

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 6, 2015

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THIS WEEK:

- **Trafficking; Knowledge of Weight**
- **Motion for New Trial; General Grounds**
- **Ineffective Assistance of Counsel**
- **Sentencing; Merger**
- **O.C.G.A. § 24-14-8; Similar Transactions**

Trafficking; Knowledge of Weight

Childs v. State, A14A1621 (2/18/15)

Appellant was convicted of trafficking in cocaine. He contended that the evidence was insufficient to support his conviction. Specifically, that the State failed to prove that he had knowledge of the weight of the cocaine found in his vehicle. The Court agreed.

The evidence showed that appellant was driving his uncle's vehicle when he was stopped on I-75 South. The officer immediately smelled raw marijuana in the vehicle. Appellant admitted there was marijuana in the vehicle, but only a very small amount. The passenger gave the officer the marijuana. Appellant and his passenger were then arrested. A search of the vehicle revealed a brown paper bag inside the center console of the car between the driver seat and the front passenger seat. Inside the brown paper bag were two clear plastic bags. One bag contained a white chunky substance that appeared to be crack cocaine and weighed 27.32 grams. The other bag contained 35.13 grams of powdered cocaine that was 45.2 percent pure.

The Court found that the State failed to present sufficient facts and circumstances from which a jury could reasonably infer that appellant knowingly possessed 28 grams or

more of cocaine with a purity of 10 percent or more. Although the State introduced evidence that appellant possessed two bags of cocaine, one bag only appeared to contain crack cocaine. Because that substance was never tested, there was no evidence of its purity. The only confirmed substance was the powdered cocaine, which weighed 35 grams, only seven grams more than the statutory threshold. Moreover, the State did not point to a set of scales or any other evidence that appellant had weighed or measured the cocaine. And, the Court noted, the State presented no evidence of prior similar transactions or other evidence that appellant was specifically familiar with trafficking weights of cocaine and would know that the cocaine he possessed weighed at least 28 grams. Accordingly, the Court held, appellant's conviction for trafficking in cocaine must be reversed.

Motion for New Trial; General Grounds

Gomillion v. State, S14A1872 (3/2/15)

Appellant was convicted of murder and other offenses. He filed a motion for new trial challenging his convictions pursuant to the general grounds set forth in O.C.G.A. §§ 5-5-20 and 5-5-21, namely that the verdicts were "contrary to law and the principles of justice and equity" and were "decidedly and strongly against the weight of the evidence." Appellant contended that the trial court failed to exercise its discretion and weigh the evidence as a "thirteenth juror." The Court agreed and remanded the case.

Here, the Court found, the motion for new trial hearing transcript clearly showed that appellant requested the trial court to

exercise its discretion to review the evidence as a thirteenth juror. In its order denying the motion for new trial, however, the trial stated, “The testimony and the other evidence introduced at trial was sufficient for a rational trier of fact to find [appellant] guilty beyond a reasonable doubt.” This statement echoes the standard of review found in *Jackson v. Virginia*, but is not the proper standard of review when considering a motion for new trial based on the general grounds. Furthermore, there was nothing in the order indicating that the trial court exercised its discretion as the thirteenth juror. Likewise, there was nothing in the motion for new trial hearing transcript that overrode the trial court’s own statement that it applied a legal standard to a matter requiring its discretion. Accordingly, the Court held, the matter was remanded for the trial court to consider the motion under the proper standard of review.

Ineffective Assistance of Counsel

State v. Mobley, S14A1329 (3/2/15)

Mobley was convicted of murder and other charges. The evidence showed that Mobley and Tinch had a heated argument. Later that day, as Tinch was walking past a yard where Mobley was sitting, the two renewed their argument. Tinch made a move towards Mobley like he was going to enter the yard; Mobley pulled a gun and fired a warning shot, but not fired at Tinch. Mobley then fired two or three more shots as Tinch ran back towards his house. Tinch was hit once in the chest and died from his wound.

The trial court decided that Mobley had been denied the effective assistance of counsel because his lawyers had persuaded the trial court to give a jury charge on mutual combat. The trial court found that there was no evidentiary basis for such a charge because there was no evidence at trial that Tinch was armed with a deadly weapon. And in any event, the trial court reasoned, the charge on mutual combat impaired the defense of justification which, the trial court found, was the sole defense urged at trial by Mobley by instructing that a person engaged in mutual combat may claim justification only if he first withdraws from the mutual combat and communicates that withdrawal to the other combatant. The trial court concluded that

because no evidence supported the charge on mutual combat, and because the charge impaired the sole defense, it was unreasonable for the lawyers to have asked for the charge, thus rendering their performance deficient in this respect. As to prejudice, the trial court determined that Mobley had shown a reasonable probability that the charge on mutual combat affected the outcome of the trial, inasmuch as the case on justification was close, and the mutual combat charge impaired the justification defense.

The State appealed and the Court reversed. First, the Court found, the trial court erred by finding that justification was Mobley’s sole defense because Mobley also argued that if the killing was not justified, it amounted to only voluntary manslaughter.

Second, the trial court erred with respect to the significance that it attached to the absence of proof that Tinch was armed with a deadly weapon. Even if the law of mutual combat properly applies only when both combatants are similarly armed, the jury was told nothing of any such requirement and since mutual combat was actually charged in this case, the jury could have found mutual combat consistent with the instructions of the court. But, because the law of justification does not otherwise require such a withdrawal and communication as a predicate to the justified use of force in defense of self, the charge on mutual combat, to the extent that the jury found that Mobley and Tinch were, in fact, engaged in mutual combat, would have impaired somewhat his justification defense.

