

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JULY 20, 2012

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## THIS WEEK:

- **Identification**
- **Jury Charges; Knowledge**
- **Homicide by Vehicle; Similar Transactions**
- **Recidivist; Parole**
- **Double Jeopardy; Child Hearsay Statute**
- **Drug Trafficking; Equal Access**
- **Juveniles; Gang Activity**

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## Identification

*State v. Mojica, A12A0252 (7/5/2012)*

Mojica was indicted on the charges of kidnapping with bodily injury, robbery by force, aggravated assault, and two counts aggravated battery for the workplace assault of Dana Raissian. After three mistrials, the trial court granted Mojica's third motion to reconsider the denial of his motion to suppress identification on constitutional grounds and suppressed the identification. The State appealed pursuant to OCGA § 5-7-1 (a) (4). However, the Court found no error and affirmed.

The evidence showed that Raissian was working after hours in her office when she noticed Mojica, an employee of the office building's cleaning service, walk through her office to reach a filing area behind that office. Later that evening, as Raissian walked down the hall from her office to the printer, she was startled to see the same man in her peripheral vision, but then calmed down once she recognized him as a cleaner. As she turned to look back, the man told her "I need you to cooperate with me" and dragged her into a dark office where she was choked until she passed out. When she

regained consciousness, Raissian was back in her own office. She had been badly beaten: her left scapula was broken, her jaw was broken in two places, teeth were missing, her ear was ripped, and she had a subarachnoid hemorrhage in her brain. Security officers were the first to reach the victim and began to question her about the attack. Raissian described her attacker as a tall, Hispanic male with a moustache and broad shoulders, wearing an apron. She indicated that it was the same person who cleaned her floors earlier that evening. A police officer then arrived on the scene. The building cleaning crew supervisor was present when the officer questioned Raissian. The supervisor did not hear all of Raissian's description, but after hearing that the attacker was cleaning near Raissian's office, she went downstairs to retrieve Mojica's worker identification badge and gave it to the officer. Raissian was placed on a gurney by EMT personnel, and, as she was waiting by the elevators to leave, the officer showed the identification badge to Raissian and asked if she recognized the person as her attacker. Raissian said that she recognized him as the man who cleaned her floor earlier. Pascoe ordered all Hispanic male cleaners to remain at work for questioning that evening, but Mojica left with his girlfriend, who testified at trial that he made her leave with him and their young child and go to Chicago that evening to avoid arrest.

There were three jury trials in this case that each resulted in a mistrial. Before the first jury trial, the first trial judge, denied a motion to suppress Raissian's identification of Mojica's identification badge. The first judge presided over the first two mistrials. Before the third trial, the first judge denied reconsideration of the motion to suppress and another judge was

brought in to preside over the third trial of the case, which also resulted in a mistrial. A second motion to reconsider the denial of the motion to suppress was denied by the second judge prior to the third jury trial. After the third trial, the first judge, now acting in senior status, granted Mojica's third motion to reconsider the denial of the motion to suppress, holding that additional evidence presented during the three trials convinced her that the identification was impermissibly suggestive.

The State argued that the trial court erred in finding that Raissian's identification of Mojica by only looking at his worker identification badge was impermissibly suggestive and in granting Mojica's third motion for reconsideration. The Court disagreed. The Court noted that even assuming that Raissian's identification of Mojica's worker identification badge was not impermissibly suggestive, the issue was whether under "the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." Here, Raissian's testimony that she had the opportunity to see her attacker in the lighted hallway prior to her attack conflicted with testimony from responding officers who interviewed her directly after the attack when she said that she had been grabbed from behind; Raissian did not have the opportunity to see her attacker during the assault since they were in a darkened office and her attention was focused on her own survival; the ER physician who treated Raissian testified that the injury to her brain could have caused memory loss; and several cleaners working at the building that evening fit Raissian's description of a tall, broad-shouldered Hispanic male. Therefore, the Court could not conclude that the trial court erred in ruling that there was a substantial likelihood of misidentification.

