

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 20, 2014

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THIS WEEK:

- **Newly Discovered Evidence; Photographic Line-ups**
- **Inconsistent Verdicts**
- **Search & Seizure; Roadblocks**
- **Sentencing; Merger**
- **Search & Seizure; Standing**
- **Prior Difficulties; Substantive Evidence of the Offense**
- **Accomplice Testimony; Corroboration**
- **Recusal; Out-of-Time Appeal**
- **Voir Dire; Refreshing Recollection**

Newly Discovered Evidence; Photographic Line-ups

Sutton v. State, S14A0482 (6/16/14)

Appellant was convicted of malice murder and other crimes. He argued that the trial court erred in failing to grant his motion for new trial based on newly discovered evidence. The record showed that at the motion for new trial, appellant introduced evidence showing that the GBI firearms examiner that testified at trial resigned from the GBI on April 1, 2009, following an investigation which demonstrated that she intentionally fabricated firearms data in another, unrelated case. Appellant contended that this newly discovered evidence required that he be granted a new trial. The Court disagreed. The Court held that a new trial may not be granted on the basis of newly discovered evidence where, as here, the only effect of the evidence would be to impeach the credibility of a witness.

Appellant also contended that his trial counsel rendered ineffective assistance because he failed to object to a witness' in-court identification of him as the shooter on the ground that it was based on a photographic lineup which was impermissibly suggestive. The evidence showed that the witness told the lead detective the name "Chris" was tattooed on the neck of the shooter. The detective showed the witness a six-person photographic lineup. At that time, the witness identified another as the shooter because "he looked familiar." But, as he investigated the case, the detective realized that, although this identified person was a co-conspirator, he was not at the scene of the crime on the night in question. Thereafter, the detective told the witness he picked the wrong man out of the lineup and he prepared another photographic array, which included a photo of appellant, for the witness to view. The witness identified appellant as the shooter in the second array and he identified him as the shooter at trial. The name "Chris" appeared as a tattoo on appellant's neck.

The Court stated that convictions based on eyewitness identification at trial following a pretrial identification by photograph will be set aside only if the photographic identification procedure was so impermissibly suggestive as to give rise to a very substantial likelihood of irreparable misidentification. An identification procedure will not be deemed to be impermissibly suggestive unless it leads the witness to the virtually inevitable identification of the defendant as the perpetrator, and is the equivalent to the authorities telling the witness, "This is our suspect."

Here, the Court found, the witness picked out appellant's photo from the second array on his own initiative. It cannot be said that the

second photographic array was impermissibly suggestive simply because the lead detective informed the witness he picked the wrong suspect from the first array. At no point did the detective suggest whom the witness should identify as the shooter. Therefore, trial counsel was not ineffective for failing to challenge the witness' in-court identification.

Inconsistent Verdicts

Springer v. State, A14A0598 (6/10/14)

Appellant was convicted of involuntary manslaughter as a lesser included offense of felony murder, aggravated assault and possession of a firearm during commission of a felony. The evidence showed that there was a large crowd of people in a parking lot when a fight broke out. During the melee, appellant was seen in the crowd, shooting a gun. At least one other person was also firing a weapon. When the police arrived, they found, between two cars in the parking lot, the victim lying dead from a gunshot wound to the back. Appellant argued that his convictions should have been set aside because the jury returned mutually exclusive verdicts of involuntary manslaughter and aggravated assault, resulting in a reasonable probability that he acted with both criminal intent (with the intent to harm) and criminal negligence (without the intent to harm). The Court agreed.

Verdicts are mutually exclusive where a jury returns verdicts of guilt as to both criminal intent and criminal negligence offenses in those factual situations involving the same act by the accused as to the same victim at the same instance of time. This is because such verdicts reflect an illogical finding by the jury that the defendant acted with both criminal intent and criminal negligence toward the victim.

To determine whether appellant's convictions for involuntary manslaughter and aggravated assault were mutually exclusive, the Court looked to the indictment, the evidence, the verdict form, and the jury instructions. The jury's verdict form specifically found appellant guilty of involuntary manslaughter based upon reckless conduct as a lesser-included offense of felony murder. A guilty verdict for involuntary manslaughter based on reckless conduct requires a finding that the defendant acted with criminal negligence and without intent. Thus, the jury's involuntary

manslaughter conviction would be mutually exclusive of an aggravated assault conviction under O.C.G.A. § 16-5-20(a)(1).