Nevertheless, the Court also found, although the charge on mutual combat may have carried a cost to the justification defense, it presented the benefit of improving the chances that the jury might find Mobley guilty of only voluntary manslaughter, not murder. Whether the potential upside of a charge is worth its costs is a quintessential question of trial strategy. Moreover, a strategy that presents alternative defense theories, all of which are better for the defendant than the prosecution theory of the case, generally falls within the broad range of reasonable professional conduct. And where, as here, the lawyers pursued not only a justification defense, but also voluntary manslaughter as an alternative to murder, it cannot be said that no reasonable lawyer would have asked for the charge on mutual combat, even though

it might have impaired to some extent the principal defense of justification. Accordingly, because Mobley failed to show deficient performance, the trial court erred in finding that his lawyers provided constitutionally ineffective assistance.

Sentencing; Merger

McDonald v. State, S14A1342 (3/2/15)

Appellant was convicted of malice murder, three counts of felony murder, armed robbery, false imprisonment, theft by taking; possession of a firearm during the commission of a crime; and possession of a firearm by a convicted felon. Although not raised by the parties, the Court noted an error in the sentences given to appellant. The trial court imposed a life sentence for malice murder and then purported to “merge” all remaining verdicts, with the exception of those for firearm possession, into the malice murder verdict. The Court stated that as to the three felony murder counts, the trial court used incorrect nomenclature, as these verdicts did not “merge” into the malice murder verdict but rather were vacated by operation of law. With the felony murder verdicts vacated, the three remaining felonies on which a guilty verdict was reached—armed robbery, false imprisonment, and theft by taking—should have been evaluated to determine whether any of these verdicts merged as a matter of fact into the malice murder.

The test for determining whether one crime is included in another, and therefore merges as a matter of fact, is the “required evidence” test: whether conviction for one of the offenses is established by proof of the same or less than all the facts required to establish the other crime. Here, none of the three remaining verdicts merged as a matter of fact into the malice murder because malice murder requires proof of, among other things, the victim’s death, a fact which is not required to support any of the three remaining counts; armed robbery, theft by taking, and false imprisonment all require proof of facts (the taking of property, the detention of the victim) not required to establish malice murder.

However, the Court found, the theft by taking verdict merged into the armed robbery count. Both of these counts charged appellant with the taking of a necklace and pendant worn by the victim. Where the indictment

charges both armed robbery and theft arising from a single transaction, theft by taking does not require proof of any facts separate from those required for armed robbery. Thus, the theft by taking should have been merged into the armed robbery verdict.

Accordingly, the Court vacated the sentencing order to the extent that it “merged” the felony murder, armed robbery, theft by taking, and false imprisonment verdicts into the malice murder verdict. The felony murder verdicts were vacated by operation of law, and, on remand, the trial court was directed to merge the theft by taking verdict into the armed robbery verdict, and to impose lawful sentences on the remaining armed robbery and false imprisonment verdicts.

O.C.G.A. § 24-14-8; Similar Transactions

Bradshaw v. State, S14A1365 (3/2/15)

Appellant was convicted of malice murder and other related crimes. The evidence, briefly stated, showed that appellant shot two people who tried to sell him a packaged brick of hay they claimed was marijuana. Appellant argued that the evidence was insufficient because it was solely based on the uncorroborated testimony of his co-defendant. The Court disagreed.

The Court noted that this case was tried under Georgia’s new Evidence Code. O.C.G.A. § 24-14-8 is virtually identical to the corroboration provision in the old Evidence Code, O.C.G.A. § 24-4-8. Thus, the Court was presented with how to interpret this new Code section. The Court state that in the absence of a provision in the Federal Rules of Evidence governing accomplice testimony; in light of the General Assembly’s statement that it did not intend to change the substantive law of Georgia as existing on December 31, 2012, unless that law was displaced by a provision of the new Evidence Code; and in light of the nearly identical language of the accomplice provisions in the old and new Evidence Codes, the Court would give the new accomplice provision the same meaning as the old one. And having made this determination, the Court found that there was ample corroboration of the co-defendant’s testimony to support appellant’s convictions.

Appellant also contended that the trial court erred in admitting similar transaction evidence of criminal conduct occurring in Ohio. The Court noted that the Eleventh Circuit applies a three-part test to determine admissibility of evidence of other crimes and acts under Rule 404 (b): 1) the evidence must be relevant to an issue other than defendant’s character; 2) the probative value must not be substantially outweighed by its undue prejudice; and 3) the government must offer sufficient proof so that the jury could find that defendant committed the act. The Court also noted that this test may be in conflict with that used by other circuits, but since the General Assembly has expressed its intent to follow the Eleventh Circuit as of January 1, 2013, even in the event of such a conflict, it would apply the Eleventh Circuit rule.

And, having made this determination, the Court found that the evidence presented met the test. As to the first prong, the evidence was admissible to show intent because a defendant who enters a not guilty plea makes intent a material issue which imposes a substantial burden on the government to prove intent, which it may prove by qualifying Rule 404 (b) evidence absent affirmative steps by the defendant to remove intent as an issue. The evidence was also admissible to prove motive because it demonstrated appellant’s willingness to use violence when he or someone close to him is cheated in a drug deal.

As to the second prong of the test, the Court found that the trial court did not abuse its discretion in determining that the probative value of evidence of the Ohio crime, which was factually similar to the Georgia crimes and occurred only six months before them and which was needed by the State to help establish that appellant and not his co-defendant, was the shooter, was not substantially outweighed by its prejudicial effect. Finally, the Court found that the third prong of the test was also satisfied. Based on appellant’s statements to the co-defendant and the testimony of the Ohio officer, a jury could have found by a preponderance of the evidence that appellant committed the Ohio crime.