Next, the State argued that the trial court erred in considering Mojica's third motion for reconsideration because it was untimely filed and out of term. The State did not contest that Mojica's original motion to suppress was timely filed, arguing instead that the trial court erred in considering Mojica's second and third motions for reconsideration because they were filed outside the time period proscribed by OCGA § 17-7-110. The Court found that whether Mojica was to be afforded an opportunity to file for reconsideration of the original motion to suppress outside the time proscribed by OCGA § 17-7-110 was at the discretion of the trial court. The Court noted that, "This

discretion will not be disturbed on appeal absent abuse of discretion." When the motion to suppress was initially heard, the only witnesses who testified were Raissian, the officer, and cleaning supervisor. In its orders granting the motion to reconsider, the trial court noted that it was convinced by additional evidence presented during the course of the three jury trials that its denial of Mojica's motion to suppress was in error. This evidence included testimony from an expert witness during the third trial that Raissian's injuries could have caused memory and vision loss, conflicting statements made by Raissian regarding the circumstances of her attack, and testimony from an investigator during the third trial that she did not use a later photo lineup because she was concerned the victim might not pick the right victim. Because the evidentiary posture changed, the Court held that the trial court did not err in considering Mojica's second and third motions for reconsideration out of term.

## Jury Charges; Knowledge

*McGee v. State, A12A0564 (7/6/2012)*

Appellant was convicted of trafficking in cocaine. Appellant contended that the trial court erred in its response to a jury question pertaining to the knowledge requirement of the trafficking statute. The Court agreed. In its initial charge, the trial court instructed the jury on the statutory definition of trafficking in cocaine, see OCGA § 16-13-31 (a) (1), but the court did not define "knowingly" as that term is used in the trafficking statute. Later, during its deliberations, the jury returned a note inquiring, "Does the defendant have to know what crime is being committed to be a party to that crime?" In response to the jury's question, the trial court responded, "The short answer to that is no. As far as to know what specific crime is being committed, the defendant—the State would have to prove, however, that the defendant knew, or should have known, what prohibited conduct was being committed." Appellant objected to the trial court's response to the jury's question, arguing that "you actually have to know what a person is doing to be a party to it." The trial court noted appellant's objection for the record but made no correction to its response to the jury's question.

The Court found that the trial court's response to the jury's question was an incor-

rect statement of the knowledge requirement imposed by the trafficking statute. The Court explained that to convict a defendant of trafficking in cocaine, the State must prove "that the defendant knew that he possessed a substance and knew that the substance contained some amount of cocaine." Furthermore, the conviction of a defendant as an aider and abettor and thus party to the crime requires proof that he "had knowledge of the intended crime and shared in the criminal intent of the principal actor." The trial court's response, however, erroneously informed the jury that appellant could be found guilty of trafficking in cocaine upon a showing of mere criminal negligence rather than proof of guilty knowledge. All charging errors are presumed to be prejudicial unless the record shows them to be harmless. Error in a jury charge is harmless only if there is no reasonable probability that it misled the jury or permitted a defendant's conviction on an erroneous theory. The Court concluded that there was a reasonable probability that the erroneous response may have misled or confused the jury regarding what the State was required to prove. While the evidence was sufficient for the jury to find that appellant had knowledge of and shared in the criminal intent to possess the cocaine that his friend sold to the undercover agent, the evidence on this point was not overwhelming. Given the evidence presented, the jury could have found that appellant knew that his friend was involved in some type of dangerous transaction and agreed to protect him from being robbed, but did not specifically know that his friend possessed cocaine as part of that transaction or share in his criminal intent to possess it. The Court therefore reversed appellant's conviction and remanded the case for a new trial.

