

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING FEBRUARY 14, 2014

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## THIS WEEK:

- **Jury Charges; Rule of Sequestration**
- **Waiver of Post-Conviction Relief**
- **Search & Seizure; Identification**
- **Sentencing; Merger**
- **Search & Seizure; Hearsay**
- **Indictments; Dismissal "With Jeopardy"**
- **Search & Seizure; Inventory**
- **Identification; Jury Charges**

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### ***Jury Charges; Rule of Sequestration***

*Hudson v. State, A13A2043 (2/5/14)*

Appellant was convicted of four counts of child molestation, two counts of cruelty to children in the third degree, aggravated assault and interference with a 911 call. The evidence showed that the two victims of the molestation charges were appellant's two pre-teen step-daughters. After the girls told their mother, she confronted appellant and a fight ensued.

Appellant argued that the trial court erred by refusing to charge the jury on mutual combat and justification. The Court stated that a charge on mutual combat generally is proper when there is evidence of a mutual intention or agreement to fight. Here, however, the evidence showed no such intention or agreement and therefore, did not support a charge on mutual combat.

Similarly, a charge on justification was also not warranted. A prima facie case of justification requires a showing that the victim was the aggressor, that the victim assaulted

the defendant, and that the defendant was honestly trying to defend himself. If the amount of force used by a person is excessive, it does not qualify as self-defense. Here, the Court found, appellant failed to demonstrate that the trial court abused its discretion in determining he had made a prima facie showing of justification. The Court noted that it was true that there was some evidence that appellant's wife attacked first. But appellant hit her in the face with a trophy, covering her in blood and splattering blood over the room. She required sutures; he did not even appear to have been in a fight. Thus, appellant failed to show that the trial court abused its discretion in determining that he had not made a prima facie case of self-defense.

Finally, appellant argued that the trial court erred in allowing an investigator to remain in the courtroom to assist the prosecutor in violation of the rule against sequestration. But, the Court found, appellant did not argue that the trial court abused its discretion, but instead argued that this exception to the sequestration rule should be abolished. However, the Court noted, this exception was established long ago by our Supreme Court and the Court of Appeals has no authority to overrule or modify a decision made by the Supreme Court of Georgia.

### ***Waiver of Post-Conviction Relief***

*Henderson v. State, A13A2106 (2/4/14)*

Appellant appealed from the trial court's denial of his motion to modify his sentence. The record showed that as part of a negotiated plea of guilty to entering an automobile (O.C.G.A. § 16-8-18, Count 1), and three counts of burglary (O.C.G.A. § 16-7-1,

Counts 2, 3, & 4), appellant was sentenced to a total of 40 years, to serve ten, with the remainder to be served on probation. He also was ordered to pay restitution to the victims in Count 1 in the amount of \$1,095 and to the victim in Count 3 in the amount of \$260. Additionally, and as part of the negotiated agreement, he agreed that he would forfeit any and all rights to post-conviction relief. As stated by the trial court and acknowledged by appellant during the plea hearing, “[y]ou have forfeited by contract any post-conviction relief that you may normally seek. Do you understand that?” Appellant: “Yes, Sir.” Nonetheless, appellant filed a motion to modify his sentence, contending that the restitution ordered on Count 1 was inappropriate and that his parents were ill and needed him. In a one sentence order, the trial court denied the motion.

The Court found that appellant validly waived his right to post-conviction relief by entering into the plea agreement with the State, which was accepted and approved by the trial court. In so holding, the Court noted that appellant was represented by counsel during the plea and the trial court fully informed him of his rights which he voluntarily waived as part of the plea agreement.

## **Search & Seizure; Identification**

*Parker v. State, A13A2152 (2/4/14)*

Appellant was convicted of armed robbery. The evidence showed that appellant and his two co-defendants, Bourassa and Smith, robbed the victim at gunpoint at the apartment complex at which appellant and Bourassa lived. After the robbery, the victim gave the police a description of his assailants. The police went to the apartment complex and after inquiry, were directed to Bourassa’s apartment. Bourassa and Smith were at the apartment at the time. The police arrested Bourassa and Smith. Once at the jail, each man gave Mirandized statements implicating appellant. They also provided the police a physical description of appellant and information that appellant used the first name “Marquis,” he lived in apartment 2203 with his girlfriend, and his girlfriend drove a white Dodge Avenger. The officers who were still at the scene then surveilled apartment 2203. They noticed a woman drive up in a Dodge

Avenger and go into the apartment. Thereafter a man matching the description given to them came out of the apartment and he was detained. After appellant told the onsite officers his name, the investigating officer who was back at the sheriff’s office used an on-file photograph of appellant for the purpose of preparing a photo lineup. When Bourassa and Smith identified appellant during separate photo lineups, appellant was arrested.

