

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 14, 2017

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Robert W. Smith, Jr.
General Counsel

Lalaine Briones
State Prosecution Support Director

Sheila Ross
Director of Capital Litigation

Sharla Jackson
Domestic Violence, Sexual Assault,
and Crimes Against Children
Resource Prosecutor

Gilbert A. Crosby
Sr. Traffic Safety Resource Prosecutor

Jason Samuels
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **Witness Corroboration; Accomplices**
- **Void Sentences; Life Without Parole**
- **Gang Affiliation; Evidence**
- **Sentencing; Merger**
- **Field Sobriety Testing; Harper**

Witness Corroboration; Accomplices

Heatherly v. State, S16G1498 (6/19/2017)

Appellant was charged with felony theft by taking. At trial, an accomplice testified against appellant. The jury found appellant guilty of misdemeanor theft by taking based on the value of the property stolen. The Court of Appeals affirmed in *Heatherly v. State*, 336 Ga. App. 875 (2016). The Supreme Court granted certiorari to determine whether the Court of Appeals erred in affirming his conviction.

Appellant argued that because he had originally been charged with theft by taking property with a value of more than \$500.00, regardless of the eventual proof of the value of the stolen property, and regardless of his eventual sentence, his case must be considered a “felony case” for purposes of OCGA § 24-14-8, which provides that the “testimony of a single witness is generally sufficient to establish a fact [but in] felony cases where the only witness is an accomplice, the testimony of a single witness shall not be sufficient.”

The Court disagreed. Relying on *Wall v. State*, 75 Ga. 474 (3) (1885), the Court stated that no issue regarding sufficiency of the evidence for a *felony* theft conviction was presented here; appellant was convicted of a

misdemeanor level theft. And, it was from the misdemeanor final judgment of conviction and sentence that appellant brought his appeal, and the fact that he was originally indicted for a felony grade theft does not alter that. Therefore, the Court held, the Court of Appeals was correct in rejecting appellant’s assertion that, in this case, the testimony of a single witness accomplice had to be corroborated.

Void Sentences; Life Without Parole

Pope v. State, S17A0615 (6/19/17)

On May 1, 2007, appellant was indicted for malice murder, felony murder while in the commission of aggravated battery, and arson in the first degree. The State filed a notice of intent to seek the death penalty. On January 8, 2013, appellant entered *Alford* pleas to the counts in the indictment, and in exchange, the State removed the death penalty as an option. Following a two-day sentencing hearing, on January 15, 2013, the superior court sentenced appellant to life in prison without the possibility of parole for malice murder plus twenty years in prison for first-degree arson; the felony murder stood vacated by operation of law. Two days later, on January 17, 2013, the superior court filed a document entitled “Factual Support of Aggravating Circumstances Justifying Sentence of Life Without Possibility of Parole,” in which it set forth as aggravating circumstances that appellant committed the murder while engaged in both aggravated battery and arson, which it found were “established as a matter of law by the allegations of the indictment to which defendant pled guilty.” Thereafter, in 2016, appellant filed a motion to vacate void sentence and other motions. The

trial court summarily denied both motions.

The Court found that under OCGA § 17-10-32.1, a defendant pleading guilty in a death penalty case cannot be sentenced to life without the possibility of parole unless the sentencing court makes a specific finding of a statutory aggravating circumstance beyond a reasonable doubt, *contemporaneously* with the sentencing. The requirement that such finding be contemporaneous with the sentencing is rooted in concerns of due process; to permit a judge to find a statutory aggravating circumstance after sentencing a defendant to life without parole would constitute a denial of due process because the defendant would have been deprived of an opportunity to be heard before the imposition of sentence.

Yet, the Court stated, that is precisely what happened in this case. There was no aggravating circumstance specified at the time of sentencing, so the statutory requirement was not met. And, the sentencing court's belated filing of its "Factual Support of Aggravating Circumstances Justifying Sentence of Life Without Possibility of Parole," two days following appellant's sentencing did not cure the fatal defect. Accordingly, the Court held, inasmuch as the sentencing court did not fulfill the requirements of former OCGA § 17-10-32.1, the sentence of life without the possibility of parole imposed upon appellant was void and consequently, vacated.

