CaseLaw Update

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CaseLaw This Week

Week Ending May 14, 2004

- **Constitutional Law – Vagueness**
- **Mutually Exclusive Verdicts**
- **Search and Seizure – Warrant based on statements against penal interest**
- **Search and Seizure – Burden of proving the validity of the warrant**
- **Search & Seizure**
- **Identification**
- ***Allen* Charge**

Constitutional Law – Vagueness

Lindsey v. State, S04A0224 (04/27/04), 04 FCDR 1531, 2004 Ga. LEXIS 319.

The defendant was charged, among other things, with carrying a concealed weapon in violation of O.C.G.A. § 16-11-126 (a). The loaded pistol was being transported in his car in a side door pocket that did not contain a lid that would be capable of enclosing the pistol within the pocket of the car door. According to O.C.G.A. § 16-11-126 (d), the crime of carrying a concealed weapon shall not forbid a person, who is not otherwise ineligible for a license, from transporting a loaded firearm in any private passenger vehicle in an open manner, fully exposed to view, or in the glove compartment, console, or similar compartment of the vehicle. The defendant argues that section (d) of O.C.G.A. § 16-11-126 is unconstitutionally vague in that it does not define glove compartment, console, or other similar compartment.

Statutory language that has a commonly understood meaning satisfies the requirements of due process. *Rouse v. Dept. of Natural Resources*, 271 Ga. 726, 729 (2)(a) (524 S.E.2d 455)(1999). The court held that although the statute does not define those particular terms, each term has a commonly understood meaning when used in reference to a car. **"In order to transport a firearm in a compartment which is 'similar' to [a glove box or console], the weapon must necessarily**

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be located in an area of the automobile that is equipped with a lid or cover so as to be capable of enclosing its contents." The court held that the trial court correctly overruled the defendant's demurrer challenging the constitutionality of O.C.G.A. § 16-11-126 for vagueness.

Mutually Exclusive Verdicts

Flores v. State, S04A0319 (04/27/04), 04 FCDR 1549, 2004 Ga. LEXIS 322.

The defendant was convicted of felony murder while in the commission of aggravated assault by shooting the victim with a pellet gun, aggravated assault of the victim with a pellet gun, aggravated assault of a third party with a pellet gun, involuntary manslaughter of the victim while in the commission of reckless conduct, reckless conduct against the victim, and reckless conduct against the third party. The defendant appealed arguing, among other things, that a guilty verdict for felony murder and a guilty verdict for involuntary manslaughter are mutually exclusive under the reasoning of *Jackson v. State*, 276 Ga. 408 (577 S.E.2d 570)(2003). The court agreed and reversed the defendant's conviction for felony murder and granted a new trial.

In *Jackson*, the defendant was found guilty of felony murder based on aggravated assault and involuntary manslaughter based on reckless conduct. He argued that guilty verdicts for felony murder and involuntary manslaughter are mutually exclusive because the verdicts reflect the possibility that the jury could have found that the defendant acted with both criminal intent and criminal negligence. In that case the court agreed and set forth an analysis to be used when confronted with the possibility of mutually exclusive verdicts. The court defined mutually exclusive verdicts as a situation where a guilty verdict on one count logically excludes a finding of guilt on the other. The court further stated that guilty verdicts for felony murder and involuntary manslaughter are not mutually exclusive as a matter of law. Rather, one must also analyze the act upon which the charge of felony murder and involuntary manslaughter is predicated. If the finding of guilt for both felony murder and involuntary manslaughter rests on the commission of a predicate act where the jury was required to reach two positive findings of fact that cannot logically mutually exist, then the two guilty verdicts are mutually exclusive.

The circumstances of *Jackson* are essentially the same as those in the present case. Here, the defendant was found guilty of felony murder based on aggravated assault. He was also found guilty of involuntary manslaughter based on reckless conduct. Following the reasoning of *Jackson*, felony murder based on aggravated assault requires proof of criminal intent where involuntary manslaughter based on reckless conduct requires proof of criminal negligence. Therefore, a finding of felony murder based on aggravated assault logically excludes a finding of involuntary manslaughter based on reckless conduct because criminal intent and criminal negligence cannot exist within the same act, the pointing of the pellet gun at the victim which ultimately resulted in his death.

Justice Carley wrote a concurring opinion in order to expound upon the issue of mutually exclusive verdicts since he wrote a strong dissent in *Jackson v. State*, supra. Because *Jackson* is now the law of Georgia, Justice Carley fully supports the *Flores* decision; however, he specifically wrote for the benefit of the bench and bar a warning that the principle of mutually exclusive verdicts sets a trap for the unwary. The Justice states **"our trial judges and prosecuting attorneys would be well advised to exercise extreme caution in a case in which the indictment or accusation charges alternative offenses which may result in mutually exclusive verdicts."** The concurrence warns that a defendant who does not object to an erroneous jury charge or even a defendant who induces an erroneous charge may still raise the mutually exclusive verdicts issue on appeal and would be entitled to a new trial if successful. If the possibility of mutually exclusive verdicts exists, then it is important to make sure the jury is informed that it cannot return verdicts on all counts. They may return guilty verdicts to only one of the mutually exclusive charges.

Search and Seizure – Warrant based on statements against penal interest

Graddy v. State, S03G1611 (04/27/04), 04 FCDR 1558, 2004 Ga. LEXIS 318.

The defendant was charged with manufacturing methamphetamine, manufacturing methamphetamine within 1000 feet of a school, and possession of a firearm by a convicted felon. She moved to suppress the evidence recovered from her property and to dismiss the charges against her based on the fact that the probable cause for the search warrant was based on hearsay statements that were against the penal interest of a third party declarant. The motions were granted by the trial court, but the Court of Appeals reversed. The Georgia Supreme Court granted cert. to address issues raised by the Court of Appeals' opinion.

