted no compelling reason for counsel's presence, and the Court stated, "[W] e have never ruled that counsel must be present during psychiatric evaluation ordered by a trial court." In fact, it has been observed that an attorney present during a psychiatric interview could contribute little and might seriously disrupt the examination.

Moreover, appellant was given a full and proper *Miranda* warning at the time of his arrest, but it was not necessary to remind him (although the State did so) that he need not answer any of the interviewer's questions before the State psychiatric examination. A full, separate, second warning was not necessary. Accordingly, in this specific context, there was no requirement to repeat the *Miranda* warnings. In addition, his counsel was aware of the psychiatric interview and chose not to attend. The trial court therefore did not err in its ruling to admit into evidence incriminating statements made by appellant during his interview with the State's expert.

Judicial Comments; OCGA § 17-8-57

Murphy v. State, S11A1358 (2/6/12)

Appellant was convicted of malice murder and other crimes. He contended that two of the trial court's remarks during the testimony of a police detective improperly conveyed an opinion regarding the credibility of that witness. Specifically, during the officer's testimony regarding the contents of appellant's statement to police, the trial court stated in response to an objection, "You're asking this Detective, who is a good detective, what is in someone, somebody else's head." Further, the trial court stated, "[T]his man has worked a lot of cases and he's got a recollection and he's got a written memorandum and hopefully between the two of those and his good efforts we're going to find the truth of the matter." Although defense counsel did not object to the statements, appellant raised them on appeal as violative of OCGA § 17-8-57.

The Court agreed and reversed his convictions. The jury could have interpreted the trial court's calling the detective a "good detective" as expressing a favorable opinion on his abilities and thus bolstering that witness's credibility. Further, the jury may have construed the trial court's comments regarding the officer's use of the written document and his "best efforts" as an expression of the court's opinion that the detective's recollection of appellant's statement was reliable or credible. The Court found that it was impossible to say that, after hearing the trial court's statements, the jurors were not influenced to some extent. Therefore, the trial court erred in making statements that could have been interpreted as offering an opinion on the detective's credibility. Moreover, it was of no consequence that counsel failed to contemporaneously object. A violation of OCGA § 17-8-57 is always "plain error" and failure to object will not preclude appellate review.

Venue; Sale of Agricultural Products

Babbitt v. State, A11A1565 (1/27/12)

Appellant was granted an interlocutory appeal from the denial of his motion to dismiss the State's indictment charging him with ten counts of violating OCGA § 16-9-58, which prohibits a person from acting with fraudulent intent to buy agricultural products and failing or refusing to pay for those products within a certain amount of time. Briefly stated, the evidence showed that appellant lived in Kansas. Through telephone contact, he made an oral contract with Georgia sellers to purchase cattle. The sellers made multiple shipments of hundreds of cattle to appellant in Kansas for a total cost of over $365,000.00. Appellant made payments of $77,000 and $28,000, respectively, but then failed to pay the balance. Appellant contended that venue lied in Kansas, not Georgia.

Article VI, Section II, Paragraph VI of the 1983 Georgia Constitution requires that all criminal cases be tried in the county "where the crime was committed." OCGA § 16-9-58 provides as follows: "*Any person*, either on his or her own account or for others, who with fraudulent intent shall buy [agricultural products including cattle] and *fail or refuse to pay therefor within 20 days* following receipt of such products or chattels or by such other payment due date explicitly stated in a written contract agreed to by the buyer and seller, whichever is later, shall be guilty of a misdemeanor; except that if the value of the products or chattels exceeded $500.00 such

person shall be guilty of a felony…" The Court noted that the statute does not contain a specific venue provision. The Court found that the key verbs are "buy" and "fail or refuse to pay," and the crime is not complete until the failure or refusal occurs. Under the terms of the UCC and shipping documents (bills of lading), title to the cattle did not pass until payment for the livestock was received. Thus, there was some evidence that the place of payment was at the seller's location, i.e., in Laurens County. Accordingly, assuming the State can prove fraudulent intent, under OCGA § 16-9-58 there was some evidence that appellant wrongfully failed or refused to pay the seller in Laurens County for the cattle he purchased. In addition, appellant made telephone contact with the seller in Laurens County to affect the purchase, the cattle were shipped from there, and appellant sent two payments there. And even if appellant's fraudulent intent arose in Kansas sometime after the cattle were shipped, the crime was not consummated until he failed or refused to pay. Therefore, the trial court properly denied the motion to dismiss.