## Homicide by Vehicle; Similar Transactions

*McMullen v. State, A12A0296 (7/9/2012)*

Appellant was convicted on two counts of homicide by vehicle in the first degree stemming from a motor-vehicle accident in which it was determined that appellant was driving under the influence of a combination of drugs to the extent that it was less safe for her to do so. Appellant argued that the trial court erred in admitting similar transaction evidence. At trial, the State presented evidence that the accident occurred on a clear day—free of rain,

fog or other visual impairments—and that the immobile truck and trailer were visible from the “straightaway” road for approximately five to seven tenths of a mile prior to the point of impact. The only known eyewitness to the accident testified that she was headed southbound on the same road and observed as appellant’s vehicle approached and then struck the trailer without appearing to brake, slow down, or swerve to avoid the accident in any way. The witness further stated that there were no other vehicles on the road that would have impeded appellant’s view or prevented her from changing lanes prior to the collision. The State also presented expert-witness testimony from a clinical neuropsychopharmacologist who discussed in general the anticipated effects on the average human body of the drugs discovered in appellant’s blood, which included the presence of methamphetamine, morphine, and phentermine, at the identified concentration levels. He opined that, although the drugs may to some extent offset each other in that the morphine may counter the agitation and excitement caused by the methamphetamine and, to a lesser extent, the phentermine, the combined effect of those drugs would likely negatively impact appellant’s alerting responses, heighten her level of distractibility, and “certainly increase the probability of impairment” while driving. Finally, over appellant’s objection, the State admitted similar-transaction evidence of a 1998 conviction, in which appellant pleaded guilty to possession of methamphetamine with the intent to distribute.

Appellant asserted the trial court erred in denying her motion to suppress and allowing the State to introduce, as evidence of a similar transaction or occurrence, a certified copy and testimony regarding her guilty plea, more than ten years prior to the present offense, for possession of methamphetamine with the intent to distribute. Appellant moved to exclude the evidence on the basis that the prior crime was not sufficiently similar and was too remote in time to warrant its admission. The Court noted that appellant’s prior conviction stemmed from an incident in which she was the passenger in a vehicle that was stopped by a deputy conducting a license check. The State called the deputy as a witness who testified that the driver of the car was determined to be driving under the influence and gave him consent to search her vehicle. During the search, appellant was seen trying to swallow an undetermined amount of

methamphetamine that had been in her pants, and the deputy found an additional amount of methamphetamine in a small box in the car. Appellant ultimately pleaded guilty to possession of methamphetamine with intent to distribute, and the State tendered a certified copy of her conviction. The trial court determined that the crimes were sufficiently similar so as to allow the evidence of the prior conviction for the limited purpose of showing appellant’s course of conduct, bent of mind, and intent.

The Court disagreed with the trial court and found that other than the fact that both crimes involved methamphetamine, there were virtually no similarities between the two crimes. The Court could discern no relevance that a ten-plus year old conviction for possession of methamphetamine with intent to distribute would have to the determination of whether appellant was under the influence of a combination of drugs to the extent that it rendered her a less safe driver during the accident at issue. The Court found that this was inadmissible character evidence and was “highly and inherently prejudicial.” The Court therefore reversed appellant’s convictions.

## Recidivist; Parole

*Barber v. State, A12A0759 (7/9/2012)*

Appellant was convicted of rape, statutory rape, and child molestation. The trial court concluded that appellant was subject to the sentencing provisions of OCGA § 17-10-7 (c), and pursuant to those provisions, the court sentenced him to imprisonment for life without parole for the rape, as well as imprisonment for concurrent terms of twenty years without parole for the statutory rape and child molestation. Appellant contended that he was not properly subject to the sentencing provisions of OCGA § 17-10-7 (c). The Court agreed and vacated his sentence and remanded for resentencing.

