

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 29, 2014

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THIS WEEK:

- **Mutually Exclusive Verdicts**
- **Commenting on Defendant's Silence**
- **Merger; Sentencing**
- **Search & Seizure; Standing**

Mutually Exclusive Verdicts

Springer v. State, A14A0598 (7/30/14)

Appellant was indicted for felony murder, aggravated assault, and possession of a gun during the commission of a felony. The jury convicted him of involuntary manslaughter as a lesser included offense of felony murder, aggravated assault and the possession charge. He contended that the jury returned mutually exclusive verdicts of involuntary manslaughter and aggravated assault. The Court agreed and reversed.

Verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other. Thus, the Court noted, it has held that 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. Further, if a guilty verdict is returned on a crime that can be committed in two ways, one of which is, and one of which is not, mutually exclusive of a guilty verdict for a second crime, the guilty verdicts are considered mutually exclusive unless the Court is able to conclusively state that the verdict on the first crime rested exclusively on the non-mutually exclusive ground so as to eliminate the reasonable

probability that the jury might have returned a mutually exclusive verdict.

Here, appellant's involuntary manslaughter and aggravated assault verdicts involve the same act by the accused as to the same victim at the same instance of time. Aggravated assault with a deadly weapon may be committed either by attempting to commit a violent injury to the person of another, OCGA § 16-5-21 (a) (1), or by committing an act which places another in reasonable apprehension of immediately receiving a violent injury, OCGA § 16-5-20 (a) (2). A verdict of guilty as to aggravated assault based on OCGA § 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 OCGA § 16-5-20 (a) (2) does not.

The Court noted that 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 required a finding that the defendant acted with criminal negligence, that is, without any intention to do so. Thus, the jury's involuntary manslaughter conviction would be mutually exclusive of an aggravated assault conviction under OCGA § 16-5-20 (a) (1). And, the Court found, because an examination of the indictment, the evidence, the jury instructions and the verdict form showed that the jury could have found appellant guilty of aggravated assault under OCGA § 16-5-20 (a) (1) or (a) (2), it must conclude that the jury based the verdict on (a) (1) in determining if the verdict was mutually exclusive.

Commenting on Defendant's Silence

Davis v. State, A14A1355 (7/22/14)

Appellant was convicted of armed robbery, kidnapping, hijacking a motor vehicle and theft by taking. He argued that the trial court erred in denying his motion for a mistrial based on a detective's alleged comment on appellant's post-arrest silence. The transcript showed that the prosecutor asked whether the detective's investigation suggested any suspect other than appellant; the detective answered, "no." The prosecutor then asked, "[d]id any family members or anybody else come up and inform you that [appellant] was nowhere near that area at the time?" The detective answered, "No. [In the year between the crime and the trial,] I've been contacted by nobody providing an alibi of where he was, that he wasn't at this location, or that he was with them. I've been contacted by absolutely nobody." Appellant's counsel moved for a mistrial, arguing that the statement that "nobody" had provided an alibi implied that appellant himself had failed to come forward during the investigation, claiming to have an alibi. The trial court determined, however, that the jurors likely inferred from the detective's response, taken in context, only that none of the witnesses had given appellant an alibi and that they would not have taken the testimony as a comment on appellant's silence.

The Court stated that it is fundamental that the fact that a defendant exercised the right to remain silent may not be used against the defendant at trial. Therefore, Georgia law prohibits the State from commenting on a criminal defendant's post-arrest silence or failure to come forward after a crime, even when the defendant takes the stand in his own defense. Evidence of the election to remain silent warrants reversal only if it points directly at the substance of the defendant's defense or otherwise substantially prejudices the defendant in the eyes of the jury. And here, the Court found, having reviewed the record, it discerned no abuse of discretion in the trial court's ruling.

Merger; Sentencing

Mathis v. State, A14A0080 (7/15/14)

Appellant was convicted of armed robbery and aggravated assault. He contended that the trial court erred by failing to merge his conviction

for aggravated assault into his conviction for armed robbery. The Court agreed.