Sentencing; Credit for Time Served

Cochran v. State, A11A1601 (1/31/12)

Appellant appealed from the denial of his pro se motion to correct a clerical error in his sentence. The record showed that appellant was arrested on July 29, 2008. He stayed in the county jail until he was sent to a state facility in December, 2008. He was then returned July 2, 2009 and remained there until his sentencing on July 27, 2009, when he received ten years for burglary. In its sentence, the trial judge made a notation that he receive "credit pursuant to jailers aff[idavit]" which essentially only gave him credit for his county time.

Appellant contended that the trial court deprived him of credit for his pretrial detention in the state facility. The Court agreed. Under OCGA § 17-10-12, the amount of credit for time spent in confinement while awaiting trial is to be computed by the convict's pre-sentence custodian, and the DOC has the duty to award the credit for time served based upon that calculation. Because trial courts are not involved in such calculations, a defendant aggrieved by the calculations in awarding credit generally must seek relief from the DOC. And the remedy for dissatisfaction with that relief would be in a mandamus or injunction action against the Commissioner of the Department of Corrections.

However, an exception exists where the trial court in its written sentencing order gives gratuitous misdirection to the correctional custodians because a trial judge has no authority to interfere with the administrative duties of the correctional custodians and the DOC to determine and award credit for time served. Because the DOC appeared to have relied upon the trial court's handwritten notation in calculating appellant's sentencing credit, the Court found that the notation was a gratuitous misdirection that had the effect of improperly taking credit away from appellant. Accordingly, the Court reversed the trial court's denial of appellant's motion and remanded the case with direction to strike the words "credit pursuant to jailers aff[idavit]." from his sentence.

Jury Charges

Tiller v. State, A11A1616 (2/1/12)

Appellant was convicted of aggravated assault, battery, and possession of a firearm by a convicted felon. He argued, and the State conceded, that he was entitled to a new trial because the trial court charged the jury on a method of committing battery that was not alleged in the indictment. Although the indictment charged appellant with committing battery by causing "visible bodily harm to [the victim]," the trial court charged the jury as follows: "A person commits the offense of battery when that person intentionally *causes substantial physical harm or visible bodily harm to another*." (Emphasis supplied.) Although defense counsel did not object to this charge, appellant contended he was entitled to a new trial under the plain error analysis provided by OCGA § 17-8-58.

The Court stated that generally, it is not error to charge an entire Code section even though a portion of the charge may be inapplicable to the facts in evidence. Nevertheless, the giving of a jury instruction which deviates from the indictment violates due process where there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed to limit its consideration to the manner specified in the indictment. Here, the trial court read the indictment to the jury, and the jury had it with them during their deliberations. The court instructed the jury that it should not convict appellant "unless and until each element of the crime as charged is proven beyond a reasonable doubt" and that "[t]he burden of proof rests upon the State to prove *every material allegation of the indictment and every essential element of the crime* charged beyond a reasonable doubt." (Emphasis supplied.) Finally, the court informed the jury that "[i]f, after considering the testimony and the evidence presented to you together with the charge of the Court you should find and believe beyond a reasonable doubt that the Defendant . . . did . . . *commit the offense of battery as alleged in Count 2 of the indictment* you would be authorized to find the Defendant guilty." (Emphasis supplied.) The Court held that these charges properly "limit[ed] the jury's consideration to the specific manner of committing the crime alleged in the indictment." Therefore, the Court stated, because these charges cured the contended error in the battery charge, it need not reverse or engage in a plain error analysis.

Miranda; Custodial Statements

Thompson v. State, A11A1798 (2/1/12)

Appellant was convicted of burglary. He contended that the trial court erred in denying his motion to suppress his statement relating to the burglary because it was custodial interrogation without benefit of *Miranda* warnings. The Court agreed and reversed his conviction.