According to OCGA § 17-10-7 (c), when someone commits a felony, having already been convicted of three earlier felonies, he must serve the sentence imposed upon his conviction for the fourth or subsequent felony without parole. In this case, appellant was convicted of rape, statutory rape, and child molestation, all crimes that he committed, according to the indictment, in or around June 2007. The record showed that, prior to June 2007, appellant had been twice convicted of felonies,

once in 2001 for felony assault and receiving stolen property in Ohio, and once in 2002 for impersonating a police officer. The record also showed that, after June 2007, but before his conviction in this case, appellant had been convicted of a third felony, forgery. Based on these three felonies, the court below concluded that OCGA § 17-10-7 (c) applied. Appellant argued, however, that the third prior felony conviction did not count for the purposes of OCGA § 17-10-7 (c), inasmuch as that conviction was entered only after he committed the crimes of which he was convicted in this case. The Court agreed. The Court found that the terms of OCGA § 17-10-7 (c) were clear and unambiguous, and they plainly forbid parole only when a defendant, “after having been convicted” of three felonies, “commits [another] felony.” Therefore the Court held that the record failed to show a basis for applying the sentencing provisions of OCGA § 17-10-7 (c), and the sentence imposed by the trial court must be set aside, and the case remanded to the court below for resentencing.

## Double Jeopardy; Child Hearsay Statute

*Wadley v. State, A12A0445 (7/12/2012)*

Appellant was convicted of one count of child molestation. Thereafter, his trial counsel filed a motion to disqualify the trial judge from further proceedings in appellant’s case. The motion was granted based on evidence of the judge’s “bias, prejudice or a systematic pattern against defense counsel.” Appellant then filed a motion for new trial claiming multiple errors, including the trial judge’s bias, the sufficiency of the evidence, and that the child’s hearsay evidence was inadmissible. The Court ultimately affirmed the denial of appellant’s plea in bar following the grant of a new trial after he was convicted of child molestation, holding that double jeopardy did not apply because the evidence supported his conviction.

The trial court granted appellant a new trial on the basis that the actions by the trial court exhibited bias, that the trial court had commented on the evidence in the presence of jurors as prohibited by OCGA § 17-8-57, and that over appellant’s objection, the trial court had held a hearing on sealed Department of Family and Children Services records without him being present, presumably as an

in camera inspection under OCGA § 49-5-41 (a) (2). The trial court specifically rejected appellant's arguments as to the sufficiency of the evidence and the admissibility of certain hearsay under the Child Hearsay Statute. Facing a second trial, Appellant filed a "Plea in Bar and Motion to Dismiss Indictment with Prejudice Based on Double Jeopardy, Prosecutorial Misconduct and Other Misconduct of the State," challenging, among other things, the admissibility of the child's hearsay testimony. Appellant contended that the trial court erred in denying his plea in bar because the admission of the child victim's out-of-court statements violated the Child Hearsay Statute and the Sixth Amendment. Relying on *Hatley v. State*, 290 Ga. 480 (722 SE2d 67) (2012), appellant contended that, by failing to put the child victim on the stand during the trial, the State violated his Sixth Amendment right of confrontation and that the inadmissible hearsay of the victim's out-of-court statement was legally insufficient to support a conviction because that was the only evidence of his guilt. In *Hatley*, the Georgia Supreme Court held that courts must now interpret OCGA § 24-3-16, consistent with the demands of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (129 SC 2527, 174 LE2d 314) (2009), to require the prosecution to notify the defendant within a reasonable period of time prior to trial of its intent to use a child victim's hearsay statements and to give the defendant an opportunity to raise a Confrontation Clause objection. If the defendant objects, and the State wishes to introduce hearsay statements under OCGA § 24-3-16, the State must present the child witness at trial; if the defendant does not object, the State can introduce the child victim's hearsay statements subject to the trial court's determination that the circumstances of the statements provide sufficient indicia of reliability. The trial court should take reasonable steps to ascertain, and put on the record, whether the defendant waived his right to confront the child witness. The Court also held that construing the Child Hearsay Statute in a manner "that fails to put the onus on the prosecution to put the child victim on the witness stand to confront the defendant" cannot pass constitutional muster. Here, although the child victim was available to testify, she was not called to the stand. Her statement was presented through the

