

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MARCH 21, 2014

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## THIS WEEK:

- **Recusal; Search & Seizure**
- **Identification; Photographic Lineups**
- **Motions to Suppress; Prosecutorial Misconduct**
- **Statements; Miranda**
- **Statements; Promise of Benefit**
- **Theft By Taking; Sentencing**
- **Verdicts; Defendant's Right to Testify**
- **Venue; Parol-Evidence**
- **Judicial Comment; Court Bailiffs**

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### **Recusal; Search & Seizure**

*State v. Hargis, S13G0645 (3/17/14)*

Appellant was convicted of several crimes relating to the unlawful manufacture of methamphetamine. In *Hargis v. State*, 319 Ga.App. 43 (2012), the Court of Appeals held that the trial judge should have recused, and that appellant's motion to suppress should have been granted. The Supreme Court granted the State's petition for writ of certiorari.

The State argued that the Court of Appeals erred in reversing appellant's convictions regarding the failure to recuse. The Supreme Court agreed. The evidence showed that appellant's co-defendant, Taylor, met with her lawyer, Davis, to discuss the case before the first scheduled date of trial. Unbeknownst to Davis and the prosecuting attorney, Taylor made audio recordings of these meetings with a recorder that appellant had instructed her to use. These recordings were later discovered in a house shared by appellant and Taylor during the execution of a later search warrant. Before

trial, appellant filed a motion to compel the State to produce the audio recordings, and the trial court set a hearing on his motion. In connection with the hearing, the prosecuting attorney made the recordings available to the trial judge for an in camera inspection. By this time, Davis no longer represented Taylor, but Davis nevertheless approached the trial judge in chambers to discuss the recordings and the two had an ex parte conversation concerning appellant. Appellant was tried and convicted in October of 2009, a few weeks after the private conversation. It was undisputed that the trial court never disclosed the private conversation with Davis to appellant or on the record.

The Court noted that it was unclear when appellant actually learned of the conversation, but that he certainly knew of it by June 3, 2011, when he first raised the ex parte communication in an amended motion for new trial, asserting that the trial judge was disqualified by her receipt of the communication, that the trial judge should have recused before trial, and that Hargis, therefore, ought to have a new trial. The trial court, noting that appellant never asked the court to recuse, denied the motion for new trial.

The Court stated that when a party learns of grounds for the potential disqualification of the judge, under USCR 25.1, he must promptly move for the recusal of the judge, and if he does not, the question of disqualification is not preserved for appellate review. Here, the record showed that appellant never filed a motion to recuse, even after he had knowledge of the grounds for potential disqualification. Asserting a disqualification in a motion for

new trial before the same judge who is alleged to be disqualified, without also asking the judge to recuse from hearing the motion for new trial, is not a proper means of raising and preserving the issue. The Court also noted that even after appellant learned of the grounds for the potential disqualification of the trial judge, he apparently decided to take his chances with the same judge on his motion for new trial. That was his choice to make, but he could not do so and still preserve the disqualification issue for review in the appellate courts. "To hold otherwise would be to sanction gamesmanship." Moreover, the requirement that a motion to recuse be filed promptly is intended to promote judicial economy, that is, to ensure that long and costly proceedings before a disqualified judge are avoided. "The idea that a party could allow a judge whom the party believes to be disqualified to continue to preside over the case without objection, only later to urge the disqualification, is inconsistent with the principles of fair play and judicial economy that are embodied in the requirement that a motion to recuse be filed promptly." Accordingly, the Court held, the claim of disqualification was not properly preserved for appellate review, and therefore, the Court of Appeals ought not have reached the merits of it.

Appellant also argued that the trial court erred in denying his motion to suppress. The evidence showed that when appellant failed to appear on the date his trial was first scheduled to begin, a bench warrant issued for his arrest. In July of 2009, law enforcement got a tip that appellant was seen back at his residence and that he was driving a beige truck. Officers saw the beige truck approach the residence and then speed away. Thinking appellant may head north, one officer began to drive north, toward the state line. Along the way, he saw the beige truck parked at a convenience store, facing the road with its headlights lit. The officer then saw a man exit the convenience store and enter the truck, sitting in the driver's seat. Before the man drove away, the officer approached the truck, informed the man that law enforcement personnel were looking for the owner of a similar truck, and asked for his identification. The officer had seen appellant before, and he believed that the man in the truck was, in fact, appellant, but he wanted to confirm the identity of the man. At that point, the man opened his wallet, and the

officer observed that the wallet contained two photographic identification cards. The man refused, however, to show either identification card to the officer, and he also refused to give his name. The officer asked the man to exit the truck, and he did so, leaving the wallet in the driver's seat. The officer then attempted to handcuff the man, but the man became increasingly belligerent and resisted the restraint. Eventually, the officer secured the man in handcuffs. After the man was secured, the officer reached into the truck, picked up the wallet, and removed the identification cards. One card was a Tennessee driver's license, and it bore a photograph of appellant, as well as his name. The other card was a forged Georgia driver's license, and it bore a photograph of appellant, but the name of another. Appellant was then placed under arrest.