Briefly stated, police were notified that a daycare center had been broken into. Two vacuum cleaners were taken, including one with a broken handle. A witness saw appellant carrying the vacuum cleaners and go into a gas station. A description of appellant was broadcast. Officer Findley spoke to the witness and then proceeded to the gas station. Officer Edelkind responded to the daycare center where he observed appellant, who had returned to the scene. Officer Edelkind approached appellant and asked where he was coming from and if he would empty his pockets before a pat-down. Appellant complied with this request and removed items from his pockets, including a crack pipe and push rods. The officer proceeded to ask him when he had last used drugs, and appellant replied that he had just spent his last $5.00 on drugs. Appellant also admitted to owning the crack pipe. Shortly

after appellant emptied his pockets of the drug paraphernalia, Officer Findley returned to the daycare center after hearing over the radio that Officer Edelkind had stopped an individual matching the suspect's description. Officer Findley approached Thompson and immediately asked "where did he put the vacuums[?]" Appellant responded that he had sold them for $5.00. Thereafter, Thompson was placed under arrest at the direction of a detective.

For *Miranda* purposes, a person is "in custody" when either formally arrested or restrained to the degree associated with formal arrest. But unless a reasonable person in the suspect's situation would perceive that he was in custody, *Miranda* warnings are not necessary. The inquiry focuses upon the objective circumstances attending the particular interrogation at issue, and not upon the subjective views of either the person being interrogated or the interrogating officer.

Although appellant was not handcuffed or told that he was under arrest, the officer confiscated the contents of his pockets by placing the items on the patrol car before continuing to detain him. The Court found that under these circumstances, after producing drug paraphernalia, admitting to own it, and admitting to recently buying and using drugs, a reasonable person would certainly perceive himself to be in police custody. Additionally, the accusatory nature of Officer Findley's question required the benefit of *Miranda* warnings, because although officers may make initial on-the-scene inquiries without *Miranda* warnings to ascertain the nature of the situation at hand, the questioning must not be aimed at obtaining information to establish a suspect's guilt. Officer Findley's question, which came after a witness identified appellant as the suspect, was clearly aimed at establishing his guilt. Accordingly, appellant's admission regarding the vacuum cleaners should have been suppressed. Finally, the Court found that the admission was not harmless and therefore, a new trial was required.

Jury Charges; Lesser Included Offenses

Dailey v. State, A11A1894 (1/31/12)

Appellant went on a crime spree and was convicted of numerous felonies against numerous victims. He contended that the trial court erred by denying his requests to charge the jury on the misdemeanors of pointing a gun at another and reckless conduct as lesser included offenses of the felony counts of aggravated assault committed against victims Sheldt and Smith. Those counts alleged that appellant committed aggravated assault by "pointing a gun" at the respective victims. "[A] person who, using a deadly weapon, commits an act which places another in reasonable apprehension of immediate violent injury commits the felony of aggravated assault." Appellant argued that he was entitled to have the jury charged on the cited misdemeanor offenses, asserting there was evidence that Sheldt and Smith were not placed in reasonable apprehension of immediately receiving a violent injury. Additionally, he argued that there was evidence that he did not intentionally point the gun at those two men.

The Court stated that generally, where a case contains some evidence, no matter how slight, which shows that the defendant committed a lesser offense, then the trial court should charge the jury on that offense. The assault statutes require not only an awareness by the victim that a pistol is pointed at him, but also a reasonable perception on the victim's part of the danger of immediately receiving a violent injury. If the victim is not placed in reasonable apprehension of immediate violent injury by the pointing of the firearm, only the misdemeanor of pointing a firearm (and not the felony of aggravated assault) has been committed.

Here, the Court held, uncontradicted evidence showed that both Sheldt and Smith were placed in reasonable apprehension of immediately receiving a violent injury when Dailey pointed a gun at them. "If the pointing of a firearm places the victim in reasonable apprehension of immediate violent injury, then the felony of aggravated assault, rather than the misdemeanor of pointing a gun at another has occurred. Therefore, since the only testimony was that the weapon was pointed as a threat and perceived as such, an assault occurred. Although pointing a firearm at another is an offense included in aggravated assault, it is not error to refuse a charge on it when the evidence does not reasonably raise the issue that the defendant may be guilty only of the lesser crime.

As to reckless conduct, appellant's argument was that he did not have the requisite intent to commit the offense of assault because he was intoxicated. The Court noted that there was no evidence that his intoxicated state was involuntary; nor did he cite any evidence that his intoxication resulted in any permanent brain function alteration. The evidence showed that he committed the two counts of aggravated assault at issue here; evidence merely that he was intoxicated did not make them anything less. The only testimony was that in pointing the pistol at Sheldt and Smith, he did so intentionally, not consciously disregarding a substantial and unjustifiable risk that his act or omission would cause harm or endanger their safety, and consequently the trial court properly refused to give a jury instruction on reckless conduct.

