Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 13, 2013

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THIS WEEK:

Motions For New Trial; General Grounds

White v. State, S13A0794 (9/9/13)

Appellant was convicted of murder and other crimes. He contended that the trial court applied the wrong standard to the general grounds of his motion for a new trial. The Court agreed and remanded the case with directions. When the evidence is legally sufficient to sustain a conviction, a trial judge may grant a new trial under O.C.G.A. § 5-5-20 if the verdict of the jury is "contrary to . . . the principles of justice and equity," or if, under O.C.G.A. § 5-5-21, the verdict is "decidedly and strongly against the weight of the evidence." When timely raised, these grounds for a new trial—commonly known as the general grounds—require the trial judge to exercise a broad discretion to sit as a "thirteenth juror." In exercising this discretion, the trial judge must consider some of the things that she cannot when assessing the legal sufficiency of the evidence, including any conflicts in the evidence, the credibility of witnesses, and the weight of the evidence. The discretion of a trial judge to award a new trial on the general grounds should be exercised with caution and invoked only in exceptional cases in which the evidence preponderates heavily against the verdict.

The Court determined that the evidence was sufficient to authorize a rational trier of fact beyond a reasonable doubt that appellant was guilty of the crimes of which he was convicted. However, the Court held that the trial court misapplied the proper standard to appellant's timely general grounds motion. The language of the order expressed weighing evidence "in the light most favorable to [the] verdict" and nothing in the order indicated that the trial court performed its duty to exercise its discretion and weigh the evidence in its consideration on the general grounds. Thus, the Court held, the trial court failed to apply the proper standard in assessing the weight of the evidence and remanded for the trial court to apply the proper standard to the general grounds and to exercise its discretion to sit as a "thirteenth juror" pursuant to O.C.G.A. §§ 5-5-20 and 5-5-21.

Indictments; Return in Open Court

State v. Brown S12G1305 (9/9/13)

On January 6, 2011, a Cobb County grand jury returned an indictment against Brown in the newly constructed Cobb County courthouse. Brown filed a motion in abatement alleging the indictment was not returned in open court. The trial court agreed and quashed the indictment. The State appealed and the Court of Appeals affirmed. The Supreme Court granted the State's petition for a writ of certiorari.

The Court, citing *Zugar v. State*, 194 Ga. 285 (1942) stated that in Georgia, a grand jury indictment must be returned into open court because the general public must be permitted to witness court proceedings to guarantee that they may never be secret or star-chamber court proceedings. The term "open court," as far as returning the indictment is concerned, means that the indictment is returned in a place where court is being held open to the public with the judge and the clerk present. A failure to return the indictment in open court is per se injurious to the defendant.

The Court held that Brown's indictment was not returned in a place that was open to the public. All court personnel and the sheriff testified that the new courthouse was not scheduled to be opened for the court's regular business until January 10. The judge was not conducting his proceedings in the new courthouse that week, but only had the grand jury presentments therein because he wanted to show the grand jury the new courthouse on their last day. The persons who were able to access the new courthouse on January 6 were attorneys and members of the media who had a relationship with court personnel or were knowledgeable enough to obtain an escort from the clerk's office or the district attorney's office. On January 6, the average member of the public who simply wanted to observe the return of the indictment in the Judge's new courtroom would not have had such relationships or knowledge. Rather, a member of the public would have found the front entrance locked with no instruction on how to gain entry and, if a member of the public was able to make his/her way to the breeze way entrance via the old courthouse, he or she likely would have been turned away by the deputies posted there. Thus, as the trial court and the Court of Appeals correctly concluded, the indictment was not returned in a place open to the general public as required by *Zugar* and its progeny.

The State, nevertheless, argued that the per se injurious rule announced in *Zugar* should be substituted with a harmless error test. The Court, however, declined the State's invitation to overrule *Zugar* and its progeny, in light of the historical precedent of returning indictments in open court and this state's policy of protecting the openness of our courts.

Expert Witnesses; Discovery Violations

Valentine v. State, S13A0902 (9/9/13)

Appellant was convicted of murder. He contended that the trial court gave inadequate time for his counsel to interview and prepare for the testimony of a State's expert witness concerning blood spatter. The record showed that the State's expert witness had given an oral report of his opinions to the prosecuting attorney before the trial commenced, but the State failed to reduce that oral report to writing and to produce it to appellant, as required by O.C.G.A. § 17-16-4(a)(4). For that reason, the trial court postponed the testimony of the expert until late in the trial, and it gave appellant's lawyer an opportunity to interview the expert before he testified, a remedy for which O.C.G.A. § 17-16-6 expressly provides.