Gang Affiliation; Evidence

Davis v. State, S17A0176 (6/19/17)

Appellant was convicted of felony murder, armed robbery, aggravated assault, and possession of a firearm during the commission of a felony. The evidence, briefly stated, showed that appellant and Mosley were often seen together. Appellant had sold pills to the victim. When the victim contacted appellant to buy more pills, appellant talked with others about robbing the victim. Later that day, at the place of sale, the victim was found shot to death. That same afternoon, Mosley informed someone that he had shot someone over some pills.

Appellant argued that the trial court erred in allowing evidence of Mosley's gang affiliation. At the start of trial, appellant's counsel argued that the State should not be able to elicit testimony that Mosley had tattoos showing an affiliation with a gang, and that Mosley identified himself as being associated with

that gang in a text message to appellant. The trial court ruled that it would allow evidence that one of Mosley's tattoos and a text message he sent to appellant referenced the name of a gang. Evidence was presented that Mosley had a tattoo on his chest and arm that read "ABT Stunna." An investigator testified that Mosley had been documented as a member of the ABT gang, Appellant's girlfriend testified that Mosley's street name was "Stunna," and a sergeant testified that Mosley identified himself in a text to appellant as "ABT Stunna" following the shooting.

The Court noted that the State sought to show a connection between the robbery and murder and the history of the gang, and the foreseeable consequence of appellant's participation in the robbery with Mosley. And as the trial court found, the evidence was also relevant to identify Mosley as the person who communicated with appellant by text shortly after the murder using someone else's phone. Although appellant argued that evidence of Mosley's gang affiliation was improper because neither he nor Mosley was charged with gang activity, the Court found that there is no requirement that the State charge a defendant with violating the prohibition of participation in criminal street gang activity in OCGA § 16-15-4 in order to admit otherwise relevant evidence of gang activity. Therefore, the Court held, in light of the purpose expressed by the State and evidence of the communication between appellant and Mosley after the murder with Mosley using the name "ABT Stunna," the trial court did not abuse its discretion in allowing the admission of evidence of Mosley's gang affiliation. And, in light of the strong evidence of appellant's participation in the crimes, the Court also concluded that it was highly probable that the admission of this evidence did not contribute to the jury's verdict.

Sentencing; Merger

Gomez v. State, S17A0265. S17A0266 (6/19/17)

Appellants Gomez and Huitron were convicted of numerous crimes relating to the death of their three-year-old daughter, Esmerelda. The record showed that Esmerelda suffered a severe skull fracture and other injuries and died three days later. Appellants were indicted for malice murder, three counts of felony murder, four counts of aggravated battery, two counts of aggravated assault, one felony

count of contributing to the deprivation of a minor resulting in death, and six counts of first degree cruelty to a child, all with Esmerelda as the victim. The State later nolle prossed one aggravated battery count and one child cruelty count. The jury found appellants guilty of two counts of felony murder (based on aggravated assault with an unknown object and contributing to the deprivation of a minor), the two counts of aggravated assault, the felony count of contributing to the deprivation of a minor, two counts of first degree child cruelty, and two charges of second degree child cruelty as a lesser included offense. Gomez was also found guilty of another lesser included charge of second degree child cruelty (based on fracturing Esmerelda's ribs). Appellants were found not guilty of the remaining charges. The trial court sentenced Gomez and Huitron to two terms of life imprisonment without the possibility of parole on the two felony murder counts. They were also sentenced to 20 years for aggravated assault using hands, 20 years for first degree cruelty to children, and 10 years for second degree cruelty to children. Gomez was sentenced to an additional 10 years for her additional second degree cruelty to children conviction.

The Court noted that as charged in Count 4 of the indictment, appellants were convicted of felony murder based on contributing to the deprivation of Esmerelda "by failing to provide for [her] protection . . . , which caused [her] to be deprived and resulted in her death." Contributing to the deprivation of a minor is a felony when the offense "result[s] in the serious injury or death of a child." OCGA § 16-12-1 (d.1). But, the Court found, under its recent decision in *Williams v. State*, 299 Ga. 632 (2016), the felony deprivation statute cannot be used as a predicate offense for felony murder. Accordingly, the Court vacated appellants' convictions for felony murder based on contributing to the deprivation of Esmerelda.