Appellant first argued that the trial court erred in allowing the investigating officer to testify about another officer’s custodial interview of Bourassa and Smith. Specifically, that the hearsay evidence could not be used to prove the lawfulness of the State’s actions and violated his right to confront witnesses. The Court disagreed. A defendant may seek to suppress evidence seized during a warrant search if the warrant was not supported by probable cause. Similarly, in order for a warrantless arrest to be valid, police officers must have probable cause to believe the accused has committed or is committing a criminal act. But, it has long been recognized that hearsay is admissible in determining the existence of probable cause. Admission of hearsay for that purpose does not violate the constitutional right of a defendant to confront the accusing witnesses, because guilt or innocence is not the issue for determination. There is a great difference between what is required to prove guilt in a criminal case and what is required to show probable cause for arrest or search. A finding of probable cause may rest upon evidence which is not legally competent in a criminal trial. Consequently, the trial court did not err in admitting hearsay testimony at the suppression hearing, giving it such weight and credit it deemed proper.

Appellant also argued that the photographic identifications by his co-defendants should have been suppressed because his photograph was obtained as a result of, and tainted by, his illegal arrest. Specifically, he argued that he was arrested when he exited his apartment and was confronted by police. The Court again disagreed. The test of whether a detention amounts to a custodial arrest depends upon whether a reasonable person in the suspect’s position would have thought the detention would not be temporary. Here, the Court found, when officers made contact with appellant, they had a reasonable suspicion to believe he was the third suspect involved in

the armed robbery. Notably, Bourassa and Smith gave incriminating statements that they were involved in the armed robbery and provided information regarding the physical description and apartment number (2203) of the third assailant (appellant). The officers observed appellant coming out of apartment 2203, and appellant matched the physical description provided by Bourassa and Smith. Additionally, police officers saw a woman drive up to the apartment complex in a white Dodge Avenger and enter apartment 2203, and those observations were consistent with information provided by the co-defendants. Consequently, the officers had a reasonable suspicion to detain appellant as they investigated whether he was involved in the robbery.

Moreover, during this investigation, appellant provided his full name to the police officers, who relayed this information to the investigating officer. The investigating officer then searched a police database and found a picture of appellant to prepare a photo lineup. The Court thus concluded that although he was not free to leave, he was not under arrest, at the time he provided his name, noting that the evidence did not show that appellant was handcuffed, placed in a patrol car, or otherwise physically restrained. Consequently, the trial court did not err in denying his motion to suppress the photograph identifications.

## **Sentencing; Merger**

*Thomas v. State, A13A2292 (2/6/14)*

Appellant was convicted and sentenced on one count of aggravated assault for pointing a gun at the victim; two counts of aggravated battery, one for each injury to the victim’s hands; and one count of possession of a firearm by a convicted felon. The evidence showed that in a scuffle appellant started by pointing a loaded gun at the victim’s head, the victim was shot and injured in both hands.

Appellant contended that for the purpose of sentencing, the trial court erred by failing to merge the two convictions of aggravated battery. The Court disagreed. The Court stated that where different conduct of the accused causes separate aggravated batteries on the victim, the accused may be convicted and sentenced for each crime. Here, each count of aggravated battery required the State to prove that appellant shot the victim separate times and injured him in a different way: the

first count of aggravated battery charged that appellant rendered the victim's right thumb useless by shooting it, and the second count charged that appellant seriously disfigured the victim's left hand by shooting it. Thus, each aggravated battery verdict was attributable to different conduct than the other aggravated battery verdict, that is, appellant fired the gun on separate occasions causing injury to each of the victim's hands. The trial court, therefore, was not required to merge the two counts of aggravated battery.

Appellant also argued that his conviction of aggravated assault for pointing the gun at the victim's head should merge into one or more of his convictions of aggravated battery because the subsequent batteries were "part and parcel of the original act" of pointing the gun. The Court again disagreed. The Court noted that after appellant initially pointed the gun at the victim's head, the victim raised his arms and retreated in defense. Appellant then moved forward and pointed the gun at the victim at close range, which prompted the victim to struggle for the gun in self defense. Only then was the victim shot in each hand. Thus, the victim's initial aggravated assault prompted the victim to move defensively, and appellant then took a separate action of moving toward the victim, which led to the struggle that resulted in the victim getting shot in each hand. Therefore, the Court found, appellant's initial act of pointing the gun at the victim's head, an aggravated assault, was a separate act from the ensuing acts of aggravated battery. Accordingly, the crimes did not merge.