The Court noted that after the expert's testimony was postponed, appellant did not ask for more time to prepare. Rather, appellant simply urged the trial court to disallow the expert witness altogether. That remedy, however, was foreclosed by the finding of the trial court that the State had not acted in bad faith and appellant did not dispute the trial court's finding of a lack of bad faith on appeal. Thus, by failing to ask for more time to prepare for the testimony of the expert witness, the Court held, appellant waived any claim of error with respect to such failure.

Communications With Jurors; Presumption of Prejudice

Russell v. State, S13A0882 (9/9/13)

Appellant was convicted of felony murder. He contended that the trial court failed to declare a mistrial due to improper contact between a State's witness and a juror. The record showed that during a break in the trial, defense counsel observed the prosecuting detective in the case smoking a cigarette and conversing with some of the jurors. This observation was brought to the attention of the trial court, and the trial court questioned the detective and the three jurors at issue. All four testified under oath that appellant's case was not discussed at all, and that the principal topics were unrelated matters. The three jurors affirmed that neither their opinions about the case nor their impartiality had been affected by the brief contact with the detective.

The Court stated that a defendant is entitled to be tried by a jury untainted by improper influence, and improper communication with a juror raises a presumption of prejudice to the defendant, which the State must rebut beyond a reasonable doubt. However, some improper communications may be inconsequential, and in order to disturb a jury verdict, the communication must be found to be so prejudicial that the verdict at issue is deemed to be inherently lacking in due process. Here, the presumption of prejudice was rebutted by the sworn and uncontroverted testimony of all parties directly involved supporting a determination that the irregularity was inconsequential. Thus, the Court held, the contact, while improper, did not contribute to the verdicts and was harmless beyond a reasonable doubt. Accordingly, a mistrial was not required.

Voluntariness; Hope of Benefit

Dennis v. State, S13A0758 (9/9/13)

Appellant was convicted of malice murder, kidnapping with bodily injury, and other crimes in connection with the death of two victims. He contended that the trial court erred in admitting the videotaped statement that he made to law enforcement officers after his arrest because it was not knowingly, intelligently, and voluntarily made. Specifically, he alleged that the two officers who interrogated him made statements that could be construed as suggesting a lighter punishment if he confessed.

To be admissible, a confession must have been made voluntarily without being induced by the slightest hope of benefit or remotest

fear of injury. A hope of benefit generally arises from promises related to a reduced criminal punishment—a shorter sentence, lesser charges, or no charges at all. The State must prove by a preponderance of the evidence that the statement was made knowingly and voluntarily.

At the *Jackson v. Denno* hearing, one of the interviewing officers testified that he used a standard waiver of rights form to read appellant his constitutional rights; appellant was asked to read the form separately and initial each right; and appellant appeared to understand what he was doing. The form that appellant signed stated that he understood his rights and had not been threatened, promised anything, or forced to answer any questions. The Court found that the officers' statements during the course of the interview that appellant could help himself by clearing his conscience; could "do something big" by being honest; and should think how he could get back on his career path were statements encouraging him to tell the truth and not promises of a hope of benefit. Furthermore, when appellant asked the officers about the charge or sentence he was facing, they said they did not know, told him that they could not say, or made no direct response. Additionally, The officers' erroneous statements that appellant's co-defendant had cooperated with them and taken responsibility for the crime did not render appellant's statement inadmissible. Therefore, the Court concluded, the State proved by a preponderance of the evidence that appellant knowingly and voluntarily waived his rights and his subsequent statement was made without being induced by the slightest hope of benefit.

Sentencing; Motion to Vacate Sentencing

Adams v. State, S13A0692 (9/9/13)

On April 10, 1997, appellant pled guilty to charges of malice murder, kidnapping with bodily injury, armed robbery, rape, and aggravated sodomy, and was sentenced to five consecutive terms of life in prison. In 2008, appellant filed a motion for an out-of-time appeal, which the trial court denied and the Supreme Court affirmed. On April 20, 2012, appellant filed a "Motion to Vacate Void Sentence"; the trial court denied the motion, and appellant appealed.

Appellant contended that the trial court sentenced him to life in prison without the possibility of parole without finding a statutory aggravating circumstance as required by then-effective O.C.G.A. § 17-10-32.1(b), and that the sentence of life without the possibility of parole was therefore void. The Court noted that appellant's contention was based upon a misapprehension; the trial court did not sentence appellant to life in prison without the possibility of parole. Rather, the trial court sentenced him to five consecutive terms of life in prison, and such sentences did not require a finding of an aggravated circumstance under then-effective O.C.G.A. § 17-10-32.1(b).

