

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING APRIL 30, 2010

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## THIS WEEK:

- **Statements**
- **Jury Charges**
- **Ineffective Assistance of Counsel**
- **Right to Counsel; *Alabama v. Shelton***
- **Juveniles; Admissions**
- **Juror Misconduct; Sentencing**
- **Evidence; Prior Difficulties with Victim**

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### Statements

*Madrigal v. State, S10A0209*

Appellant was convicted of malice murder and other related offenses. He contended that his statements were involuntary. The evidence showed that after committing the crimes, appellant fled to Mexico. He was arrested on a warrant when he flew from Mexico to Canada. A Canadian officer interviewed appellant. He told appellant that "Misrepresenting yourself and withholding information is only going to make things worse for you. I suggest you tell me everything that happened because you are only damaging your credibility by continuing to be less than forthcoming with your answers about this particular event." The Court held that assuming for purposes of this appeal that OCGA § 24-3-50 is applicable, the Canadian officer's statement that withholding information would make things worse for appellant was, in context, an admonition not to damage his credibility but to tell the truth. Where, as here, no promises of lighter punishment were made to the suspect, such an admonition to tell the truth does not constitute hope of benefit so as to render involuntary any statement made thereafter.

### Jury Charges

*Hicks v. State, S10A0177*

Appellant was convicted of malice murder. He contended that the trial court erred in not giving jury charges on justification and voluntary manslaughter. The evidence showed that the victim and a person named Vinson argued. Thereafter appellant approached the victim with a gun. The victim turned and fled and appellant shot him three times in the back. Appellant claimed that his actions were justified by his defense of Vinson. The Court disagreed. First, because justification is an affirmative defense, appellant must have admitted acting with the intent to inflict an injury, but claim that he did so while in reasonable fear of suffering immediate serious harm to himself or another. Here, appellant's defense was that someone else committed the crime. Second, no evidence was presented that appellant was acting in defense of Vinson. Therefore, the trial court properly refused to charge on justification.

Similarly, the trial court did not err in failing to give appellant's request to charge on voluntary manslaughter. Voluntary manslaughter presupposes an intentional killing, which was completely inconsistent with appellant's own version of the events. In addition, there was no evidence that appellant and Vinson had any type of relationship that would explain an impassioned attack by appellant on the victim.

### Ineffective Assistance of Counsel

*Johnson v. Roberts, S10A0063*

In this habeas case, appellant contended that his guilty plea attorney was ineffective for

affirmatively misinforming him regarding his parole eligibility. The Court agreed. To prove ineffective assistance of counsel in connection with a guilty plea, a defendant must prove that his counsel was deficient, and that absent the deficiency, there is a reasonable probability that he would have proceeded to trial rather than pleading guilty. The record showed that appellant was charged with armed robbery and had negotiated a 20 years to serve sentence. In response to his question regarding parole eligibility, his defense attorney told him he would only have to serve 10 years before being eligible for parole. This was incorrect because OCGA § 17-10-6.1 (c) (4) mandates that the full sentence imposed for a first conviction of armed robbery be served without reduction by parole or any other sentence-reducing measures. Moreover, the trial court reinforced this erroneous advice by informing appellant that the Board of Pardons and Parole “determines how long you [serve]” and that “nobody’s here telling you how long it’s going to be, ‘cause nobody in this room knows.’” The case was remanded to the habeas court for a determination of whether appellant would not have pled guilty had he been given the correct advice regarding parole eligibility.

*Cabrera v. State, A09A1658*

Appellant was convicted of trafficking in methamphetamine. He contended that he received ineffective assistance of counsel. The Court agreed and reversed. At trial, the prosecutor called appellant’s co-indictee to testify. This co-indictee had pled to the charge prior to trial. The co-indictee refused to answer any questions. The prosecutor then used leading questions to place the co-indictee’s statement into evidence. Defense counsel did not object. Her theory of the case was that appellant was merely present in the vehicle when the drugs were found. She considered it a trial tactic.

The Court held that because it is well-established law that the State cannot introduce a co-indictee’s statement through leading questions when the co-indictee refuses to testify, trial counsel provided ineffective assistance by failing to object. To the extent she may have failed to object based upon trial strategy, the Court found that this was not a reasonable decision a competent attorney would have made under the same circumstances. The Court further found that appellant dem-

onstrated a reasonable probability that the outcome would have been different if his trial counsel had made the proper objection to the prosecutor’s questioning. The questioning refuted the defense theory that appellant was an innocent driver who was not involved in the drug transaction. It also implied that appellant had threatened the co-indictee into refusing to testify against him.

## **Right to Counsel; Alabama v. Shelton**

*Alford v. State, S10A0062*

Alford pled guilty in 1995 to DUI and was given 12 months probation. He was not represented by counsel. He filed a habeas petition alleging he was entitled to legal representation. The habeas court held that he was not because he was only sentenced to probation and no imprisonment. The issue before the Court was whether *Alabama v. Shelton*, 535 U. S. 654, 122 SC 1764, 152 LE2d 888 (2002), applies retroactively to appellant’s convictions because he was unrepresented by counsel.

In *Barnes v. State*, 275 Ga. 499 (2002) the Georgia Supreme Court, adopting *Shelton*, held, “that absent a knowing and intelligent waiver, no indigent person may be imprisoned for any offense, or sentenced to a probated or suspended prison term, unless he was represented by counsel at his trial.” It is the State which must show the defendant made a knowing and intelligent waiver of his right to counsel. Here, a review of the record showed no voluntary or intelligent waiver of appellant’s right to counsel, nor that he was apprised of the dangers of proceeding without counsel.