Appellant's indictment also charged him with aggravated assault based on his actions in engaging in an exchange of gunfire resulting in the death of the victim. The verdict form returned by the jury did not specify which subsection of O.C.G.A. § 16-5-21(a) served as the basis for appellant's aggravated assault conviction. The trial court's instructions on aggravated assault charged the jury under both O.C.G.A. § 16-5-21(a)(1) and (a)(2). Aggravated assault with a deadly weapon, may be committed either by attempting to commit a violent injury to the person of another, O.C.G.A. § 16-5-21(a)(1), or by committing an act which places another in reasonable apprehension of immediately receiving a violent injury. O.C.G.A. § 16-5-20(a)(2). A verdict of guilty as to aggravated assault based on O.C.G.A. § 16-5-21(a)(1) requires a finding of an intentional infliction of injury, which precludes the element of criminal negligence in reckless conduct. A verdict of guilt predicated on O.C.G.A. § 16-5-20(a)(2) does not. Thus, because the Court was unable to conclusively state that the jury's aggravated assault verdict rested exclusively on either criminal negligence or criminal intent so as to eliminate the reasonable probability that the jury might have returned a mutually exclusive verdict by finding appellant acted with both criminal intent and criminal negligence at the same time as to the same victim, the Court reversed appellant's involuntary manslaughter and aggravated assault convictions and remanded for a new trial.

Search & Seizure; Roadblocks

Johnson v. State, A12A1785 (6/10/14)

In *Johnson v. State*, 320 Ga. App. 231 (2013), the Court affirmed the trial court's denial of a motion to suppress evidence seized pursuant to a roadblock, and found that, contrary to appellant's claim, there was evidence to support the finding that the decision to implement the roadblock was made by supervisory personnel. The Georgia Supreme Court remanded the case back to the Court with direction that it reconsider in light of two subsequent opinions, *Brown v. State*, 293 Ga.787 (2013), and *Williams v. State*, 293 Ga. 883 (2013).

The Court stated that when a roadblock is challenged, the State must show that the law enforcement agency implementing the roadblock had, at the programmatic level, an appropriate primary purpose other than ordinary crime control. Once this is shown, the State must also prove that the particular checkpoint at which the defendant was stopped was properly implemented and operated in accordance with the five requirements of *LaFontaine v. State*, 269 Ga. 251 (1998). Thus, a roadblock is satisfactory where (1) the decision to implement the roadblock was made by supervisory personnel rather than the officers in the field; (2) all vehicles are stopped as opposed to random vehicle stops; (3) the delay to motorists is minimal; (4) the roadblock operation is well identified as a police checkpoint; and (5) the screening officer's training and experience is sufficient to qualify him to make an initial determination as to which motorists should be given field tests for intoxication.

Here, the Court noted, appellant did not argue that the law enforcement agency's checkpoint program had an inappropriate primary purpose. Rather, the only argument appellant made was that the decision to implement the roadblock was made by officers in the field, contrary to the first of the *LaFontaine* requirements. However, the Court found, the evidence showed that the supervisor made the decision to implement the checkpoint in advance while acting in a supervisory role, instead of while acting as an officer in the field. Moreover, a checkpoint is not rendered unconstitutional solely because the supervisor who authorized the checkpoint later participates to some extent in the checkpoint operation. Therefore Court concluded, there was evidence supporting the trial court's finding that the roadblock was authorized in advance by a supervisor, and affirmed the denial of the motion to suppress.

Sentencing; Merger

Oliphant v. State, S14A0111 (6/16/14)

Appellant was convicted of malice murder and 15 other offenses in connection with an armed robbery. The evidence showed that appellant and a group of others approached Pedro as he sat on the front steps of his mobile home. They then pulled guns and robbed him. When a person inside the mobile home

heard a commotion and opened the door to investigate, the group fired into the home, killing Paola, a relative of Pedro.