Appellant contended that it was unlawful for the officer to retrieve the identification cards from the wallet, and the Court of Appeals agreed, citing *Arizona v. Gant*, 556 U. S. 332 (2009). The Supreme Court, however, disagreed. It long has been settled that, as an incident of a lawful arrest, an officer may search the person of the arrestee. By the time the officer directed appellant to exit the truck, the officer had good reason to believe, based on his personal knowledge of appellant, that the man in the truck was, in fact, appellant. And the officer knew that appellant was wanted on an outstanding warrant. As such, the officer had authority at that point to arrest appellant on the warrant. That the officer still wished to more definitively identify appellant, and that the officer did not tell appellant until a few moments later that he was under arrest, did not change the fact that appellant was under arrest for the purposes of the Fourth Amendment at the time that the officer directed him from the truck and handcuffed him. Accordingly, the officer was permitted at that moment to search appellant's person.

The Court noted that the wallet was in the seat of the truck by the time that the officer got around to retrieving the identification cards from it. But, the Court found, appellant had the wallet on his person when he first was approached by the officer, he held it as he interacted with the officer, and he put it in his seat only at or about the time the officer directed him to exit the truck, thereby initiating the arrest. In these circumstances,

the Court concluded, the wallet can fairly be considered as an effect on the person of the arrestee at the time of the arrest. And as such, the officer could reasonably seize and examine it, especially considering that his purpose for doing so was to more definitively identify appellant.

Nevertheless, appellant argued, the officers had no right to further search his truck and thus, the evidence inside pharmacy bags found in the truck, showing he was still manufacturing methamphetamine, should have been suppressed. The Court again disagreed. After the arresting officer retrieved the identification cards from the wallet and saw that the cards both had photographs of appellant but bore different names, the officer had probable cause to arrest appellant not only upon the outstanding warrant, but also for unlawful possession of a false, fictitious, fraudulent, or altered identification document. The investigator, who arrived on the scene shortly after appellant's arrest, also became aware of the two identification cards. Under *Gant*, when an officer lawfully arrests the occupant or recent occupant of an automobile, and when it is reasonable to believe evidence relevant to the crime of arrest might be found in the vehicle, the officer may search the passenger compartment of the vehicle for such evidence as an incident of the arrest. Before the investigator entered the truck to search, the investigator knew not only that appellant had a false identification document, but also that appellant was under indictment for crimes relating to the manufacture of methamphetamine, that appellant had returned earlier that day to the location at which he previously had been involved in the manufacture of methamphetamine, that signs of recent activity had been observed at that location, that the bags in plain view were pharmacy bags, and that persons involved in the manufacture of methamphetamine often use false identification documents to purchase items used in the manufacturing process from multiple pharmacies. Having probable cause to arrest appellant for possession of a false identification document, the investigator had reason to believe that evidence of that crime might be found in the vehicle in which appellant had been arrested only minutes earlier. Accordingly, under *Gant*, the investigator was authorized to enter the vehicle to search the pharmacy bags.

## **Identification; Photographic Lineups**

*Wright v. State, S13A1786 (3/17/14)*

Appellant was convicted of malice murder, felony murder, aggravated assault, and possession of a firearm during the commission of a felony in connection with the shooting death of Cedric Finley. He argued that his due process rights were violated when the trial court denied his motion to suppress a witness' in-court identification of him. The Court stated that to determine whether a defendant's due process rights were violated by an admission of an in-court identification, the Court uses a two-step process. First, it must determine whether the identification procedure used was impermissibly suggestive. If so, it must then determine whether there was a substantial likelihood of irreparable misidentification in light of the totality of the circumstances. To make this second determination, various factors must be considered, including: 1) a witness' opportunity to view the accused at the time of the crime; 2) the witness' degree of attention; 3) the accuracy of the witness' prior description of the accused; 4) the witness' level of certainty at the confrontation; and 5) the length of time between the crime and the confrontation.