testimony of other witnesses over appellant's continuing objection. The Court noted that premitting whether the trial court erred in admitting her out-of-court statements, a retrial is not barred by the double jeopardy provisions of the Georgia and United States constitutions because the evidence against appellant was not insufficient. Rather, in this case, the Court found that the error asserted was that it was admitted in a manner that violated appellant's right to confront a witness against him. Thus, the testimony could be properly introduced on retrial if the State proceeded as directed by *Hatley*. The Court held that evidence found to be inadmissible hearsay on appeal but which could be made admissible at re-trial by laying the proper foundation may be considered when examining whether the evidence was sufficient to authorize the guilty verdict.

## Drug Trafficking; Equal Access

*Garcia v. State*, A12A0662 (7/11/2012)

Appellant was convicted by a jury of trafficking in cocaine, trafficking in methamphetamine, and possession of a firearm during the commission of a felony. He was acquitted of misdemeanor possession of marijuana. He appealed the denial of his amended motion for new trial, challenging the sufficiency of the evidence. Because the State failed to prove any connection between appellant and the contraband other than spatial proximity, the Court reversed.

The evidence showed that FBI narcotics agents, investigating a suspected shipment of cocaine from Mexico to Atlanta, were led to a house. The agents conducted a "knock and talk" at the house, hoping to gather information from the occupants and to obtain permission to conduct a search. The agents knocked on the door for about three minutes before appellant opened the door and told the agents that he neither lived in nor owned the residence. Four other people were also found in the house. One of the other people present told the agents that he had been living in the house for two weeks, and he consented to the officers' search of the house, despite the lack of a warrant. Upon entering, the agents performed a protective sweep of the house, which revealed four weapons and a quantity of marijuana. Following this discovery, the

agents placed under arrest all five of the people found in the home, including appellant. Upon execution of a search warrant, officers found the following contraband in the house: hidden in the attic, two guns; hidden in the fireplace chimney, a plastic container of methamphetamine; on the fireplace mantle, a ledger containing drug transaction notes; hidden inside the clothes dryer, a money counter; in a corner of the living room, a "shrine" related to drug trafficking; hidden inside a wall behind a medicine cabinet in one bathroom, five plastic containers of methamphetamine; and in the other bathroom, hidden inside a wall behind a medicine cabinet, a large quantity of cocaine, over \$46,000 in cash, and notes regarding drug transactions. Additionally, a search of one bedroom revealed three guns: one under a mattress, one inside a suitcase, and one under a bed. The search of another bedroom, identified as room "E," revealed a gun under a pillow on a sleeping bag lying on the floor, two more guns in the bed, and a pair of plaid shorts and a dark colored t-shirt with a light colored logo across the chest. An FBI agent testified that, during his surveillance of the house prior to executing the search warrant, he noticed a man exit the subject house and obtain a lawnmower from a neighboring house. The man, whom the agent identified as appellant, then pushed the lawnmower back to the house and proceeded to cut the grass. The agent also identified the clothes located in bedroom "E" as the clothes appellant wore while cutting the grass. Appellant testified on his own behalf at trial, stating that he had been living with a friend for the past three months. Appellant further testified that he had never visited that house prior to the day of the arrest; and that he was at the house earlier that day because he was to be paid \$50 to cut the grass. He borrowed clothes from another occupant in the house to wear while cutting the grass; afterwards, he left the clothing in bedroom "E." Appellant stated that he left the house because there was no one to pay him at that time. He was later told to arrive at the house that evening to receive his payment. Once at the house, appellant testified that he stood by the door because he did not know the other people in the house and did not feel comfortable sitting with them on the couch. Appellant contended that the State failed to prove that he knowingly possessed the drugs because

he was not the owner or lessee of the house; no contraband was found on his person; and the evidence did not link him with the drugs found hidden in the house.