Appellant argued that some of his sentences should have merged. The Court agreed. The record showed that appellant was convicted of and sentenced for the malice murder, felony murder, and aggravated assault on Paola. The Court found that given the malice murder conviction, the felony murder conviction should have stood vacated by operation of law, and the trial court therefore erred in imposing a separate sentence on the felony murder count. Also, the Court found that the aggravated assault of the same victim, based on the same shooting that caused her death, should have merged, as a lesser included offense, into the malice murder conviction.

As to Pedro, appellant was also convicted of and sentenced on four different counts: One count for armed robbery (Count 4) and three for aggravated assault (Counts 5, 6, and 11). Count 5 alleged aggravated assault by putting a handgun in Pedro's mouth; Count 6 alleged aggravated assault by shooting Pedro with a handgun; and Count 11 alleged aggravated assault with intent to rob by pointing a handgun at Pedro and demanding money. Appellant argued that the aggravated assaults charged in Counts 5, 6 and 11 should have merged into Count 4, the armed robbery conviction.

The Court stated that to determine whether there are two offenses or only one when the same act or transaction constitutes a violation of two distinct statutory provisions is whether each provision requires proof of a fact which the other does not. Thus, the Court found, the conviction on Count 11, aggravated assault with intent to rob, should have merged with the armed robbery conviction. Similarly in Count 5, the aggravated assault with a deadly weapon did not require proof of any fact in addition to those necessary to prove the armed robbery. However, as to Count 6, the evidence showed that, after the armed robbery and initial shooting, the assailants ran away, but one then returned briefly and shot Pedro in the leg. Because this subsequent shooting occurred after the initial criminal transaction was completed, the aggravated assault conviction arising therefrom did not merge with the other convictions.

Finally, the Court noted that the record also showed that the trial court sentenced

appellant to a felony-level sentence of five years on his conviction for possession of a pistol by a person under the age of 18. But, according to O.C.G.A. § 16-11-132(b), the first conviction thereunder is a misdemeanor punishable by imprisonment for not more than 12 months. Appellant's sentence on this Count was therefore also vacated and the case remanded for resentencing.

Search & Seizure; Standing

Lowe v. State, S14A0410 (6/16/14)

Appellant was convicted of malice murder and possession of a firearm during the commission of a crime. He argued that the trial court erred in denying his motion to suppress a handgun recovered from the home in which he was apprehended pursuant to an arrest warrant, contending that the search of the home and seizure of the weapon violated his rights under the Fourth Amendment. The Court stated that when such a motion is made, the State has the burden of proving that the search and seizure were lawful and the defendant bears the burden of proving his standing to raise a challenge to the legality of a search and seizure. Here, the record showed that at the hearing on the motion to suppress, the State clearly contested appellant's standing to challenge the search of the home and the seizure of the weapon found there. Specifically, the State contended that appellant was not a resident of the home, nor did he have any standing otherwise, he was merely there.

The Court found that neither at the hearing on the motion to suppress, at trial, in his pleadings, nor at the hearing on his motion for new trial, did appellant attempt to meet his burden of proof to show that he had standing to move to suppress this evidence. Accordingly, the Court found, the trial court did not err in denying his motion to suppress.

Prior Difficulties; Substantive Evidence of the Offense

Sowell v. State, A14A0571 (6/11/14)

Appellant was convicted on one count of aggravated child molestation and two counts of child molestation. The victim was three-years-old. Count 1 of the indictment charged appellant with aggravated child molestation by alleging that on or about October 11, 2011, he "lick[ed] the vagina of [the victim] . . ."

The evidence also showed that a couple of months earlier, the victim made an outcry to her aunt that appellant committed the same act upon her, but the mother of the victim at that time did not report the incident to the police. This evidence was allowed in as prior difficulties between the victim and appellant. During the charge conference, defense counsel inquired about including a jury instruction on the limited purpose for which the jury could consider prior difficulties. But, the State argued, such an instruction was unnecessary because the aunt's testimony regarding the victim's initial outcry could be considered as evidence of the offenses alleged in the indictment (despite the fact that the indictment alleged that the offenses occurred on a specific date). The trial court agreed, citing the principle that the date in the indictment was not material to the offense, and, therefore, holding that the jury could convict appellant if it found that his actions were committed within the statute of limitation, which in this case encompassed all four years of the victim's life. Consequently, the court refused to instruct the jury regarding prior difficulties.