"Simply, there was no evidence that [appellant] committed an unlawful act not a felony." Accordingly, it was not error for the trial court to decline to charge the jury on the cited misdemeanor offenses.

Search & Seizure

State v. Mincher, A11A1906 (2/2/12)

Appellant was charged with DUI per se (under 21). The trial court granted her motion to suppress, challenging the lawfulness of the traffic stop, and the State appealed. The evidence showed that while waiting for the traffic light to turn green, appellant realized that her vehicle was nearly out of gas; and noticing a gas station several hundred yards off to the right, she decided to turn right at the intersection despite not being in the dedicated turn lane. But before doing so, she turned on her right turn signal, looked back over her right shoulder to make sure that no other vehicle was approaching in the right turn lane, and then turned right onto the highway. At that same moment, a police officer, who had been traveling in the same direction and who had also stopped at the same intersection, saw her vehicle and decided to initiate a traffic stop for what he believed was an illegal right turn. Consequently, the officer turned right to follow appellant and turned on his blue lights just as she was pulling into the gas station.

The State argued that the officer had a reasonable articulable suspicion justifying the traffic stop because appellant made an illegal right turn in violation of OCGA § 40-6-120 (a) (1), which provides that: "[b]oth the approach for a right turn and a right turn shall be made as close as practicable to the right-hand curb or edge of the roadway. . . ." The Court

noted that after hearing the officer and appellant's testimony and reviewing the exhibits, including the video of the traffic stop, the trial court found that she used her turn signal, checked for traffic behind her to ensure that no one's safety was at risk, and ultimately made her turn from the dedicated right turn lane. And based on these findings, the trial court concluded that appellant's right turn was not illegal, and thus, there was no objective basis for a reasonable suspicion that she was, or was about to be, engaged in criminal activity. Construed most favorably to uphold the trial court's judgment, the Court concluded that the trial court did not err in finding that the officer's traffic stop was unreasonable and not based on the observation of a traffic offense. Accordingly, the Court affirmed the trial court's grant of the motion to suppress.

Juror Misconduct

Fuller v. State, A11A1982 (1/27/12)

Appellant was convicted of aggravated child molestation and child molestation of a 12-year-old victim. He contended that the trial court erred in not granting his motion for mistrial based on juror misconduct. The Court agreed and reversed his convictions.

The record showed that after the State rested, the court took a lunch break. The prosecutors noticed four jurors sitting at a table. One of the jurors got up, walked over to the victim sitting at another table, and spoke to her for a couple of seconds. The prosecutors reported this to the court upon return from lunch. The judge questioned the juror in the presence of both parties. The juror said she told the girl, "…heh, honey, I said keep your head up, I said I'm so proud of you. . . ." The juror was questioned about the incident and repeatedly said she had not formed an opinion, could keep an open mind and reach a fair and impartial verdict, had not discussed this with any other juror and had not discussed the case in any way with other jurors or anyone else. At the conclusion of the colloquy, appellant moved for a mistrial, which the court denied.

When irregular juror conduct is shown, there is a presumption of prejudice to the defendant, and the prosecution carries the burden of establishing beyond a reasonable doubt that no harm occurred. To upset a jury verdict, the misconduct must have been so prejudicial that the verdict is deemed inherently lacking in due process. Abuse of discretion is the standard applied on appeal to a trial court's decision whether or not to replace a juror.

Here, the Court found, a juror initiated a conversation with the testifying victim in the case, such that the juror alone had access to the victim's reaction, silent or otherwise, to her expressions of support. The trial court never asked the juror what the victim's response had been and also failed to examine the victim or the other three jurors, with the result that the record contained only one account —the wayward juror's —of what occurred. Even accepting the juror's account as well as the trial court's conclusion that she intended only to express sympathy for the victim, the juror's unauthorized contact with a witness was *intentional rather than accidental*; established a *personal relationship* with that witness; and included statements reasonably construed *as expressing a judgment concerning the events at issue*. Finally, there was no evidence to suggest that appellant waived his right to a verdict from an unbiased jury of 12.