Thus, since his plea was in 1995 and *Shelton* was decided in 2002, the only issue was whether the rule in *Shelton* was to be applied retroactively. The Court held that because *Shelton* announced a “new rule,” as defined in *Teague v. Lane*, 489 U. S. 288, 109 SC 1060, 103 LE2d 334 (1989), the rule must be applied retroactively. The Court therefore determined that the habeas court erred in denying appellant’s petition.

## **Juveniles; Admissions**

*In the Interest of K.L., A10A0813*

Appellant appealed from the order of the juvenile court vacating his admissions and resetting his hearing. The record showed that

appellant was charged with numerous crimes. The initial detention hearing was set for Aug. 17, but was reset because no legal custodian was present. On Aug 27, the case convened for a 10-day adjudication, and appellant admitted to the charges. However, a sheriff’s investigator subsequently informed the court that the investigation was still ongoing and that additional charges might be generated. The juvenile court judge then decided to treat the hearing as a detention hearing, vacated the admissions, and reset the case for a 10-day adjudication.

The Court first held that no detention hearing was warranted because probable cause was found during the Aug 17 hearing. Next the Court found that by vacating appellant’s admissions, the juvenile court essentially put appellant in double jeopardy. Here, the juvenile court clearly heard the merits of the case, and after questions from the prosecutor and the juvenile court judge, the juvenile court accepted appellant’s admissions as to the charges against him. Where a juvenile court considers the case on its merits and accepts a juvenile’s admissions that he committed the acts charged, double jeopardy precludes the court from vacating the admissions and rehearing the case at a later date. Therefore, the juvenile court erred in sua sponte vacating appellant’s admissions after hearing the merits of the case and accepting the admissions.

## **Juror Misconduct; Sentencing**

*Gresham v. State, A10A0995*

Appellant was convicted of child molestation and statutory rape. He contended that the trial court erred in denying his motion for a mistrial after an alternate juror made comments about his guilt prior to trial. The record showed that immediately after the jury was chosen and sworn in, the court recessed to allow the jurors to eat lunch before opening statements. A juror then brought to the attention of the judge that an alternate, during voir dire, had made comments that the defendant should be hung and beaten with a two-by-four if he did as alleged. Many jurors apparently heard these statements. Although the alternate denied making such statements, the alternate was dismissed. The trial court then denied the motion for new trial and picked another alternate.

The Court found that the trial court did

not error because the record disclosed no basis upon which to conclude that the misconduct was so prejudicial as to deny appellant due process. Here, the trial judge thoroughly questioned each individual juror under oath about what he or she had heard, and whether he or she had the ability to remain fair and impartial, and found that each juror could remain impartial. Thus, appellant's contention that the alternate's comments prejudiced the other jurors was unsupported.

Appellant also contended that the trial court erred by imposing a disproportionately severe sentence and by denying his motion to reconsider that sentence. Specifically, he contended that from July 1, 2007 to June 30, 2008, the average sentence in the judicial circuit was 9.5 years for a child molestation conviction and 6.39 years for a statutory rape conviction, and thus his sentence was too severe because he was sentenced to 20 years, 15 to serve. The Court treated appellant's contention as a claim under the Eighth Amendment. It found that the sentence was within the statutory limits and that appellant failed to demonstrate that his sentence shocked the conscience. Therefore, the trial court did not err.

### **Evidence; Prior Difficulties with Victim**

*Stallworth v. State, A10A0102*

Appellant was convicted of two counts of forgery in the first degree. The evidence showed that appellant attempted to cash two purported Travelers Express "Moneygram" Money Orders, each of which was payable to him in the amount of \$2500. Appellant presented the money orders to Albany Check Casher manager, William Krake, who determined that the money orders appeared to be counterfeit because they lacked certain security features of genuine money orders. Over objection, Krake was allowed to testify that appellant "had come in on a few prior occasions with similar money orders," which he refused to cash. The judge, however, would not permit Krake to state whether he advised appellant that the prior money orders were counterfeit.

Appellant argued that the trial court erred in allowing Krake to testify that he had presented counterfeit money orders to Krake on prior occasions because such testimony constituted evidence of similar transactions rather than prior difficulties and should not have been

admitted because he was not provided with pretrial notice of such evidence, as required by the Uniform Superior Court Rules. The Court stated that evidence of a defendant's prior acts toward a victim, be it a prior assault, a quarrel, or a threat, is admissible when the defendant is accused of a criminal act against the victim, as the prior acts are evidence of the relationship between the victim and the defendant and may show the defendant's motive, intent, and bent of mind in committing the act against the victim which results in the charges for which the defendant is being prosecuted.

Evidence of prior difficulties between a defendant and a corporation may be admitted under proper circumstances. Here, evidence of appellant's prior attempts to present inauthentic money orders to Krake showed that his relationship with Albany Check Casher's agent, Krake, was characterized by repeated attempts to obtain funds on invalid instruments. Even though Krake was not permitted to testify whether he told appellant that the prior money orders were counterfeit, the jury could nonetheless infer from appellant's course of conduct and Krake's prior refusals to cash similar money orders that appellant knew that the money orders he presented to Krake were inauthentic. The Court found that such testimony was of particular relevance in light of the defense attempt to show that members of the general public, like appellant, would not be familiar with the security features of authentic money orders. Therefore, the trial court did not err because the State made the requisite showings for admission of evidence relating to Albany Check Casher's prior difficulties with appellant.