Appellant did not contest the trial court's general assessment of the law regarding this issue. Rather, he argued that having decided just prior to trial that the victim's aunt's testimony about the child's initial outcry was admissible specifically as evidence of prior difficulties between the parties, the trial court could not change course after both parties rested and allow the jury to consider the testimony for a more expansive purpose, i.e., as evidence of the indicted offenses. In support of this argument, appellant cited *State v. Johnston*, 249 Ga. 413, 415(3) (1982) in which the Supreme Court held that if a "trial court decides to rule on the admissibility of evidence prior to trial, the court's determination of admissibility is similar to a preliminary ruling on evidence at a pretrial conference and it controls the subsequent course of action, unless modified at trial to prevent manifest injustice." Appellant contended that allowing the victim's aunt's testimony to be considered as evidence of the indicted offenses constituted a modification that actually created a manifest injustice.

The Court agreed that the trial court's decision to expand the purposes for which the jury could consider the aunt's testimony ran afoul of *Johnston*. Moreover, the State's

argument that the trial court's pre-trial ruling merely denied appellant's motion in limine and admitted the aunt's testimony for unlimited purposes was patently belied by the language in the trial court's order, which explicitly characterized the evidence as "prior difficulties." Nevertheless, the Court held, it is a fundamental principle that harm as well as error must be shown for reversal. And here, the Court found that appellant was not harmed by the trial court's ruling.

Thus, whether it was characterized as evidence of prior difficulties or instead as evidence of the indicted offenses, the victim's outcry to her aunt was undoubtedly admissible. Indeed, the Court noted, appellant did not claim that he was surprised by the admissibility of the aunt's testimony in and of itself, and he did not appeal on such grounds. Furthermore, regardless of how this testimony was to be considered by the jury, appellant's defense—even after the denial of his motion in limine—was that he had never inappropriately touched the victim. Therefore, it did not appear that appellant was prejudiced by this evidence to the extent that he was deprived of presenting an alibi defense or was otherwise deprived of a fair trial. Accordingly, the Court found no basis for reversing his convictions.

Accomplice Testimony; Corroboration

Lindsey v. State, S14A0441 (6/16/14)

Appellant was convicted of malice murder and criminal solicitation to commit murder. The evidence showed that the victim testified against appellant in two trials in which appellant had been accused of shooting and killing Barnes, an 83 year old woman. Appellant solicited others to kill the victim and supplied the shooter with the weapon eventually used to kill the victim.

Appellant argued that his convictions must be reversed because the evidence presented at trial to support the guilty verdicts was insufficient as it rested solely on the uncorroborated testimony of the accomplice. Former O.C.G.A. § 24-4-8 required corroborating circumstances in a felony prosecution in which the only witness was an accomplice. Thus, the State had to present the testimony of at least one other witness or evidence of such corroborating

circumstances; however, the required additional evidence could be circumstantial, slight, and in and of itself, insufficient to warrant a conviction of the charged crime. But, such independent evidence has to either directly connect the defendant with the crime or justify an inference that the defendant is guilty; it must corroborate the identity of the defendant and that the defendant participated in the crime. After the State provides such evidence, it is for the jury to determine whether the evidence sufficiently corroborates the accomplice's testimony and warrants the sought conviction. Corroboration of only the chronology and details of the crimes, in and of itself, is not sufficient to satisfy the requirement of additional evidence. However, there may be circumstances in which the timing and the specifics of criminal acts can serve as corroborating circumstances if they are directly linked to the identity of the defendant as the perpetrator of the crime on trial. And, even though evidence of motive without more is insufficient to corroborate the testimony of an accomplice, it can be considered in the determination of whether an accomplice's version of events inculcating a defendant is corroborated.