The Court agreed and noted that an essential element of trafficking in cocaine and trafficking in methamphetamine is the knowing possession of 28 grams or more of the substances. Possession may be actual or constructive and joint or exclusive, but mere spatial proximity to the contraband is not sufficient to prove joint constructive possession, “especially where, as here, the contraband is hidden.” Instead, the State needed to demonstrate that appellant had the power and intent to exercise dominion or control over the cocaine and methamphetamine. To do this, the State must provide “evidence of a connection linking the defendant to the contraband other than his mere spatial proximity.” A connection can be made between a defendant and contraband found in his presence by evidence which shows that the contraband was discovered on premises occupied and controlled by the defendant with no right of equal access and control in others. In this case, it was undisputed that appellant did not reside at the home, so there was no presumption that appellant had control of the drugs. The Court concluded that the evidence was insufficient to find defendant in constructive possession of the contraband because the State had not eliminated other reasonable hypotheses, including that others with access to the house could have been responsible for the drugs. “While the evidence creates the gravest suspicion that defendant may be guilty of the offense of which he was convicted, suspicion is not sufficient to support a conviction.”

## Juveniles; Gang Activity

*In the Interest of A.G., A12A0005; A12A0011; A12A0012; A12A0013 (7/11/2012)*

Appellants were charged with battery and violating the Georgia Street Gang Terrorism and Prevention Act. They contended that the evidence was insufficient to support the verdict against them and that the trial court erroneously based its findings on evidence not properly in the record before it. The Court reversed. In reviewing the record the Court found that following a pep rally in the Tattnall County High School gymnasium, T. W., a student,

was surrounded by four other students, A. M., S. W., D. R., and A. G., who took turns striking him around his head. An officer on duty at the school, searched all four students within an hour and a half after the incident. A notebook was found on A. M. that had “G-ville 912” written on the outside cover. A. M. testified that the writing was not gang-related and was short for his town, Glenville, and its zip code. However, the officer, who was certified by the trial court as an expert on gangs, testified that “G-ville 912” was written in a style associated with gangs. A bandana with a currency print was found on A. G. and purple bandanas were found on S. W. and D. R. The officer concluded that the bandanas were gang-related because of the particular way they were folded and instructed the court that the different patterns could identify member rankings within a gang. However, the officer also noted that he had not seen purple bandanas identifying with gang membership at the school before, and that bandanas signifying gang membership at the school “are normally red, white, or black.” Additionally, the officer testified that he did not know the current name of any gang within the school or its members because they change names so often. None of the appellants challenged their adjudication of the predicate offense—battery. Rather, they contended that the State failed to show that they were associated with an organization that fits the definition of “criminal street gang.” All four appellants were charged with violating OCGA § 16-15-4 (a), which makes it unlawful for persons associated with a “criminal street gang” to engage in “criminal gang activity” by committing certain enumerated predicate offenses, including battery. The Court noted that the statute contemplates that the existence of such an organization, and that its members are “associated in fact,” “may be established by evidence of a common name or common identifying signs, symbols, tattoos, graffiti, attire, or other distinguishing characteristics.” However, the Court found such evidence, without more, was insufficient to prove that the juveniles are members of a criminal street gang. The only evidence presented by the State that the four juveniles were members of a criminal street gang was the testimony from the officer that the three bandanas found on A. G., S. W., and D. R. were indicia of gang membership and that the writing on A. M.’s notebook was written in a style associated

with gangs. Giving credence to the officer’s testimony, this evidence was insufficient to prove beyond a reasonable doubt that the four juveniles were members of a criminal street gang. Thus, the Court held, the State failed to establish a nexus between the battery and an intent to further street gang activity and reversed the judgments on the counts charging criminal street gang activity.