The State argued that because this felony murder conviction was vacated, the underlying count of contributing to the deprivation of Esmerelda resulting in her death (Count 7) should "unmerge" and a conviction and sentence should be imposed on that count. The Court disagreed because only one conviction and sentence may be imposed for the killing of a single victim. Thus, because appellants were convicted and sentenced on Count 3 for felony murder based on aggravated assault resulting in Esmerelda's death, they could not be convicted

and sentenced on the felony child deprivation count, as that crime also was predicated on Esmerelda's death.

The Court also noted that appellants were found guilty of two counts of aggravated assault with an "object ... which, when used offensively against a person, is likely to or actually does result in serious bodily injury." OCGA § 16-5-21 (b) (2). Count 11 charged appellants with using hands to cause acceleration/deceleration injuries resulting in hemorrhages of Esmerelda's brain and eyes, and Count 12 charged them with using an unknown object to cause her skull fracture. The trial court properly merged Count 12 into the felony murder conviction based on that aggravated assault, but appellants were also convicted and sentenced on Count 11. The Court found that this was error. Both aggravated assault counts required proof of the same elements — an assault with a deadly object. And there was no evidence of a deliberate interval between Esmerelda's eye and brain injuries and her skull injury; indeed, the evidence indicated that all of these injuries likely resulted from the same act — one or both of the appellants hitting Esmerelda's head against a hard surface. Therefore, the Court found, because there was no evidence that the injuries occurred in a manner other than in a single transaction, with no "deliberate interval," only a single verdict for aggravated assault can stand, and the remainder must be merged into that verdict. Accordingly, the Court held that Count 11 merged into the felony murder count based on aggravated assault, just as Count 12 did.

Finally, the Court noted that appellants were convicted of second degree child cruelty for striking Esmerelda with an unknown object causing contusions to her head, torso, and extremities (Count 16), and first degree cruelty to children by causing acceleration/deceleration injuries resulting in hemorrhages of the brain (Count 17). Although there was testimony that Esmerelda had some bruises that had begun to heal on her torso and extremities, Count 16 did not allege that appellants caused those past injuries; it alleged only that appellants caused contusions on the day of Esmerelda's death, meaning that the charged injuries occurred on the same day as the injuries in Count 17. Thus, the Court found, as with the two aggravated assault charges, there was no evidence that these injuries resulted from acts of cruelty separated by a deliberate

interval. And again, the elements required to prove the two charges overlap; Count 16 and Count 17 both required proof that appellants "cause[d] a child under the age of 18 cruel or excessive physical or mental pain." OCGA § 16-5-70 (b) & (c). The only difference between the crimes is that because the conviction on Count 16 was for second degree child cruelty, it required proof of criminal negligence, which is a less culpable mental state than the malice required to prove first degree child cruelty as charged in Count 17. Accordingly, the Court held, Count 16 should have been merged into Count 17, and it therefore vacated each appellants' conviction on Count 16.

Field Sobriety Testing; Harper

Mitchell v. State, S17A0459 (6/26/16)

Appellant was accused of DUI. The evidence showed that after the stop, appellant initially refused to perform field sobriety tests. The officer told appellant "that based on all the things that I observed already, which was the strong smell of alcohol coming from him; his mild slurred speech, his bloodshot, glassy eyes; the fact that he had to use the vehicle for ... for balance, and his drunk-like appearance, his impaired appearance, that I believed that he was an impaired driver and that if he did not perform field sobriety, I had no option but to arrest him for DUI; or he could perform field sobriety and maybe he would, maybe he wouldn't; but that — there was no choice if not[.]" Appellant then agreed to do the field sobriety tests; he failed them and was arrested for DUI.