Here, the Court found, this was certainly true. The timing and circumstances of the victim's murder supported the identity of appellant as the mastermind behind the crimes. Appellant had ample motive to kill the victim, that is, initially to prevent the victim from again testifying at appellant's retrial for the murder of Barnes, and then as retribution for the victim having twice testified against him. Indeed, an investigator in the Barnes murder case testified about appellant's visible animus toward the victim during the initial trial of that case. And, perhaps even more significantly, in the present trial, the State presented evidence of a separate and independent attempt to cause fear and potential harm to an anticipated witness for the prosecution. The State's witness, who was a close friend of the victim and who had previously offered evidence in the case against appellant, testified that she had received threatening phone calls in an attempt to dissuade her from testifying; she had notified law enforcement because she feared for her life and the welfare of her children. Although the witness was not permitted to give further details about the substance of the phone calls,

inasmuch as appellant was the one on trial, the Court found that a reasonable and plain inference to be drawn is that appellant made the calls or that they were made at his instigation. Evidence of a defendant's attempt to influence or intimidate a witness is circumstantial evidence of guilt, even in the situation in which the defendant does not personally make the attempt, that is, action by a third party to influence a witness not to testify or to testify falsely is relevant and admissible into evidence in a criminal prosecution on the issue of the defendant's guilt when the accused is shown to have authorized the attempt. The plain inference that appellant was responsible for the menacing phone calls was uncontradicted at trial. Moreover, the Court noted, there was no objection at trial to admission of evidence of the calls on the basis that they had not been sufficiently connected to appellant, nor was any error in that regard enumerated on appeal.

The independent corroborating evidence need only justify an inference that the defendant is guilty. And, the jury was authorized to make the inference that appellant was responsible for the menacing calls, which evidenced appellant's intent to exact retribution against one who would aid the State in obtaining his conviction. Thus, there was evidence, albeit slight, to corroborate the accomplice's version of events identifying appellant as the prime mover in the plot to murder the victim. Accordingly, the Court held, the evidence was sufficient to enable the jury to find appellant guilty beyond a reasonable doubt.

Recusal; Out-of-Time Appeal

Henderson v. State, S14A0225, S14A0226 (6/16/14)

Appellant pled guilty to two counts of murder and numerous other crimes. The evidence showed that appellant filed a pro se motion for out-of-time appeal in June 2012, which the trial court denied. The Court affirmed that denial in April 2013. In August 2013, appellant filed a motion to withdraw his guilty plea and a motion to recuse the trial judge, who was the same judge that had taken his guilty plea and denied his motion for out-of-time appeal. The trial court denied both motions in separate orders, and appellant filed a notice of appeal from both orders.

Under Case No. S14A0225, appellant argued that the trial court erred in denying

his motion to recuse. The Court disagreed. A motion to recuse must be filed “not later than five (5) days after the affiant first learned of the alleged grounds for disqualification and not later than ten (10) days prior to the hearing or trial which is the subject of recusal or disqualification,” unless the movant shows “good cause” for failing to meet the time requirements. Uniform Superior Court Rule 25.1, once a motion to recuse is filed with the trial judge whose recusal is sought, that judge must make three threshold determinations regarding the legal sufficiency of the motion: whether it was timely filed; whether the affidavit made in support of it is legally sufficient; and whether, if some or all of the facts set forth in the affidavit are true, recusal would be authorized. If all three of these conditions are met, the trial court must refer the motion to “another judge . . . to hear the motion to recuse.” U.S.C.R. 25.3. If any one of the conditions is not met, the trial court does not err in denying the motion.

Appellant argued that the trial court erred by failing to hold an evidentiary hearing on his motion to recuse. But, the Court found, it is not required under U.S.C.R. 25.3 that such an evidentiary hearing be held. The Uniform Superior Court Rules governing recusal only contemplate an evidentiary hearing if it is determined that the motion satisfies the three threshold requirements and the recusal motion is assigned to another judge and even then, such a hearing is not required. Here, the Court found, there was no error in the trial court’s failure to hold an evidentiary hearing.

Appellant also contended that, because the orders denying his motion to recuse and his motion to withdraw were filed on the same day at the same time, the trial court violated U.S.C.R. 25.3 by failing to cease acting upon the merits of his motion to withdraw until the court decided whether the motion to recuse met the threshold requirements of that rule. But, the Court found, the fact that the orders were entered at the same time did not show that the trial court, when reviewing the two motions, considered the motion to withdraw first. Since appellant had not “shown otherwise,” the Court presumed that the trial court ruled on appellant’s motion to recuse before turning to his motion to withdraw.