Nonetheless, appellant contended that in sentencing him to five consecutive terms of life in prison, the trial court effectively sentenced him to life in prison without the possibility of parole. In support, he cited Article IV, Section II, Paragraph II (c) of the Georgia Constitution which provides in pertinent part that "the General Assembly, by law, may prohibit the board from granting and may prescribe the terms and conditions for the board's granting a pardon or parole to: . . . (2) Any person who has received consecutive life sentences as the result of offenses occurring during the same series of acts." However, the Court found, appellant's contention was based again upon a misapprehension. This constitutional provision does not itself forbid the Board of Pardons and Paroles from granting him parole; rather the constitutional provision empowers the General Assembly to enact a law prohibiting the Board from granting parole to one who has been sentenced in such a manner as appellant. Moreover, the Court noted, assuming without deciding that a law enacted under this constitutional provision would bring appellant's sentences under the ambit of then-effective O.C.G.A. § 17-10-32.1(b), the General Assembly has not passed such a law. Accordingly, Article IV, Section II, Paragraph II (c) of the Georgia Constitution had no effect on appellant's sentence and the trial court did not err in denying his "Motion to Vacate Void Sentence."

Out-of-Time Appeals; Unavailability of Transcript

Lewis v. State, S13A0920 (9/9/13)

Appellant was indicted on numerous counts of malice murder, felony murder, armed robbery and aggravated assault. As part of the plea negotiations, appellant pled guilty to only one count of felony murder and was sentenced to life in prison. An order of nolle prosequi was entered as to the remaining counts against him. He thereafter moved for an out-of-time appeal, which the trial court denied.

Appellant contended that he should have been granted an out-of-time appeal because his guilty plea was not entered into intelligently and voluntarily in that his constitutional rights were not explained to him as required by *Boykin v. Alabama* and the Uniform Superior Court Rules. He further argued that the trial court "failed to reserve the transcript recording of the guilty plea hearing," which he maintained was fatal to upholding the validity of his plea. The Court disagreed.

An appeal from a judgment entered on a guilty plea is authorized only if the issue on appeal can be resolved by facts appearing in the record, and the trial court's refusal to grant an out-of-time appeal is reviewed by the Court for an abuse of discretion. Where a defendant challenges the constitutionality of his guilty plea, the State has the burden to show that the plea was informed and voluntary, including that the defendant made an articulated waiver of the three *Boykin* rights, which are the right to trial by jury, the privilege against self-incrimination, and the right to confront one's accusers.

Here, the Court found, the record contained a 2006 affidavit of the court reporter at the guilty plea, which effectively stated that preparing a transcript of appellant's guilty plea hearing was no longer viable. However, the absence of a transcript of appellant's plea hearing, in and of itself, does not preclude consideration and determination of the validity of the plea; other evidence of record may establish that the plea was entered into knowingly and voluntarily. Thus, the Court noted, here a three page plea questionnaire provided a lengthy, handwritten assessment of appellant's intelligence and voluntariness. The Court concluded that the record provided was ample enough to determine that appellant had full understanding of what his plea represented and its consequences. Further, the mere fact that the trial court did not follow to the letter the Uniform Superior Court Rules did not render the record invalid. Rather, the record, as a whole, affirmatively showed that the plea

in question was knowing and voluntary and that the guilty plea substantially complied with the applicable uniform rules.

Judgment on the Merits; Want of Jurisdiction

Von Thomas v. State, S13G0198 (9/9/13)

Appellant was convicted of a felony and because he was previously convicted of three other felonies, he was sentenced pursuant to O.C.G.A. § 17-10-7(c) as a recidivist. Years later, appellant moved the sentencing court to vacate his sentence, claiming that he should not have been sentenced as a recidivist because he was denied the assistance of counsel in connection with one of his prior felony convictions. The sentencing court denied his motion on the merits, and the Court of Appeals affirmed, also on the merits.

The Court stated that when a sentencing court has imposed a sentence of imprisonment, its jurisdiction to later modify or vacate that sentence is limited. The sentencing court generally has jurisdiction to modify or vacate such a sentence only for one year following the imposition of the sentence. But a sentencing court has jurisdiction to vacate a void sentence at any time. Because appellant filed his claim to vacate his sentence five years after the sentence was imposed, the sentencing court only had jurisdiction of his motion to the extent that it presented a cognizable claim that the sentence was void. A sentence is void if the court imposes punishment that the law does not allow. Whether a sentence amounts to punishment that the law does not allow depends not upon the existence or validity of the factual or adjudicative predicates for the sentence, but whether the sentence imposed is one that legally follows from a finding of such factual or adjudicative predicates. Further, a defendant cannot assert a claim that his conviction was unlawful in an untimely motion to vacate his sentence simply by dressing it up as a claim that his sentence was void. Instead, a claim that a conviction was unlawful must be asserted by a motion for new trial, direct appeal from the judgment of conviction, extraordinary motion for new trial, motion in arrest of judgment, or petition for the writ of habeas corpus. On the other hand, motions to vacate a void sentence are limited to claims that the law does not authorize that sentence, most typically because it exceeded the most severe punishment for which the applicable penal statute provides.