Here, the evidence showed that the identification procedure used was a photographic lineup. On the night of the shooting, the witness chose two suspects from the police photographic lineup, one of whom was appellant. Appellant contended that the witness' in-court identification should have been excluded because there was a substantial likelihood of irreparable misidentification. The Court disagreed. The evidence showed that the witness had a sufficient opportunity to observe appellant as appellant got out of the car, approached the witness' car, spoke to the witness for approximately fifteen seconds while standing at an arm's length distance from the witness' car door, and walked towards the house. The witness testified that he was able to see appellant's face when he spoke to him, and he heard appellant say, "There's Ced." The witness also saw an assault rifle in appellant's hands, appellant pull the trigger, and the flash from the muzzle of the gun. The witness testified that it was starting to get dark but that there was a street light illuminating the area. Regarding the accuracy of the witness's

description of the gunman, on the night of the shooting, the witness described the gunman as a 6'2" or 6'4" black male, having a slim build, weighing about 170-180 pounds, with a low or short haircut. Although the witness failed to note appellant's gold teeth or tattoos on his hands, his description of the gunman matched appellant, who testified at trial that he was 6'4" and weighed 180-183 pounds. Additionally, the witness testified that he was 95 percent certain that appellant was the gunman that spoke to him and fired the shots killing the victim. Thus, the Court concluded, under the totality of the circumstances, there was not a substantial likelihood of irreparable misidentification.

Nevertheless, appellant also argued that the witness' in-court identification was unreliable and should have been excluded because the witness was unable to definitively select appellant from the photographic lineup. But, the Court stated, the witness' failure to select only appellant from the lineup does not require the exclusion of the witness' in-court identification. The witness based his in-court identification of appellant on his personal observations of appellant from the night of the shooting and his face-to-face confrontation with him. Moreover, the witness testified that his identification of appellant was based on remembering appellant from the scene of the crime, not from seeing him in the photographic lineup. Therefore, the Court held, the witness' in-court identification was reliable and the trial court did not err in denying appellant's motion to suppress.

## **Motions to Suppress; Prosecutorial Misconduct**

*Taylor v. State, A13A1899 (3/6/14)*

Appellant was convicted of DUI (less safe) and obstruction of a law enforcement officer. He contended that the trial court erred in failing to consider his motion to suppress which he filed after the 10-day period for filing motions. The Court stated that pursuant to O.C.G.A. § 17-7-110 and USCR 31-1, appellant was required to file his motion to suppress within 10 days after the date of his arraignment, unless that 10-day filing period was extended by the trial court. When a defendant files an untimely pre-trial motion, the trial court may dismiss the motion or entertain a request by the defendant to accept

the late filing. Here, the Court found, the record showed that appellant was arraigned on April 20, 2011. At his arraignment, appellant specifically acknowledged that he understood that he had the right to have a lawyer represent him; if he could establish that he was indigent, he had the right to a court-appointed lawyer; and a lawyer from the Public Defender's office was in court that day. That same day, the trial court served appellant with an order in open court which informed him that "all motions such as a motion to suppress illegally seized evidence must be filed within 10 days of today. Failure to do so will result in the loss of the right to file those motions. The court strongly encourages you to get an attorney immediately to represent you." Appellant indicated at his arraignment that he wanted to hire private counsel and he did not apply for court-appointed counsel until May 4, 2011, more than ten days after his arraignment. Appellant did not file his motion to suppress until May 18, 2011, well outside the 10-day filing period, and, the Court found, nothing in the record indicated that he sought leave of the trial court to file an untimely motion to suppress. Since appellant did not file a timely motion to suppress or seek leave to file his motion after the 10-day filing period, the trial court did not err in refusing to consider the motion.

Appellant also contended that the trial court erred in refusing to grant his motion for a mistrial after the State improperly commented on the evidence. The record showed that at the end of the co-defendant's direct testimony, the prosecutor stated: "Wow. That was quite a story." Appellant objected and moved for a mistrial. The trial court denied the motion, but instructed the prosecutor not to "supply an editorial." The prosecutor replied that he was going to follow up with a question, and, in accordance with the trial court's direction, then proceeded with his cross-examination.