Under these circumstances, no rehabilitation of the juror was possible, and the State failed to show that appellant was not harmed by the misconduct. The trial court thus abused its discretion when it denied the motion for mistrial.

Contempt; Police Officer Subpoenas

Apoian v. State, A11A2122 (1/30/12)

Appellant, a police officer, appealed from an order finding him in contempt for failure to appear on a subpoena. The evidence showed that appellant was subpoenaed to testify in a criminal case. He was put on call because he was supposed to be in the office at the time the trial was to begin. But that morning, the officer called in sick. When the prosecutor called over, the officer could not be reached and the prosecutor was told the officer would be there within an hour. The trial started at 10 a.m. and the prosecutor informed the judge of appellant's tardiness and expected arrival. The court, being dismayed at the police department's perceived lack of respect for subpoenas, dismissed the case for want of prosecution. When appellant arrived in court at 12:15 p.m., the judge found him in contempt.

Appellant contended that the trial court erred by holding him in contempt because he was not afforded due process. The Court agreed. Failure to respond to a subpoena is not the type of conduct subject to summary contempt proceedings. Thus, appellant was entitled to reasonable notice of the charges, the opportunity to call witnesses and present evidence, and the opportunity to retain counsel of his own choosing and adequately prepare his defense. The contempt proceedings in this case clearly did not comply with due process, and therefore, the trial court's finding of contempt were vacated and the case remanded for further proceedings.

One of the judges wrote separately to note that appellant was "subpoenaed" through the use of a protocol between the prosecuting office and the city police department. Without criticizing the prosecution or the protocol, he questioned whether the officer was in fact lawfully subpoenaed to court.

Police Interrogations; Ultimate Issue

Roberts v. State, A11A1802 (2/1/12)

Appellant was convicted of rape, incest, and aggravated sexual battery. The evidence showed that before he was arrested, appellant was interviewed by two police officers. In the course of that interview, one officer explained that he believed the account of the victim and thought that appellant "took advantage of [the victim]," and he added that "facts are facts, you raped [the victim], you raped her." The interview was recorded, and the trial court admitted the recording, without requiring that these comments be redacted before it was played for the jury. Appellant contended that the admission of the recording without redactions was error because the comments pertained to the ultimate issue and bolstered the credibility of the victim.

Sworn witnesses, generally speaking, should not be permitted to opine from the stand about whether another witness is truthful, or about the ultimate issue in the case. But the Court stated, if the officer had taken the witness stand and, in the course of his sworn testimony, offered opinions about whether the victim ought to be believed or whether appellant had, in fact, raped the victim, the admission of those opinions might well amount to error. But here, when the officer made the comments, the officer was not then a sworn witness. Instead, he was interviewing a suspect in the course of a law

enforcement investigation, and law enforcement interrogations are, by their very nature, attempts to determine the ultimate issue and the credibility of witnesses. Comments made in such an interview and designed to elicit a response from a suspect do not amount to opinion testimony, even when a recording of the comments is admitted at trial.

Nevertheless, the Court stated, while comments of this kind are not opinion testimony, this did not mean that they always can be admitted, and such comments ought not to be admitted if the probative value of the comments is outweighed by their tendency to unduly arouse the jury's emotions of prejudice, hostility or sympathy. Here, the Court found, the comments had some probative value. One of the interviewing officers explained at trial that, when they interviewed appellant, they deliberately chose to use a confrontational interview technique, one that was warranted, they thought, in light of what they knew about appellant. This confrontational technique included the confrontational comments about which appellant asserted as error, and by the conclusion of the interview, this technique yielded an admission from appellant that he might have had intercourse with the victim against her will. Generally, every act or circumstance serving to elucidate or throw light upon a material issue or issues is relevant and for this reason, evidence of the circumstances in which the officers elicited an important admission from appellant had some probative value. And, the Court found, the prejudicial effect of admitting these comments was minimal because the officer who made the comments later arrested appellant, "so it hardly would have been news to anyone that the officer believed the account of the victim and thought that [appellant] had, in fact, raped the victim." For these reasons, the trial court did not abuse its discretion when it admitted a recording of the interview of appellant without requiring the redaction of the comments.