The Court stated that recidivist sentencing is no different. The existence and validity of three prior felony convictions are necessary predicates to the imposition of a recidivist sentence under O.C.G.A. § 17-10-7(c), as well as timely notice that the State intended to assert such convictions in aggravation of the sentence. However, the Court noted, a defendant can waive a claim that a prior conviction was invalid because the defendant was denied the assistance of counsel in connection with that conviction. And, while there are certain situations in which a challenge cannot be waived, none involved a claim about the existence or validity of the prior convictions. Instead, they involved claims about the effect or use of the prior convictions—assuming the existence and validity of the convictions—in the imposition of a recidivist sentence, such as claims that a prior conviction under the First Offender Act could not be used in aggravation of sentence, claims that a prior conviction for which the sentence had been suspended could not be used, and claims that a prior conviction could not be used in aggravation of sentence because it had been "used up" to prove an element of a crime for which the sentence was to be imposed. None of these situations were present here.

Nevertheless, appellant argued that the Court's decision in *Nash v. State*, 271 Ga. 281 (1999) compelled a ruling in his favor. The Court disagreed. Prior to *Nash*, the burden was placed upon the State to prove the existence of prior guilty pleas used in the aggravation of sentence and that the defendant was represented by counsel in all felony cases where imprisonment resulted. However, other than death penalty cases, *Nash* shifted the burden of production to the defendant to "raise the issue" with respect to whether a prior guilty plea was entered knowingly and voluntarily. And the Court noted, since *Nash*, our courts have held that objections to the validity of prior convictions used in aggravation of sentence—including objections that the defendant was denied the assistance of counsel in connection with the prior convictions—can be waived.

Thus, the Court found, appellant did not assert a claim that his sentence was void, meaning that it was a sentence that the law did not allow. Accordingly, the sentencing court was without jurisdiction to vacate his sentence, and neither the sentencing court nor the Court of Appeals ought to have reached the merits of his motion. Accordingly, the Court vacated the decision of the Court of Appeals, and remanded the case to the Court of Appeals with direction to vacate the decision of the sentencing court and to remand to the sentencing court for dismissal of the motion.

Modified Merger Rule; Sentencing

Grimes v. State, S13A1211 (9/9/13)

Appellant was found guilty of voluntary manslaughter and felony murder. Appellant argued that the "modified merger rule" of *Edge v State*, 261 Ga. 865 (1992) should apply and he should have been sentenced only for voluntary manslaughter. However, the Court explained, the modified merger rule is not applicable when the underlying felony was independent of the killing itself, such as burglary, robbery, or even when an assault was directed against someone other than the homicide victim. Hence, the *Edge* modified merger rule does not apply to any felony murder conviction in which the underlying felony was not the aggravated assault of the murder victim. In appellant's case, the indictment charged him with attempted armed robbery by "brandishing a knife and demanding money," and the evidence supported his conviction for felony murder in the commission of that attempted armed robbery. Because the underlying felony—that attempted armed robbery—was independent of the killing itself, the Court held that the modified merger rule of *Edge* did not apply, and appellant was properly convicted of felony murder.

Appellant also contended that he was erroneously sentenced as a recidivist ineligible for parole pursuant to O.C.G.A. § 17-10-7(c) because the State failed to prove that he had been convicted of three prior felonies. However, the Court noted, appellant did not object to the statements of the prosecuting attorney or otherwise dispute that he had three prior felony convictions, and absent objection, the statements of a prosecuting attorney can prove prior convictions. Furthermore, appellant's sentencing was not subject to O.C.G.A. § 17-10-7(c) because the record

showed his recidivist sentencing for voluntary manslaughter was subsequently vacated when the trial court merged the conviction into his felony murder conviction. Thus, the only sentence that survived was the sentence for murder, and the trial court never pronounced a sentence pursuant to O.C.G.A. § 17-10-7(c) for that crime, nor did the sentencing order reflect that appellant was parole ineligible.

Compulsory School Attendance

Pitts v. State, S13A0741 (9/9/13)

Appellant was convicted of violating O.C.G.A. § 20-2-690.1 requiring children between the ages of six and sixteen attend school. She challenged the constitutionality of O.C.G.A. § 20-2-690.1(c), arguing that the statute is impermissibly vague as it fails to adequately and fairly give notice of what conduct is forbidden in that the statute does not define the terms "excused" and "unexcused" in the case of school absences. The record showed that for the counts for which she was convicted, appellant "wholly failed to provide any attempt whatsoever" to excuse her son's absences from school.