The Court stated that when prejudicial matter is improperly placed before the jury, a mistrial is appropriate if it is essential to the preservation of the defendant's right to a fair trial. Whether the statements are so prejudicial as to warrant a mistrial is within the trial court's discretion. The Court found that the circumstances of this case did not show that the trial court abused its discretion in denying appellant's motion for a mistrial because the prosecutor's comment addressed

the co-defendant's testimony, not the other evidence supporting appellant's convictions, and the trial court admonished the prosecutor regarding the allegedly improper comment.

## **Statements; Miranda**

*Robinson v. State, A13A2267 (3/7/14)*

Appellant was convicted of aggravated assault and possession of a firearm during the commission of a felony. The evidence showed that appellant invited the victim to physically fight her after a verbal dispute arose over a \$5 dice bet. The victim was unarmed, and appellant had concealed her firearm in her pocket. After two or three punches were thrown, appellant shot the victim. She contended that the trial court erred by admitting her custodial interrogation because she did not knowingly and intelligently waive her right to counsel. The Court disagreed.

The Court noted that the record showed appellant was 20 years old, and she appeared to be "in her right mind," "clear headed," and suffering no ill effects from the physical altercation. She was unconfined during the interview, which took place in an unlocked conference room at 8:30 p.m. She had completed the eleventh grade, but initially appeared to have trouble spelling her middle name. An officer then told her, "Nekia, prior to speaking with you, I have to read you something, ok? It's called a Miranda warning." He then read her a *Miranda* warning card, concluding by telling her that "you can decide at any time to exercise these rights and not answer any questions or make any statements. Do you understand what I read you?" Appellant replied, "yes, sir." He then provided her with a written *Miranda* waiver form and explained that it contained what he just read her. He then read a portion of it to her and allowed her to review it and initial each line. During her review of the waiver form, appellant asked an officer, "What [does] this mean, like attorney, like a lady or something?" The officer re-read the form with her and explained that she had the right to speak to an attorney before making a statement or while making a statement, concluding by saying, "Do you understand that?" Appellant said, "It's saying . . . like, I could have someone in the room with us talking?" The officer nodded and replied, "If you want an attorney present, yes you can." Appellant appeared satisfied with

that answer and resumed silently reading the waiver form. After she concluded reviewing each provision in the form, she signed the written waiver at the bottom.

The Court found that the video showed no evidence of coercion or enticement by the interviewing officer. Appellant's rights were explained to her orally and in a written form, which she reviewed, initialed, and signed. The officer answered her questions plainly and waited for her to review the form at her own speed. She gave no indication of further confusion or questions upon reading the form. Further, a defendant must make a request for counsel sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. The trial court did not err by concluding that the question was not a request for counsel, but rather for clarification, which the officer provided by explaining that appellant could have an attorney present before or during questioning. Thus, the Court found, the evidence showed that at the time of her interrogation, appellant knew where she was and what she was doing, that she made appropriate responses to questions asked by the officers, and that she did not appear to be under the influence of any intoxicant or drug. Accordingly, the trial court did not err.

## **Statements; Promise of Benefit**

*State v. Robinson, A13A2487 (3/7/14)*

Robinson was charged with multiple counts of armed robbery. The State appealed from an order of the trial court granting in part Robinson's motion to suppress statements he made during a custodial interview. The evidence showed that following his arrest for one of the armed robberies, Robinson was interviewed at the police station by a detective with the robbery unit. Robinson's interview was recorded, and a copy of that interview was introduced into evidence and reviewed by the trial court. During the course of the interview, Robinson admitting that he was present at the scene but denying any direct involvement. The detective felt that Robinson was being untruthful. He admonished Robinson to tell "what really happened." He then said, "When this goes to court, and you know this is gonna go to court, right? . . . The only . . . and your only card in this whole entire

thing is to cooperate. That's the only thing. *The person that cooperates is the person that gets help.*" (Emphasis supplied). Robinson then provided more details about that evening's robbery, and admitted his involvement in the crime. Robinson also went on to provide police with information regarding some of the other, similar robberies that were under investigation.

The trial court granted Robinson's motion to suppress all statements Robinson made after the officer told Robinson "The person that cooperates is the person that gets help." The trial court found that this was an offer of a lighter sentence and therefore, any statements Robinson made after the detective's statement were involuntary. The State contended that the officer's statement was merely an admonishment to tell the truth and therefore, the trial court erred.