One issue the Court considered was "whether there is a distinction between the admission at trial of hearsay

statements that are against the penal interest of the declarant and the inclusion of such statements in an affidavit seeking issuance of a search warrant." Hearsay statements that are against the penal interest of the declarant and exculpatory of the accused are inadmissible in State criminal cases. However, this prohibition does not apply to pre-trial warrants. The court held that **"although a third party's exculpatory hearsay admissions against penal interest are inadmissible at a criminal trial, inculpatory statements that are made by a known or identified informant can establish probable cause for issuance of a search warrant."**

Search and Seizure – Burden of proving the validity of the warrant

Graddy v. State, S03G1611 (04/27/04), 04 FCDR 1558, 2004 Ga. LEXIS 318.

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One issue considered by the Court was the Court of Appeals reliance on *State v. Towe*, 246 Ga. App. 808 (541 S.E.2d 423)(2000), for the proposition that a defendant who challenges the validity of a warrant also has the burden of proving the warrant invalid. In the present case, the Court of Appeals stated "[w]hen a warrant has been obtained and it is challenged, the burden of proving its invalidity is on the challenger." The Court cited *State v. Towe*, supra, as its authority. *Towe* does hold that any challenger of a warrant also has the burden of proving its invalidity. The *Towe* opinion cites *Davis v. State*, 266 Ga. 212 (465 S.E.2d 438)(1996), as its authority. However, **the Georgia Supreme Court states that this holding in *Towe* "represents a serious misunderstanding of our holding in *Davis*."** In *Davis*, supra, the Court expressly rejected the idea that the challenger of a search warrant has the burden of proving its invalidity. The *Towe* opinion cited *Davis* in error as its authority supporting its claim that the defendant has the burden of proving the invalidity of a search warrant. As a result, **the Georgia Supreme Court overruled *Towe v. State* and "any other decision which places the burden of proof on the defendant who challenges a search warrant."** However, in the present case, the erroneous statement of law did not require reversal of the Court of Appeals decision. The Georgia Supreme Court found that the State assumed the burden of proving the validity of the warrant and under those circumstances the magistrate was not in error in finding probable cause to search the defendant's property.

For clarification on the burden, "[o]nce a motion to suppress has been filed, the burden of proving the lawfulness of the warrant is on the State and that burden never shifts. The only burden upon the challenger of a search warrant is that of producing evidence to support his challenge, which burden is shifted to him only after the State has met its initial burden of producing evidence showing the validity of the warrant." *Davis v. State*, 266 Ga. 212, 213.

Search & Seizure

White v. State, A04A0786 (04/27/04), 04 FCDR 1580, 2004 Ga. App. LEXIS 569

The Court of Appeals affirmed the defendant's conviction for cocaine possession. The defendant contended that one of the arresting officers illegally detained him and therefore all evidence discovered and statements made after the detention should have been suppressed. The court held that because the police were on property open to the general public and because initially they only questioned the defendant, the encounter was a first-tier encounter that triggered no Fourth Amendment protection. The encounter escalated to a second-tier encounter when the officer grabbed the defendant, but only after the defendant admitted to having drugs on his person.

Identification

Taylor v. State, A04A0464 (04/27/04), 04 FCDR 1581, 2004 Ga. App. LEXIS 567

The Court of Appeals affirmed the defendant's conviction for burglary, holding that there was no reversible error in the trial court's refusal to suppress identification evidence that was obtained by suggestive means. The court utilized a two-part test to determine if the identification evidence should be excluded. "**The threshold inquiry is whether the identification procedure was impermissibly suggestive. Only if it was need the court consider the second question: whether there was a very substantial likelihood of irreparable misidentification."** The court found that the method of identification used in this case, namely that the police brought the defendant back to the victim's house in a patrol car and had the defendant get out

of the car so that the victim could make the identification, was suggestive. The court then examined the likelihood of misidentification using a totality of the circumstances test. The court used as factors: **(1) the opportunity of the witness to view the perpetrator at the time of the crime, (2) the witness' degree of attention, (3) the accuracy of the witness's prior description of the perpetrator, (4) the level of certainty shown by the witness at the time the confrontation and (5) the length of time between the crime and the confrontation.**" Using these factors the court concluded that there was not a substantial likelihood of misidentification and the conviction was therefore affirmed.

Allen *Charge*

Burchette v. State, S03G1195 (05/03/04), 04 FCDR 1538, 2004 Ga. LEXIS 332

The Supreme Court of Georgia affirmed the defendant's conviction. The defendant appealed a portion of the standard *Allen* charge given to deadlocked juries, the portion that provides, "**[t]his case must be decided by some jury selected in the same manner this jury was selected and there is no reason to think a jury better qualified than you would ever be chosen.**" The Court concluded that the statement "must be decided by some jury" is inaccurate because there are instances where a criminal trial that ends in a hung jury does not have to be retried. Therefore, the statement "must be decided by a jury" is not accurate in these cases. "**Because we agree with courts that have concluded that the 'must-be-decided' charge is inaccurate in non-death penalty cases, and because such an inaccurate charge should not be given in a criminal trial, we now hold that the 'must-be-decided' charge should no longer be included in *Allen* charges in this State.**"

**The Prosecuting Attorneys' Council encourages you to add commentary or creative prosecution suggestions for any of this Caselaw. The responses will be published in a PAC publication, please e-mail David Fowler at dfowler@pac.state.ga.us, or Joe Burford at jburford@pac.state.ga.us with feedback.*