Moreover, the Court found, appellant’s affidavit in support of his motion to recuse showed that the motion to recuse was untimely

to the extent it sought disqualification based on the trial court’s alleged pressure on him to plead guilty and the court’s alleged improper remarks at his sentencing. Appellant learned of those grounds for disqualification in March, April, and May 2000, and because some of the trial court’s alleged involvement in the plea process occurred well before appellant’s May 24 plea, appellant should have sought disqualification within five days of learning of those grounds. Furthermore, appellant knew of all these grounds for disqualification by his May 24 plea and sentencing, and within five days of that date, he could have filed both a motion to withdraw his guilty plea and a motion to recuse the trial judge based on all instances of alleged bias by the trial court from March to May 24, 2000. Appellant could have, but did not, file a motion to recuse when, in the same case and before the same trial judge, he filed his motion for out-of-time appeal in June 2012. Since appellant had not attempted to show “good cause” for not timely asserting these grounds for disqualification, the Court found that they could not be the basis of a motion to recuse. Thus, the trial court did not err in denying appellant’s motion to recuse.

As to case No. S14A0226, appellant argued that the trial court erred in denying his motion to withdraw his guilty plea, and that he should be permitted to file an untimely motion to withdraw his guilty plea because there was manifest injustice in the form of ineffective assistance of counsel. However, the Court found, because the term of court in which appellant entered his plea and was sentenced expired in June 2000, and appellant did not file his motion to withdraw until August 2013, the trial court had no jurisdiction to entertain his motion to withdraw and properly denied it.

Finally, in denying both of appellant’s motions, the trial court handwrote, “Motion denied,” on the last page of each motion, just below appellant’s signature, and then signed and dated those pages immediately below “Motion denied.” Appellant argued that both of the trial court’s orders were invalid because the trial court did not comply with certain requirements of U.S.C.R. 36. Specifically, that the orders did not contain a “caption” setting out “the exact nature of the pleading,” U.S.C.R. 36.3, and did not identify the parties or the case number, U.S.C.R. 36.4. But, the Court found, even assuming that U.S.C.R. 36

applies to superior court judges, appellant did not show any harm.

Voir Dire; Refreshing Recollection

Bianchi v. State, A14A0432 (6/2/14)

Appellant was convicted of armed robbery. He first contended that the trial court erred in striking a juror for cause over his objection. The evidence showed that when the panel members were asked if anyone had difficulty understanding the English language that would affect their ability to serve, a juror indicated he did. When questioned individually, the juror said he understood 90 percent of what was said or “almost everything,” but English was not his native language and he did not understand some of the legal terminology that had been used so far. The State moved to strike the juror for cause, and appellant objected, because he thought that a juror who understood 90 percent of the proceedings was doing a good job. Noting that the jurors needed to understand 100 percent of the proceedings, the trial court granted the State’s motion and struck the juror for cause.

The Court noted that under O.C.G.A. § 15-12-163(b)(6) either the defendant or the State in a criminal felony trial may object to a juror on the ground that the juror “is unable to communicate in the English language.” The trial court has a duty to consider evidence regarding the objection and if it “is satisfied of the truth of any objection, the juror shall be set aside for cause.” O.C.G.A. § 15-12-163(c). The Court found that the trial court did not abuse its discretion in striking the juror for cause.

Appellant also argued that the trial court erred in failing to allow him to refresh the recollection of a detective with a recording of a witness’ telephone call. The Court stated that a witness may use any source to refresh his memory, so long as he testified from his memory thus refreshed. As long as the witness is willing to swear from his memory as refreshed, his memory may be refreshed by any kind of stimulus (e.g., a song, a face, or a newspaper item). The State conceded that the trial court erred in refusing to allow appellant time for the detective to review the recorded phone conversation, but argued that the error was harmless. The Court agreed, finding that it was highly probable that the trial

court's refusal to allow appellant to refresh the detective's recollection about her phone conversation with the victim's friend did not contribute to the jury's determination of guilt.