The Court stated that under former O.C.G.A. § 24-3-50 (now O.C.G.A. § 24-8-824), an incriminating statement will be considered involuntary, and will therefore be inadmissible, if it was "induced by another by the slightest hope of benefit or remotest fear of injury." The State bears the burden of proving that a defendant's statement was voluntary, and in determining whether the State has met its burden, the trial court must consider the totality of the circumstances. The promise of a benefit that will render a confession involuntary must relate to the charge or sentence facing the suspect, and the "hope of benefit" to which the statute refers has been consistently construed as a hope of lighter punishment. However, merely encouraging a suspect to tell the truth does not amount to the hope of benefit so as to render the suspect's inculpatory statement involuntary and therefore inadmissible. Nor is a statement rendered involuntary because the police tell a suspect that the trial judge or prosecutor might look favorably on the suspect's truthful cooperation with law enforcement.

The Court agreed with the trial court that this was not a case where Robinson was merely encouraged to "help himself" by telling the truth. Rather, the officer told Robinson that "[t]he person that cooperates is the person that gets help." At the time the officer made this statement, Robinson had been arrested with at least two accomplices, and the video showed that Robinson was aware that these individuals were in custody and at the police



station. Thus, viewing the officer's statement under the totality of the circumstances, as the trial court was obligated to do, the statement appeared to offer Robinson some hope of benefit, i.e., it indicated that if Robinson cooperated truthfully with police, he would get a lighter sentence than his accomplices. Accordingly, the trial court did not err in granting Robinson's motion to suppress that part of his police interview that occurred after the officer improperly induced Robinson to talk further.

### **Theft By Taking; Sentencing**

*Kiser v. State, A13A2249 (3/7/14)*

Appellant was convicted of false imprisonment and theft by taking. He contended that the evidence was insufficient to support his theft by taking conviction. The Court agreed and reversed his conviction. The evidence showed that Zachery, the victim's "good friend" owed the victim money and suggested the victim come over to Zachery's mobile home to pick it up. The victim drove there in his truck, got out and left the car keys on the console because he did not expect to be there long. When the victim got inside, appellant blocked the door and another individual came out of a bedroom, pointing a gun at the victim. Appellant jumped out of a closed glass window, ran past his car and hid. He called 911 and when the police arrived, they went with him back to Zachery's mobile home. When they arrived, no more than 15 minutes after the attack on the victim, no one was there and the victim's truck was gone.

Appellant contended that insufficient evidence supported his theft by taking conviction because the victim left the keys in the truck's console, no eyewitness saw him or his co-defendants take the truck, no physical evidence linked him (or his co-defendants) to the truck after it was recovered by the police, and no evidence indicated whether one or more individuals took the truck. The State asserted that the following circumstantial evidence sufficiently supported appellant's conviction: the car was taken at a late hour when no other persons were around; none of the defendants had a vehicle parked in front of the home when the victim arrived; the police found no one in the home 10-15 minutes after the victim called 911; the front door to the home was left standing open;

the defendants would need to make a quick getaway after unsuccessfully threatening the victim's life; and the defendants had a motive and opportunity to take the victim's truck.

The Court stated that the correct rule for determining the sufficiency of the evidence in convictions based entirely on circumstantial evidence is that questions as to reasonableness are generally to be decided by the jury which heard the evidence and where the jury is authorized to find that the evidence, though circumstantial, was sufficient to exclude every reasonable hypothesis save that of guilt, the appellate court will not disturb that finding, unless the verdict of guilty is insupportable as a matter of law. Even when the circumstantial evidence creates a strong suspicion of guilt, mere suspicion is insufficient to support a conviction. Here, the Court found, no evidence suggested whether one or more individuals took the victim's truck or that appellant, as opposed to one of his co-defendants, did so. Additionally, other reasonable explanations for the disappearance of the victim's truck existed, because the victim left the keys in open view on the console. Therefore, the Court concluded, the verdict of guilty was insupportable as a matter of law.

Appellant also contended that the trial court improperly considered a prior conviction during sentencing. The Court disagreed. O.C.G.A. § 17-10-2(a)(1) provides that in a presentence hearing, "the judge shall hear additional evidence in extenuation, mitigation, and aggravation of punishment, including the record of any prior criminal convictions and pleas of guilty or nolo contendere of the accused, or the absence of any prior conviction and pleas." While this Code section once provided that the State must give notice of its intent before using a prior conviction in aggravation of sentencing, the notice requirement was deleted from the statute effective July 1, 2005. Under the current statutory scheme, the State is not required to provide notice of its intent to use a prior conviction in aggravation of sentencing under O.C.G.A. § 17-16-4(a)(5) unless a defendant provides written notice to the State of its election to participate in reciprocal discovery under O.C.G.A. § 17-16-2(a). Here, the Court found, the record did not show that appellant, or any of his co-defendants, provided the written notice required by O.C.G.A. § 17-16-2(a).