Driving With a Suspended Registration; Ordinances

Lawson v. State, A11A1693 (1/27/12)

Appellant was convicted of DUI (per se); driving an uninsured vehicle; driving a motor vehicle with a suspended registration, OCGA § 40-6-15 (a); and violating a county open container ordinance. He first challenged the sufficiency of the evidence regarding his conviction under OCGA § 40-6-15 (a) which provides: "Any person who knowingly drives a motor vehicle on any public road or highway of this state at a time when the vehicle registration of such vehicle is suspended, canceled, or revoked shall be guilty of a misdemeanor." Appellant told the police that the car belonged to his father, and that he had been driving the car since his father had died. At trial, appellant testified that he did not know the vehicle was not properly registered, that his sister wanted the car and that she was supposed to have taken care of any transfer of the registration after their father's death. Specifically, he contended that, although the officers testified that the car that he was driving had a suspended registration, their testimony, to which he objected, constituted hearsay, had no probative value, and was insufficient to establish that he knew the registration had been suspended.

The Court stated that pretermitting whether the officers' testimony constituted hearsay, there was no evidence in the record from which the jury could have reasonably inferred that appellant "knowingly" drove a motor vehicle with a suspended, cancelled, or revoked registration. Although knowledge or scienter may be proved, like any other fact, by circumstantial evidence, to warrant a conviction on such circumstantial evidence, the proved facts must not only be consistent with the hypothesis of guilt, but must exclude every other reasonable hypothesis save that of the guilt of the accused. Here, the State failed to offer any evidence from which the jury could reasonably infer that appellant had either actual or constructive knowledge of the car's registration status. He did not own the car; he only had been driving it. The State did not show that he inherited the car nor did it present any facts from which the jury could infer that the car had been in his possession, custody, or control for any specific length of time. In fact, the State adduced no evidence establishing to whom the car was actually registered, when the car's registration had been suspended, or for what reason. Appellant's unrebutted testimony established that the car did not belong to him, that he did not know the car was not properly registered, that his sister wanted the car, and that she was supposed to get it registered in her name after their father died. Thus, the State's evidence failed to exclude the reasonable hypothesis that, when appellant drove his father's car, he did not know that the registration had been suspended. Consequently, this conviction was reversed.

Appellant also contended that his conviction for violating the county's open container ordinance must be reversed because the State failed to make a certified copy of the ordinance a part of the record at trial. The Court agreed. The record revealed that the State charged appellant with "possessing an open container of any alcoholic beverage while operating a motor vehicle" in violation of that county's open container ordinance. The record showed that the State submitted a certified copy of the ordinance to the court during trial. However, during the jury charge conference, the court discussed with counsel the law applicable to the open container instruction, suggesting that he would charge the jury "according to OCGA." The instruction the court ultimately gave the jury tracked the language of OCGA § 40-6-253 (b) (1) almost verbatim: "A person shall not consume any alcoholic beverage or possess any [open] alcoholic beverage container in the passenger area of any motor vehicle which is on the highway or shoulder of any public highway."

The State's Exhibit declared on its first page that it is a certified copy of the County ordinances pertaining to open containers and is comprised of "pages CD6:6.1 through CD6:7, Chapter 6 'Alcoholic Beverages'; Article I." The document in the record, however, contained only one of the pages referenced on the certification sheet, CD6:6.1, which set forth the definition of an open container. The document did not set forth the ordinance prohibiting the possession of an open container. The Court stated that it is axiomatic that the State must prove the crime charged in the accusation or indictment beyond a reasonable doubt. While the record contained evidence showing that appellant had in his car, within his reach, an open container of an alcoholic beverage, there was no showing that such conduct violated any cognizable criminal law of the local government. In the absence of evidence of a properly admissible copy of the ordinance involved, neither the trial court nor an appellate court may take judicial notice of the existence of a local ordinance. Because the State failed to meet its burden of proving beyond a reasonable doubt that appellant's possession of an open container violated any local ordinance, his conviction was reversed.

Jury Charges; Proximate Cause

Harrison v. State, A11A1911 (2/1/12)

Appellant was convicted of obstruction of a police office and interference with government property. The evidence showed that appellant was wanted on a probation warrant. Officers located him at a swimming pool. Appellant struggled with the officers and he and one of the officers fell into the swimming pool. The fall into the pool ruined the officer's cell phone and damaged his new walkie-talkie, both the property of the Sheriff's Department.