Appellant first argued that the trial court erred in holding that the Romberg field sobriety test is not a scientific test requiring that a foundation be laid under *Harper v. State*, 249 Ga. 519, 524-526 (1) (1982). The Court stated that it must determine whether the Romberg test falls into the category of a simple physical dexterity exercise observable by the average layperson, such as the walk and turn test or the one-leg stand test, or a scientific test which must meet standards of validity and reliability, such as the horizontal gaze nystagmus or "HGN" test. The Court noted only one witness, a police officer, testified with respect to "the Romberg balance [sic]." He testified that the subject is instructed to shut his eyes, tilt his head backwards, and estimate the passage of 30

seconds. He added that "[t]he main purpose of [the test] is to get a person's — excuse me — to gauge a person's internal clock, to figure out if their internal clock is correct or accurate, given that certain drugs, alcohol being one of them, that could impair your ability to interpret the passage of time or perceive it." The officer elaborated that he was also looking for "eyelid tremors" and that "pretty much anybody that's unimpaired and of reasonable faculty can estimate, can get within five seconds, plus or minus, of that 30-second mark." On cross-examination, however, the officer acknowledged that he was not aware of any validation studies for the Romberg test, "not like there are for the other three [field sobriety] tests [appellant performed], no, sir." He also acknowledged that the range of plus or minus five seconds as an indication of impairment had not been established. His knowledge of the test was based on his participation in DRE or "drug recognition expert" school. No scientific or medical testimony was presented at the hearing. Thus, the Court concluded, on the basis of the evidence presented at the hearing, admissibility of the Romberg test is subject to the *Harper* standard. The significance of eyelid tremors or an individual's "internal clock," how they may be affected by the consumption of alcohol, and particularly whether a range of five seconds above or below the actual passage of 30 seconds establishes impairment, are not matters of common sense or experience, nor are they obvious to the average lay observer. The trial court therefore erred in failing to conduct a *Harper* analysis, whether through the evaluation of expert testimony or through the examination of exhibits, treatises, or the law of other jurisdictions.

Appellant also contended that the trial court erred in denying his motion to suppress the results of the field sobriety tests, because he was told that he would be arrested if he did not submit to the tests, but was not given *Miranda* warnings. The Court disagreed. Here, the officer did not indicate by words or actions that he was going to arrest appellant. Rather, he informed appellant that he was not yet under arrest, and if "he could perform field sobriety ... maybe he would, maybe he wouldn't" be arrested. The officer gave appellant an option of sorts: perform the test properly or go to jail. Thus, a reasonable person in appellant's position would have believed that he was not yet under arrest and that his detention still

could be only temporary.” And, appellant was informed that he was not under arrest, was not placed in handcuffs, and was left alone when the officer stepped aside to consult with a sheriff’s deputy, who was conducting field-sobriety testing for the very purpose of determining whether to take appellant into custody. Therefore, the Court concluded, a reasonable person would not have believed that he was in custody, and the trial court did not err in denying appellant’s motion to suppress on this ground.

Finally, appellant contended that the trial court erred in failing to exclude evidence of his initial refusal to submit to field sobriety tests, because such tests ought to be treated as a warrantless search, analogous to the warrantless search of a defendant’s vehicle in *Mackey v. State*, 234 Ga. App. 554, 555-556 (1998). The Court stated that generally, in a “search” of an individual, some tangible evidence is taken from that person: whether a physical object in the person’s possession, or a sample of some part of their body, such as hair, blood, or urine. An action by the State which does not obtain any tangible item, but merely obtains information as to “personal characteristics,” lies in a middle ground (e.g. handwriting exemplars, voice exemplars, fingerprints). The Court found that a field sobriety test appears to be an act more akin to a handwriting or voice exemplar than the physical removal of tangible evidence. Furthermore, the Court stated, the fact that a test may incidentally reveal some other condition or impairment does not necessarily render it a search within the meaning of the Fourth Amendment. A handwriting exemplar, for example, while not a search, would certainly reveal the subject’s illiteracy and might also reveal a neurological condition. And while field sobriety tests may involve specific, unusual maneuvers that are not normally performed in public or private, most are simply intended to reveal, more quickly and in a reproducible fashion, matters that also would be revealed by more time-consuming, but clearly permissible, passive observation. Such characteristics as unsteady gait, lack of balance and coordination, impaired speech, lack of memory, or inability to divide one’s attention, generally would become apparent to a casual observer over a longer period of time. Accordingly, the Court held, although “it is a close question,” a basic field sobriety test is not a search implicating Fourth Amendment

protections. Consequently, appellant’s Fourth Amendment protections were not implicated, and the Court declined to apply the rule enunciated in *Mackey* to the administration of field sobriety tests.