Therefore, the State was not required to give notice of its intent to use a prior conviction in the sentencing hearing. Accordingly, the trial court was authorized to consider appellant's prior conviction during sentencing under O.C.G.A. § 17-10-2(a).

### **Verdicts; Defendant's Right to Testify**

*Wilmott v. State, A13A1666 (3/5/14)*

Appellant was convicted of the offenses of owning, operating or conducting a chop shop in violation of O.C.G.A. § 16-8-83 and removing or falsifying a vehicle identification number (VIN) in violation of O.C.G.A. § 40-4-21, as a lesser include offense of concealing or misrepresenting the identity of a motor vehicle in violation of O.C.G.A. § 40-4-22. Appellant argued that his chop shop conviction under O.C.G.A. § 16-8-83 should have been reversed because the jury's verdicts finding him guilty both of that offense and of falsifying a VIN under O.C.G.A. § 40-4-21 were mutually exclusive. The Court disagreed.

The Court stated that verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other. A mutually exclusive verdict may be rendered in a particular case where the offenses or acts alleged in the indictment and underlying the two counts reflect that the jury, in order to find the defendant guilty on both counts, necessarily reached two positive findings of fact that cannot logically mutually exist. Here, the Court found, the two guilty verdicts returned by the jury could be logically reconciled; a finding that a person, in violation of O.C.G.A. § 40-4-21, wilfully removed or falsified the identification number of a vehicle does not logically exclude a finding that the person, in violation of O.C.G.A. § 16-8-83, owned, operated or conducted a premise in which he knowingly altered a vehicle identification number with the intent of misrepresenting the vehicle's identity.

Nevertheless, appellant argued, the fact that the jury did not find him guilty of the greater offense of violating O.C.G.A. § 40-4-22 (altering a VIN for the purpose of concealing the vehicle's identity) meant that he could not have had the necessary intent "to misrepresent the identity of such motor vehicle" required to find him guilty of violating

O.C.G.A. § 16-8-83 in the manner alleged in his indictment. But, the Court found, that fact creates at most an inconsistency in the two verdicts. Accordingly, while appellant's assertion of error spoke in terms of mutually exclusive verdicts, the basis of his argument was that the verdicts were inconsistent.

The Court stated that there is an exception to the abolition of the inconsistent verdict rule; it applies when instead of being left to speculate about the unknown motivations of the jury, the appellate record makes transparent the jury's reasoning why it found the defendant not guilty of one of the charges. Here, however, appellant neither argued that the exception applied nor pointed to any part of the appellate record that illuminated the jury's reasoning. Instead, he merely speculated that the jury "may have" found his testimony credible and thus, mistakenly ascribed to him the intent required to find him guilty of the chop shop violation. But, the Court held, this was exactly the type of speculation in which the Court was unwilling to engage.

Appellant also argued that the trial court erred when, after the State rested, the trial court required him to indicate whether he intended to testify. The record showed that after the State rested its case, but before appellant presented his case, the trial court engaged in a colloquy with appellant in which the trial court informed him of his right to testify, obtained from him a statement of his intent to testify, and determined that he had "made his decision to testify with a complete understanding of his rights."

The Court stated that there is no requirement that the trial court have an on-the-record colloquy with a non-testifying defendant in order to inform the defendant of the right to testify and to obtain a knowing and intelligent waiver of that right. But, a trial court is not precluded from conducting such a colloquy and in fact, engaging in such a colloquy is the "better practice." Here, however, appellant's counsel expressly asked the trial court to "hold off" on having appellant state his intent to testify, "without making a commitment at [that] point[.]" on the ground that counsel was "just not sure that we want to commit to present [appellant] as a witness in this case. We might. I'd say there's a pretty good chance that we will, but we may not." The trial court then stated, "I need a response from your client at this time, sir.

However, if you would like me to re-address these questions with him at the time prior to him testifying, I will do so." At that point, the record showed that appellant spoke up, indicating that he intended to testify.