### **Search & Seizure; Hearsay**

*State v. Vaughn, A13A2179 (2/4/14)*

The State appealed from the trial court's grant of a motion to suppress filed by Meagan Vaughn, who was charged with violating O.C.G.A. § 3-3-23(a)(2) (minor in possession of alcohol). The evidence showed that Officer Wood was on duty when he was called to a nightclub by Officer Ferree, who was working there part time, off duty at that incident location. She said she had several subjects that were intoxicated and under age. When Officer Wood arrived at the nightclub, he testified that he met with the six subjects who had been detained by Officer Ferree, and all of them appeared to be under the

influence of alcohol. Officer Wood could not recall whether he performed the alco-sensor tests recorded in his report. Officer Wood acknowledged that he did not have any first-hand knowledge of the details concerning Officer Ferrer's observations before he detained Vaughn. He also testified that he did not have any particularized information about the grounds used by Officer Ferree to detain Vaughn and ask her to submit to an alco-sensor test. While Officer Wood testified that he recalled the smell of alcoholic beverage about Vaughn's person when he arrived, his report did not reflect this observation, and he initially misidentified Vaughn as someone else at the beginning of the motion to suppress hearing. Officer Ferree did not testify at the hearing. In granting the motion to suppress, the trial court ruled that Officer Wood's testimony as to anything Officer Ferree told him was inadmissible hearsay.

The Court agreed with the State's assertion that hearsay is admissible during a suppression hearing when determining the existence of probable cause for an arrest or articulable suspicion for an investigatory stop. Reasonable suspicion need not be based on an arresting officer's knowledge alone, but may exist based on the "collective knowledge" of the police when there is reliable communication between an officer supplying the information and an officer acting on that information. Officers are entitled to rely on information provided by other officers or by their dispatcher when asked to be on the lookout for a certain vehicle or suspects. There is no requirement that the officer or officers providing the information testify at the motion to suppress.

Here, however, the arresting officer acknowledged that he did not have any particularized information about the grounds used by Officer Ferree to detain Vaughn and to ask her to submit to an alco-sensor test, the subject of Vaughn's motion to suppress. Therefore, even if the trial court had considered the hearsay information provided to Officer Wood by Officer Ferree, there was still an absence of evidence on the critical issue of the motion to suppress: What were the specific and particularized facts justifying Officer Ferree's detention of Vaughn? While such evidence may have existed, it was not presented to the trial court, and the State bore the burden of proving that Officer

Ferrer's detention of Vaughn was lawful. Therefore, the Court held, the trial court's order suppressing "[a]ny inculpatory evidence gained after Defendant's detention and before Officer Wood's arrival" must be affirmed.

### **Indictments; Dismissal "With Jeopardy"**

*State v. Fiorenzo, A13A1886 (2/6/14)*

The State appealed from the trial court's dismissal "with jeopardy" of an indictment against Fiorenzo for sale of a counterfeit substance. The record showed that after the State filed its accusation against Fiorenzo, he filed a motion indicating his intent to raise the affirmative defense of entrapment, as well as a motion to reveal the identity of the "confidential and reliable informant" who assisted the State during its investigation. A pre-trial hearing was held regarding Fiorenzo's pending motions. At the hearing, the trial court inquired whether the State's listed witness was present. The prosecutor informed the trial court that the witness was not present, but that the State could respond to the motions with another officer who was present in court. The trial court then dismissed the case "with jeopardy" based on its conclusion that the State failed to prosecute.

The State argued that the trial court erred when it dismissed the criminal charges against Fiorenzo "with jeopardy" as a sanction for the State's failure to present a witness during a pre-trial motion hearing. The Court agreed. A defendant is not placed in jeopardy until, in a court of competent jurisdiction with a sufficient indictment, he has been arraigned, has pled, and a jury has been impaneled and sworn. Since the record did not show that a jury was sworn, the trial court erred in dismissing the case with jeopardy.

Moreover, the Court stated, to the extent that the trial court, in dismissing the accusation "with jeopardy," was attempting to dismiss the accusation with prejudice, the trial court was incorrect. Although the trial court has the duty to control, in the furtherance of justice, the conduct of its officers and all other persons connected with a judicial proceeding before it, the power to control the proceeding of the court is subject to the proviso that in doing so a judge does not take away or abridge any right of a party under the law. A trial court's power to control proceedings within its

jurisdiction includes the discretion to dismiss criminal charges for want of prosecution, but, only so long as such dismissal is without prejudice.

Finally, the Court found, the trial court erred by dismissing the State's case at all. Although the State was unable to produce the listed witness, it did announce its intent to address Fiorenzo's motions with testimony of another officer. The trial court dismissed the State's accusation for want of prosecution prior to hearing from that witness and prior to making a determination as to whether the State's proposed alternate witness was able to address the issues raised in Fiorenzo's motions. Accordingly, the Court concluded, the trial court's dismissal of the indictment was in error.