The Court stated that in the context of a law which criminalizes certain behavior, due process requires that the law give a person of ordinary intelligence fair warning of the specific conduct which is forbidden or mandated; such a law may be challenged on the basis of vagueness if it fails to provide such notice or if the statute authorizes and encourages arbitrary and discriminatory enforcement. Further, the mandate of due process provides that the law give sufficient warning that people may conduct themselves so as to avoid that which is forbidden. In considering the question of whether statutory notice satisfies the requirements of due process the statute may be considered in pari materia with other legislation and regulations.

Thus, the Court found, O.C.G.A. § 20-2-690.1(c) plainly criminalizes "unexcused" absences, O.C.G.A. § 20-2-693 confirms that excused absences are exempt, and that a violation of O.C.G.A. § 20-2-690.1 requires that the absences be without legal excuse. Legal excuse for absences are provided under O.C.G.A. § 20-2-693(a) and (b), which incorporates the general policies and regulations of the State Board of Education. Consequently, the trial court properly concluded that no person of ordinary intelligence could have reasonably believed that the wholesale failure to provide any attempt to excuse a child's absence could qualify as an "excused" absence under any conceivable definition of the word and appellant's due process challenge failed.

Next, appellant challenged O.C.G.A. § 20-2-690.1(c) on the basis of equal protection under the Georgia and Federal Constitutions. Specifically, she argued that the statute read in conjunction with OCGA § 20-2-693 permits local school boards to establish differing guidelines with respect to what constitutes an "unexcused" absence from school. The Court disagreed. The Court first found that the statute did not implicate a suspected class or a fundamental right, and thus, judicial scrutiny of the statute fell under the "rational basis" test. Rational basis involves a two-prong evaluation, in which the claimant initially has to establish that he or she is similarly situated to members of the class who are being treated differently, and that there is no rational basis for such different treatment. The claimant has the burden of proof as to both prongs because the statute under attack is presumptively valid.

The Court held that appellant failed to carry that burden. For equal protection, criminal defendants are similarly situated if they are charged with the same crime. However, even if appellant was situated similarly to others charged with violation of O.C.G.A. § 20-2-690.1, she only raised the possibility of different treatment under the statute. Also, she failed to show that any such potential variation in application of the statute was without a rational basis. Moreover, such statutory difference in treatment is not set aside merely because the classification was not made with mathematical nicety or because in practice it may result in some inequality. Thus, the Court found, O.C.G.A. § 20-2-690.1 is reasonably related to the legitimate governmental interest of ensuring that the children residing in Georgia are afforded the opportunity of an education. Furthermore, there are state-wide regulations which establish minimum requirements. The differences in the circumstances and resources of local school boards and the residents of each school district require that the varying school districts be allowed some flexibility in determining what constitutes an unexcused absence from school so as to trigger possible application of the sanctions of O.C.G.A. § 20-2-690.1. Therefore, appellant failed to demonstrate that the statute failed under equal protection.

Right of Confrontation; Douglas v. Alabama

Johnson v. State, S13A0901 (9/9/13)

Appellant was convicted of malice murder, felony murder, aggravated assault, and armed robbery. He contended that his due process rights were violated when the prosecutor improperly testified during the examination of an acquaintance. The record showed that when the State called an acquaintance of appellant to the stand to testify about prior statements he made to the GBI, the acquaintance immediately recanted, testifying that all of his prior statements were lies. After he was declared a hostile witness, the prosecutor began asking him about his former statements. The acquaintance admitted that he previously told the GBI that (1) appellant's co-defendant asked him to assist him in obtaining a gun; (2) appellant told him that he shot one victim and his co-defendant shot the other victim; and (3) appellant told him that he burned his mother's car to destroy clothes he had been wearing. On the stand, however, the acquaintance testified that all of these statements were either lies or based on second-hand information comprised of gossip or innuendo.

Appellant contended that, by questioning the acquaintance about his prior inconsistent statements without placing those statements into evidence, the prosecutor knowingly violated his due process rights in a similar manner as in *Douglas v. Alabama*, 380 U. S. 415 (1965). The Court found appellant's claim without merit. In *Douglas*, the witness in question invoked the Fifth Amendment and refused to testify. At that point, the prosecutor took the witness's prior statement, which was not entered into evidence, and read it out loud, stopping occasionally to ask the witness if he had said it. Each time, the witness refused to answer. The defendant in *Douglas* contended that this procedure violated the Confrontation Clause of the Sixth Amendment, and the United States Supreme Court agreed, stating the crucial link in that case hinged on the witness's direct statement. Although the reading of the

witness's statement was not testimony, it may well have been the equivalent in the jury's mind of testimony and that the witness in fact made the statement and that it was also true. Further, the witness's invocation of the 5th amendment prevented the defense from cross-examining the statements read aloud in violation of the Confrontation Clause.