Appellant contended that the trial court erred in giving the charge: "An injury or damage is proximately caused by an act whenever it appears from the evidence in the case that the act played a substantial part in bringing about or actually causing the injury or damage and that the injury or damage was either a direct result or a reasonably probable consequence of an act of the defendant." He contended that a causation analysis is inapplicable to the offense of interference with government property. Instead he argued, actual intent is required for cases involving criminal damage to property require. But, the Court found, those statutes, as well as the criminal trespass statute, include a requirement that the person "intentionally" (OCGA § § 16-7-21 (a), (e), 16-7-23 (a) (1)), "knowingly" (OCGA § § 16-7-21 (b), 16-7-22 (a)), or "recklessly or intentionally" (OCGA § 16-7-23 (a) (2)) commit the proscribed act. OCGA § 16-7-24 (a), in contrast, contains no such requirement, but states in its entirety: "A person commits the offense of interference with government property when he destroys, damages, or defaces government property." Although appellant suggested that absurd results may arise from this distinction, the Court stated, "Statutes are presumed to be enacted by the General Assembly with full knowledge of the existing condition of the law and with reference to it, and are therefore to be construed in connection and in harmony with the existing law." Any change in the intent requirements of the statute is for the legislature, not the Court.

Here, a police officer falling into the water and damaging his equipment is a reasonably probable consequence of resisting arrest and struggling with the officer at the side of a swimming pool. In the absence of a specific statutory provision, the general standard of proximate cause applies. The trial court's instruction on proximate cause therefore was not error.

Juveniles; Transfer Orders

In the Interest of C. B., A11A1626 (1/30/12)

Appellant appealed from an order of the juvenile court transferring his case to the superior court. The record showed that appellant was charged with crimes that were within the exclusive jurisdiction of the superior court pursuant to OCGA § 15-11-28 (b) (2) (A) (v) & (vi). Because she was not indicted within 180 days of her detention as required by OCGA § 17-7-50.1, the superior court entered an order granting her motion to transfer the case to the juvenile court. However, shortly after the case was transferred to the juvenile court, the State filed a motion to transfer the case back to the superior court pursuant to the provisions of OCGA § 15-11-30.2.

The Court stated that the question of whether the transfer back to the superior court pursuant to OCGA § 15-11-30.2 was proper appeared to be one of first impression. The State argued that the transfer back was proper because nothing in OCGA § 17-7-50.1 explicitly prevents such a transfer. Although the Court agreed that nothing in the statute specifically prohibits a transfer back to the superior court, it found that the transfer was nevertheless improper. The time limits set forth in OCGA § 17-7-50.1 are plainly stated and mandatory and clearly express the legislative intent that when a juvenile is detained and the superior court is exercising jurisdiction under either OCGA § 15-11-28 (b) or OCGA § 15-11-30.2, the State must obtain an indictment within the specified time or the superior court loses the jurisdiction conferred by those provisions. Further, the statute plainly adopts the date of detention as the point from which the time is calculated, and it explicitly applies whether the child is initially subject to the jurisdiction of the superior court through committing an enumerated offense, OCGA § 15-11-28, or via a transfer to the superior court after a petition and hearing, OCGA § 15-11-30.2. Here, the case was transferred to the juvenile court by the superior court because the State failed to procure an indictment within the prescribed 180 days. The same 180-day time limitation applies to both OCGA § 15-11-28 (b) and OCGA § 15-11-30.2 and that 180 days begins to run on the day the juvenile is detained whenever the superior court is exercising jurisdiction under either section. Consequently, anytime the superior court loses jurisdiction which was conferred by OCGA § 15-11-28 (b) because the State failed to obtain an indictment within 180 days of the date the juvenile was detained, the time will also have expired within which the State could procure an indictment if the superior court were proceeding under OCGA § 15-11-30.2. Thus, a transfer back to the superior court under those circumstances is pointless since an indictment returned by the grand jury would be void.

Finally, the Court stated, "It is clear to us that the legislature intended to set time limitations for the State to act in those situations in which the juvenile is detained and the superior court is exercising jurisdiction over the matter pursuant to either OCGA § 15-11-28 (b) or OCGA § 15-11-30.2, and those time limitations would be eviscerated if the juvenile court's transfer order in this case is allowed to stand. Thus, the juvenile court's transfer order must be reversed and the case transferred back to the juvenile court."