The Court stated that the trial judge has a wide discretion in the handling of a trial. But that discretion is not without limit; it cannot be exercised in an illegal, unjust or arbitrary manner. Although the trial court acted properly in instigating the colloquy with appellant about his intent to testify, the Court stated it could discern no reason from the record why the trial court continued with the colloquy and pressed appellant to state his intent once appellant's counsel indicated that appellant was not yet ready to do so. The trial court's actions undermined the relationship between appellant and his counsel and infringed upon appellant's ability to determine the manner in which he would present his case. Faced with the request to "hold off," the better practice would have been to postpone the colloquy until later in the trial.

Nevertheless, the Court found, it did not need to decide whether the trial judge's decision to proceed with the colloquy exceeded the limits of its discretion, because even if the decision constituted error, the record did not show that appellant was harmed. Although appellant argued that the trial court, "in requiring a declaration of intent to testify, gave the State an unfair advantage that the State was not entitled to have," the record revealed no such advantage. Thus, the Court noted, it was not a secret that appellant was contemplating testifying, and the trial court made it clear that it would allow the defense to revisit the issue of appellant testifying. Thus, the Court stated, it did not appear that the trial court prevented appellant from changing his mind about testifying later in the proceedings. Accordingly, the Court concluded, any error was harmless.

## **Venue; Parol-Evidence**

*Davis v. State, A13A1660 (3/6/14)*

Appellant was convicted of one count of theft by taking. The evidence showed that appellant sought to move a clothing manufacturing plant to Dodge County from Florida. He and the victim, a local Dodge County businessman, signed several agreements in the county, including a

lease, a promissory note documenting the \$350,000 loan from the victim to appellant, and a security agreement, in which appellant pledged the manufacturing plant's equipment as collateral for the loan. Thereafter, the victim wired the money to appellant in Atlanta. However, appellant never moved the business to Dodge County and spent the money on his other business ventures. Additionally, it was later determined that appellant did not own the equipment he pledged as collateral.

Appellant argued that the State failed to prove venue in Dodge County. The Court agreed. The Court stated that in a prosecution for theft by taking, the crime is to be considered as having been committed, and venue is thus established, in any county in which the accused exercised control over the property which was the subject of the theft. And, where the unlawfully appropriated property is money, the State has two options for proving venue. First, the State can proceed in the county where the accused received the money, or second, it can produce evidence tracing funds disbursed (i.e., spent) in one county (where the case is being prosecuted) back to the account or other source in the origin county, showing further that the funds were not disbursed in accordance with the contract provisions governing the use of the funds.

Here, the Court noted, the trial court found that because the negotiation and execution of the contracts occurred at the victim's offices in Dodge County, there were "significant contacts" establishing venue there. But, the Court held, it is not the residence of the beneficiary or rightful owner of the stolen funds which controls venue. Nor can a nexus or general factual connection with a county establish venue in contravention of the clear requirements of the relevant statute. Indeed, such an argument would essentially disregard the applicable law.

The Court found that although the contracts were executed in Dodge County, there was no evidence that appellant exercised any control over the \$350,000 until the victim wired the funds into appellant's bank account located in metro Atlanta. Nor was there any evidence that appellant spent or disbursed any of the funds in Dodge County. Rather, the evidence showed that appellant used the money for his other business ventures, none of which was in Dodge County. Given these

circumstances, the State failed to establish venue in Dodge County, and appellant's theft-by-taking conviction must be reversed. However, the Court concluded, because the failure to establish venue does not bar re-trial in a court where venue is proper and proven, the State was authorized to retry appellant in the proper venue.

Appellant further contended that the trial court erred in allowing the victim to testify regarding promises that appellant made prior to the execution of, yet not incorporated into, the contracts regarding how the funds would be spent. At trial, the victim testified that prior to the execution of the contracts, including the promissory note, appellant and the victim agreed that the \$350,000 loan was to be used exclusively for relocating the manufacturing plant to Dodge County. Appellant objected to this testimony, arguing that the testimony violated the parol-evidence rule and were therefore inadmissible. The trial court overruled appellant's objection and allowed the testimony.

Relying on *First Data POS, Inc. v. Willis*, 273 Ga. 792 (2001), appellant argued that the victim's testimony that appellant agreed that the \$350,000 would be used exclusively for relocating the Florida plant should not have been admitted given that 1) this agreement was not mentioned in any of the executed contracts and 2) several of those agreements contained merger clauses. In *First Data POS, Inc.*, the Supreme Court affirmed the grant of summary judgment dismissing the sellers' civil RICO claim, holding that "[a]s a matter of law, a valid merger clause executed by two or more parties in an arm's length transaction precludes any subsequent claim of deceit based upon pre-contractual representations."