In contrast, the acquaintance took the stand, admitted that he had previously talked with police, and testified that his previous statements were based on lies and rumors. Thereafter, the State failed to place the acquaintance's prior recorded statement into evidence, and, as a result, appellant was able to argue to the jury that the acquaintance was not credible and that the only evidence showed that he was an admitted liar. In fact, the Court noted, the transcript showed that both appellant and his co-defendant argued that point repeatedly. Thus, the record did not support appellant's claim that his due process rights were violated in an analogous manner to *Douglas*.

Right Against Self-Incrimination; O.C.G.A. § 40-6-270

Bell v. State, S13A0703 (9/9/13)

Appellant was found guilty of first degree vehicular homicide, reckless driving, hit and run, and tampering with evidence in connection with the death of the victim. He contended that Georgia's hit and run statute, O.C.G.A. § 40-6-270(a), was unconstitutional. Specifically, he claimed that the statutory requirement that one must stop at the scene of an accident and identify oneself violates a person's right against self-incrimination under both the U.S. and the Georgia Constitutions. The Court disagreed.

The Court found that appellant's issue had already been adversely decided against him in *California v. Byers*, 402 U.S. 424 (1971). In *Byers*, the California statute contained virtually identical language as Georgia's current hit and run statute. The U.S. Supreme Court held that the mere possibility of incrimination was insufficient to defeat the strong policy in favor of disclosure called for by the hit and run statute. In like manner, our Supreme Court found, Georgia's hit-and run statute does not confront an individual with substantial hazards of self-incrimination through requiring certain disclosures, as the statute is not directed at a highly selective group inherently suspect of criminal activities. Rather, the statute operates in a regulatory manner, directed at the public at large. As a result, it would be hard to narrow such a group to be either highly selective or inherently suspect of criminal activities. Moreover, the Court noted it is not a criminal offense under Georgia law to be a driver involved in an accident. An accident may be the fault of others and it may occur without any driver having been at fault. The substantial risk of self-incrimination is therefore unlikely under the statute because the majority of accidents occur without creating any criminal liability.

Finally, the Court stated, even assuming the Court viewed the statutory reporting requirement as incriminating in the traditional sense, it would be an extravagant extension of the privilege to hold that it is testimonial in the Fifth Amendment sense. Instead the mere act of complying with Georgia's hit and run statute involves no more than giving neutral information. It involves only two things: first, a driver involved in an accident is required to stop at the scene; second, he is required to give his name and address and vehicle registration number. Whatever the collateral consequences of disclosing name and address and vehicle registration number, the statutory purpose is to implement the state police power to regulate use of motor vehicles. Accordingly, the Court held, Georgia's hit-and-run statute does not violate one's right against self-incrimination under the Georgia or United States' Constitution.

Similar Transaction Evidence

Moore v. State, S13A0687 (9/9/13)

Appellant was convicted of malice murder. The evidence showed that appellant had been living with the victim for about a year prior to his death. The cause of death was found to have resulted from crushing chest injuries associated with manual strangulation. Over appellant's objection, the State presented similar transaction evidence regarding appellant's involvement in the 1995 death of Robert Littrell, who suffered from multiple sclerosis and had died from injuries consistent with manual strangulation. Appellant had lived with that Littrell for approximately five years, serving as his caretaker. Although appellant was not charged initially, he was later indicted for the murder of Littrell. In his defense, appellant claimed and provided expert testimony to show that he had inflicted Littrell's injuries in an unsuccessful attempt to resuscitate him through CPR.

Appellant contended that the trial court erred in ruling that the similar transaction evidence was admissible under USCR 31.3 (B). Under *Williams v. State*, 261 Ga. 640 (1991), the State must show that it sought to introduce the evidence of the independent offense for an appropriate purpose, that there was sufficient evidence to establish that the accused committed the independent offense, and there was a sufficient connection or similarity between the independent offense and the crime charged so that proof of the independent act tends to prove the crime charged. At the Rule 31.3 hearing, the prosecutor stated that the State was seeking to introduce the evidence of Littrell's death to show appellant's bent of mind and identity as the person who killed the victim and that there was sufficient evidence to establish that appellant caused Littrell's injuries based on his admissions to the investigator in that case. The State further showed other evidence of sufficient similarity between the two victims: the victims were of small stature, both lived with appellant for a significant time, and both experienced financial difficulties with appellant. Further, the State noted an expert's conclusion that both victims suffered from throat injuries consistent with manual strangulation, and the injuries to Littrell were not consistent with CPR, even if performed improperly and forcefully.