## **Search & Seizure; Inventory**

*Armstrong v. State, A13A2451 (2/6/14)*

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer, having determined that a vehicle had a cancelled registration, stopped the vehicle after the car turned into a gas station and parked in front of a gas pump. After conducting an investigation, the officer arrested the driver and his passenger. The gas station operator informed the officer that the car was blocking the gas pump and could not be left at the gas station. The officer therefore made the decision to impound the car and tow it. Pursuant to police department procedures, the officer immediately conducted a warrantless inventory search of the impounded car. During the inventory search, the officer found a backpack in the rear passenger seat which contained various controlled substances which the State used as evidence to support the charges brought against appellant.

Appellant argued that (1) it was not reasonably necessary for police to impound the car, therefore the police had no basis to conduct the warrantless inventory search of the car pursuant to the impoundment, and (2) the warrantless search was an illegal investigatory search conducted under the guise of an inventory search. The Court disagreed. The Court stated that after lawfully impounding a vehicle, it is reasonable under the Fourth Amendment for police

to conduct a warrantless, non-investigatory search of the vehicle, pursuant to standard police procedures, to produce an inventory of the vehicle's contents to protect the owner's property, or to protect police from potential danger or claims for lost or stolen property. Thus, justification for an inventory search is premised upon the validity of the impoundment of the vehicle. The test under the Fourth Amendment is whether the impoundment was reasonably necessary under the circumstances, not whether it was absolutely necessary.

Here, the impoundment was reasonably necessary because the car's registration had been cancelled, the driver and the sole passenger were under arrest, and the owner of the private property where the car was stopped did not want the car to remain on the property. Moreover, the Court stated, contrary to appellant's contention, the officer was not required under these circumstances to ask him what he wanted done with the car prior to impounding it.

Appellant also contended that the warrantless search violated the Fourth Amendment because the officer admitted prior to the search that he suspected the car may contain contraband. Thus, appellant argued, the officer conducted an illegal investigatory search without a warrant under the guise of an inventory search. The Court stated that the Fourth Amendment does not permit police officers to disguise warrantless, investigative searches as inventory searches. However, police are not required to demonstrate an absence of expectation of finding criminal evidence as a prerequisite to a lawful inventory search. When officers, following standardized inventory procedures, seize, impound, and search a car in circumstances that suggest a probability of discovering criminal evidence, the officers will inevitably be motivated in part by criminal investigative objectives. Such motivation, however, cannot reasonably disqualify an inventory search that is performed under standardized procedures for legitimate custodial purposes. Therefore, because evidence showed that the impoundment of the car was lawful and that the search was conducted in good faith pursuant to standard police department procedure for a valid inventory purpose, the trial court's denial of the motion to suppress was affirmed.

## **Identification; Jury Charges**

*Copeland v. State, A13A2070 (2/6/14)*

Appellant was convicted of robbery by sudden snatching and simple battery. The evidence showed that he pulled the purse off of the shoulder of the senior citizen victim, in the presence of the victim's husband and two others. Appellant fled, but was soon caught by an officer who returned him to the scene where the victim and her husband both identified him.

Appellant argued that the trial court erred in denying his motion to suppress any reference to the husband's pre-trial identification of him by allowing the State to meet its burden through the testimony of the responding police officer. Appellant argued that the testimony of the officer was hearsay and should not have been considered by the trial court. However, the Court found, at a suppression hearing, unlike most trials, the conduct and motives of the officers are at issue, and the court must look to the information available to the officer, including hearsay. Accordingly, the trial judge may admit hearsay testimony at the hearing, giving it such weight and credit as the court deems proper, although such evidence may not be admissible at trial. Therefore, it was not error for the trial court to receive hearsay evidence during the suppression hearing.

Appellant also contended that the trial court erred in failing to give a requested charge on the lesser included offense of theft by taking. But, the Court stated, the complete rule with regard to giving a defendant's requested charge on a lesser included offense is: where the State's evidence establishes all of the elements of an offense and there is no evidence raising the lesser offense, there is no error in failing to give a charge on the lesser offense. Appellant argued that there was insufficient evidence of force, so the lesser offense of theft by taking should have been charged. The Court disagreed. Force is implicit in sudden snatching, both as a fact and as a legal proposition, the force being that effort necessary for the robber to transfer the property taken from the owner to his possession. Robbery by sudden snatching differs from theft by taking because the robbery offense requires proof of two additional elements: the thief must take the property from the victim's immediate presence, and

the victim must be conscious of the theft at the time it is committed, i.e., before the taking is complete. If the undisputed evidence shows that the victim realized the property was being taken away from her immediate presence while the theft was being committed, the offense was robbery, not theft by taking. Here, the victim's testimony that she held on tight to the purse before it was pulled away from her, and causing her injury was sufficient to support a charge on robbery by sudden snatching. Where the evidence shows either the commission of the completed offense as charged, or the commission of no offense, the trial court is not required to charge the jury on a lesser included offense. Accordingly, the trial court's refusal to give the requested jury charge on the lesser included offense of theft by taking was not error.