Appellant argued that the holding in *First Data POS, Inc.* should be extended to apply to this criminal case. The Court declined the invitation. The Court stated that Georgia law favors the admission of any relevant evidence, no matter how slight its probative value, and even evidence of questionable or doubtful relevancy or competency should be admitted and its weight left to the jurors. But, the purpose of the parol-evidence rule is to bring finality to an agreement, except when ambiguity requires that the language of the contract be explained but not varied. Essentially, in contrast to our State's normally lenient case law defining what constitutes relevant evidence, under the parol-

evidence rule, except in certain circumstances, once two parties in privity have documented their agreement in a written contract, Georgia law deems their pre-contractual negotiations irrelevant.

Nevertheless, the Court stated, "[f]or obvious reasons, criminal law is less concerned with the finality of agreements between two private parties." Rather, the purpose of a criminal trial and the evidence admitted therein is to determine whether the defendant is guilty beyond a reasonable doubt of the offense he is charged with committing. And in a theft-by-taking case, this requires the State to submit proof of 1) an unlawful taking of the property of another 2) with the intent of depriving him of it. Statements made by appellant prior to the execution of the contracts, then, are certainly relevant to proving whether he intended to deprive the victim of the \$350,000. "Thus, while we fully recognize that we are in somewhat uncharted jurisprudential waters as far as Georgia law is concerned, this Court does not agree that the parol-evidence rule should be extended to a criminal matter in this particular context." Accordingly, the Court concluded, the trial court did not abuse its discretion in admitting the victim's testimony regarding appellant's pre-contractual statements.

### **Judicial Comment; Court Bailiffs**

*Hicks v. State, A13A1716 (3/7/14)*

Appellant was convicted of armed robbery, attempted armed robbery, burglary, four counts of aggravated assault, and fleeing and attempting to elude a police officer. He contended that the trial court erred by making improper comments to the jury pool, which remarks consisted of the following: "We, prior to today, have asked these folks, these [d]efendants, to be here on numerous occasions, hopefully to be able to resolve their case with the district attorney. These folks that are on my calendar here were not able to do that prior to today, but a majority of them now have decided that they need to go ahead and resolve their case before you're selected to try the case. So, I reckon what I'm trying to say is that we've done all we could do to resolve the case before we brought you here today. But on certain occasions, there are cases that we have to bring you here before those folks will decide

if they need to go ahead and do something to resolve their case and they have. Now we have two other cases hopefully that we're going to be able to select today, and then that will conclude the business that we would have for you today. Now, what we intend to do today is to impanel...two twelve-member jury panels that will be back here on a day certain for the actual trial of these cases. We're certain that we're probably going to be able to select one of them, but we're not certain about the second one. We're going to see what we can do, but we will go ahead and select the first one."

The Court found that although the trial court's comments may have come close to commenting on appellant's guilt or innocence had they been made only to his jury panel immediately prior to trial, in the context in which they were made, approximately three weeks prior to trial and before the entire jury venire rather than an individual panel, the comments constituted an explanation to the jury pool of the procedure leading up to their service as jurors and were not the type of comments to attach any potential negative connotation to appellant. Accordingly, the Court held, the trial court's comments did not run afoul of O.C.G.A. § 17-8-57.

Appellant also argued that his trial counsel was ineffective for failing to object at trial when the trial court instructed the prosecutor to swear the bailiffs in before the jury pool. The record showed that at the motion for new trial hearing, trial counsel testified that it was normal practice in the circuit, and she believed it was permissible. Appellant contended that because the trial court allowed the prosecutor to swear in the bailiffs before the jury pool, it established a bias toward the State. But, the Court stated, premitting whether it was error for the trial court to allow the prosecutor to administer the oath to the bailiffs, and thus, whether trial counsel was deficient for failing to object, appellant failed to establish prejudice as a result. The alleged error occurred approximately three weeks prior to trial, when the trial court was addressing the jury pool before striking a jury for the case. Thus, it was unlikely that this singular act occurring in the midst of various procedural tasks resulted in bias of the jurors in favor of the State at the trial three weeks later. Moreover, this act was not the expression of an improper opinion about the case on the part of the court or an intimation of whether appellant was guilty or

innocent, and therefore, it did not constitute a violation of O.C.G.A. § 17-8-57. Therefore, the Court concluded, appellant failed to establish that his counsel's performance was ineffective.