The trial court found that appellant served as caretaker for both Littrell and the victim at the time of their deaths. Concerning the purpose for introducing the evidence, the trial court found that the State offered the evidence to show bent of mind and identity and did not raise an improper inference concerning appellant's character. As to the evidence that appellant committed the independent act, the trial court noted that appellant admitted to Littrell's injuries, although appellant maintained that he did so inadvertently. On the similarity between the two acts, the trial court found the State provided evidence of the similarities in the personal characteristics of the two victims and the injuries that they sustained. Based on the factual findings, the trial court concluded

that the State sought to admit evidence of the death of Littrell for appropriate purposes, there was sufficient evidence that appellant committed the independent act, there was a sufficient connection or similarity so that proof of the independent act tended to prove the crime charged, and the probative value of the similar transaction evidence substantially outweighed the danger of unfair prejudice from it. Accordingly, the Court concluded that the trial court did not abuse its discretion in ruling the evidence admissible.

Hope of Benefit; Similar Transaction Evidence

Wilson v. State, S13A0723 (9/9/13)

Appellant was convicted of felony murder, possession of a firearm by a convicted felon, armed robbery, aggravated assault, hijacking of a motor vehicle, and possession of a firearm during commission of a felony. Appellant contended that the trial court erred when it admitted into evidence his recorded police interview because it was induced by a hope of benefit. Under former O.C.G.A. § 24-3-50, a confession was admissible only if "made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury." Appellant claimed that the police improperly induced his custodial statement when, in response to appellant's plea at the outset of the interview to "help me out," the detective stated: "All right. What I've got to do before I can talk to you is read you your rights, OK?" The Court state that the "hope of benefit" prohibited under O.C.G.A. § 24-3-50 must arise from a promise regarding a reduced sentence or lesser charges. Here, the Court held, the record did not show that the police made any promises, explicit or implicit, related to leniency in charges or the possible sentence appellant could receive. The noncommittal statement about which appellant complained did not approach the type of promise that would render a defendant's statement involuntary. Thus, the enumeration was without merit.

Appellant also contended that the trial court erred in admitting evidence regarding his 2005 guilty plea of two counts of aggravated assault with intent to rob. Before evidence of independent acts may be admitted into evidence, the State must show that it sought to introduce the evidence for an appropriate purpose; that there was sufficient evidence to establish that the accused committed the independent act; and that there was a sufficient connection or similarity between the independent act and the crime charged so that proof of the former tends to prove the latter. The trial court admitted the evidence regarding appellant's prior guilty plea for the limited purpose of establishing his course of conduct, which was a proper purpose for the admission of such evidence at the time of his trial. Further, there was no question as to appellant's involvement in the prior crime, given that he pled guilty to it. With regard to the similarities between the incidents, the evidence reflected that both incidents involved the shooting and pistol-whipping of unarmed victims who were targeted for robbery due to their known propensity to carry substantial cash; both incidents took place in the neighborhood in which appellant was living at the time, and in both instances appellant fled the scene and later admitted being present but denied being the attacker. In light of these similarities, the Court found no error in the trial court's admission of the similar transaction evidence.

Abandonment; Extraordinary Motion for a New Trial

Muse v. State, A13A1041 (8/30/13)

Appellant was convicted of criminal attempt to commit aggravated child molestation and criminal attempt to commit child molestation. The evidence showed that a law enforcement task force placed a fake Craig's List post to which appellant responded, and continued in correspondence via email. The task force member posed as "Father Dave," the stepfather of a fictional minor 14-year-old girl, and offered to allow appellant to engage in sexual contact with the child. Appellant eventually agreed to meet the fictitious minor at a motel. Although appellant indicated that he would be late to the meeting and driving a black Ford F150 truck, he showed up on time in a white GMC truck and parked outside of the room number designated by undercover law enforcement. Five task force members arrived in unmarked vehicles and wearing t-shirts that bore an FBI task force insignia on the left breast. The agents posing as the stepfather and minor female victim arrived in a silver Mazda, the type of car appellant was told to expect, and parked next to the white GMC. The agents recognized appellant as the truck's occupant from a photograph appellant had provided. Thereafter, at the lead agent's request, another agent pulled into the parking space beside the Mazda, rolled down his window, examined the truck's occupant, agreed that it was appellant, and relayed this information to the agent in the Mazda before returning to his original strategic parking location. At that point, appellant exited the motel parking lot at a high rate of speed and drove onto the interstate. The agents pursued appellant, initiated a stop, and made an arrest.