The Court noted that because aggravated assault does not require proof of any element that armed robbery does not, convictions for both offenses will merge—but only if the crimes are part of the same act or transaction. In determining whether the aggravated assault and armed robbery were part of the same act or transaction, the Court must consider when the armed robbery began and when it concluded. Here, the Court found, the evidence showed that the armed robbery began when the assailants, who had gone to the victim's home with the intent to rob him, used offensive weapons (hands, fists, feet and a battery charger) to take his property. These assaults immediately preceded or were contemporaneous with the taking of the victim's property. The armed robbery ended when, after demanding money and assaulting the victim, the perpetrators took the property and then left. Thus, the crimes were part of the same act or transaction. Consequently, the aggravated assault conviction merged into the armed robbery conviction as a matter of fact. Therefore, the Court held, the aggravated assault conviction and the sentence entered for it must be vacated and the case remanded to the trial court for resentencing.

Search & Seizure; Standing

Moses v. State, A14A0140 (7/15/14)

Appellant was convicted of aggravated assault, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony. He contended that the trial court erred in denying his motion to suppress. The evidence showed that the police executed a search warrant at the home in which appellant's mother lived and found evidence linking him to the crimes.

Appellant argued that the trial court erred in finding that he did not have standing to contest the search. The Court agreed. The trial court found that because appellant did not live in the house, he lacked standing. But, the Court stated, the Fourth Amendment protects people, not places, and provides sanctuary for citizens wherever they have a legitimate expectation of privacy. Notwithstanding the evidence that appellant did not live in the house, there was undisputed evidence that he had a legitimate expectation of privacy there. First, appellant owned the house, possessing

joint tenancy with his mother and a party's ownership interest in property is relevant to the party's standing to contest a search of that property.

The trial court found that appellant lacked a reasonable expectation of privacy because he leased it to a tenant. However, the Court found, no evidence showed that appellant leased the property to a tenant. The persons residing at the house were his mother (who co-owned the property) and his minor daughter. And undisputed evidence showed that, in addition to his ownership, appellant retained other rights in the house—he received mail there and kept his personal property in the master bedroom, including his clothing, jewelry, identification, and personal papers. At the time of his arrest, appellant was at the house, and his vehicle was parked in the garage. In fact, the Court noted, at trial the State emphasized appellant's connection with the house, although it maintained that he lived elsewhere. Thus, the undisputed evidence showed that appellant was neither a transient visitor at the house nor a landlord who had relinquished his rights of possession to a tenant. He owned the house, had access to it, kept personal items there, and spent time there.

Although the trial court found that people "came and went from the room in question"—presumably the master bedroom and its adjoining bathroom—the record did not demonstrate any people having access to those rooms other than appellant, his mother, the mother of his minor child, and "cleaning people." It was undisputed that both appellant's mother and the child lived in the house, and that the mother co-owned the house with him. Moreover, the Court stated, the State failed to show any authority that a property owner who otherwise had a reasonable expectation of privacy in the house relinquished that expectation by allowing persons such as household residents, family members of residents, or housecleaners access to the house. Accordingly, the Court held, appellant had standing to challenge the search of the house.

Appellant also argued that the trial court erred in finding that the affidavit in support of the warrant provided sufficient probable cause to support the search. The Court disagreed. The warrant authorizing the search of the house for items that included weapons, ammunition, gun cases and shell casings, was supported by an affidavit pertinently stating:

“On September 20, 2007, [a named victim] was shot multiple times at [a specified location in] Atlanta, Fulton County, Georgia. During course of the hom[i]cide investigation, suspect[] [appellant] was identified as one of several suspects in listed incident. Suspect[] [appellant] was apprehended at listed location [for which the warrant was sought], and in plainview [sic], several gun cases were observed by arresting officers.”

Appellant argued that this information was too conclusory to demonstrate probable cause that evidence of a crime would be found at the house. But, the Court found, the magistrate could conclude from the affidavit that a homicide involving a firearm had occurred, that appellant was connected to that crime, that appellant had been found in the house for which the search warrant was sought, and that there might be guns at that house as evidenced by the gun cases seen in the house. Moreover, earlier that day the magistrate had received another affidavit in connection with another warrant that provided more information connecting appellant to the homicide; that affidavit stated that there was an outstanding arrest warrant against appellant for murder, that members of a regional law enforcement task force had obtained information from a confidential informant with a history of reliability that appellant was at his mother’s residence, and that a vehicle matching the description of appellant’s vehicle was parked at the residence. The affidavit given in connection with the earlier warrant contained details, including information about the source and reliability of the information linking appellant to the homicide, which offset the alleged omissions in the affidavit given in connection with the warrant that appellant challenged on appeal. Therefore, the Court held, given that even doubtful cases should be resolved in favor of upholding a magistrate’s determination that a warrant is proper, the trial court did not err in denying appellant’s motion to suppress on the merits.