Appellant argued that there was insufficient evidence to convict him because the State failed to rebut his evidence of abandonment when he left the motel parking lot. The Court stated that when a person's conduct would otherwise constitute an attempt to commit a crime under O.C.G.A. § 16-4-1, "it is an affirmative defense that he abandoned his effort to commit the crime. . . under circumstances manifesting a voluntary and complete renunciation of his criminal purpose." However, a renunciation is not voluntary and complete if it results from a "belief that circumstances exist which increase the probability of detection or apprehension of the person or which render more difficult the accomplishment of the criminal purpose . . . ." And when a defendant raises and testifies in support of an affirmative defense, the State has the burden of disproving that defense beyond a reasonable doubt.

The Court held the circumstances surrounding appellant's flight from the motel parking lot indicated his acute awareness of the officer's presence. Evidence showed that appellant left the parking lot shortly after law enforcement's arrival, law enforcement wore apparel which bore the FBI insignia, and the manner in which the agent's used their vehicles to identify appellant created awareness in the appellant of the probability of apprehension. Although the jury heard appellant's subsequent recorded custodial statements in which he "expressed hesitation", they were authorized to determine whether the State met the burden to disprove the affirmative defense.

Appellant also argued that the trial court erred in denying his extraordinary motion for new trial based on new evidence. Under O.C.G.A. § 5-5-23, a new trial may be granted

in any case where any material evidence, not merely cumulative or impeaching in its character but relating to new and material facts, is discovered by the applicant after the rendition of a verdict against him and is brought to the notice of the court within the time allowed by law for entertaining a motion for a new trial. Further, a new trial may be granted on the basis of newly discovered evidence when the party seeking a new trial satisfies the lower court (1) that the evidence has come to his knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness.

Appellant contended that he was entitled to a new trial because subsequent to his conviction, it was discovered that the Craig's List posting presented to the jury was not the post to which appellant responded. However, the Court found, appellant had knowledge of the correct posting prior to trial and that, even if he did not, the correct posting content was not so material as to produce a different result. Indeed, appellant was the party who actually responded to the Craig's List post and, accordingly, was necessarily aware of its content. Thus, the contested evidence was not so material that would have probably produced a different result.

Similar Transaction Evidence

Thompson v. State, A13A1242 (9/4/13)

Appellant was found guilty of several counts of forgery. The evidence showed that appellant gave two accomplices fraudulently drawn checks from a Taco Mac restaurant for amounts under $500. The accomplices presented the checks to a convenience store clerk and planned to receive a cut from appellant when the clerk delivered the cash. When the cashier called the restaurant to verify the authenticity of the checks, the accomplice snatched the checks and fled. In pursuit, officers observed shreds of paper coming from appellant's vehicle and the accomplices later testified that they tore and discarded those fraudulent checks.

Appellant contended that the trial court erred in admitting evidence of two similar transactions Specifically, he contended that the State failed to show a "sufficient degree of similarity" between the similar transactions and the offenses charged in this case. The Court stated that similar transaction evidence is admissible where the State proves that (1) it is introduced for a proper purpose, (2) sufficient evidence shows that the accused committed the independent offense, and (3) a sufficient connection or similarity exists between the independent offense and the crime charged so that proof of the former tends to prove the latter. When addressing the "similarity" of the transaction evidence, the proper focus is on the similarities between the prior acts rather than the dissimilarities. The law does not require the prior acts to be identical in all respects to the charged offenses, and there can be a variation of circumstances where there exists a logical connection between the crimes.

The evidence showed that in the first similar transaction, appellant and an accomplice cashed two fraudulent payroll checks at a small independent grocery store. The fraudulent checks were in amounts of under $500 and were purportedly drawn from a bank account held in the name of a Taco Bell franchise. Appellant was arrested for this offense and pled guilty to forgery in the first degree. The second similar transaction showed that appellant cashed a fraudulent payroll check at a gas station/convenience store. The fraudulent check was under $500 and purportedly drawn from a bank account held in the name of a Taco Bell franchise. In that occurrence, appellant had two other accomplices with him. One of the accomplices also had a purported payroll check from Taco Bell, but the clerk refused to cash it.

The Court noted that in each similar transaction, appellant was a participant with others in attempts to cash fraudulent payroll checks at small convenience stores. The fraudulent checks were for similar amounts and were purportedly drawn from bank accounts held by Mexican food restaurants. All three occurrences were committed within a 15-month time frame. Although appellant claimed that he was not involved in the forgeries and that the only evidence that implicated him was biased testimony of the accomplices, the similar transactions were nonetheless probative and relevant because they implicated appellant in a "continuing enterprise" of negotiating fraudulent checks over a short period of time. Thus, the trial court did not err in permitting the testimony.