

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING OCTOBER 30, 2009

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## THIS WEEK:

- **Merger**
- **Prior Difficulties**
- **Child Molestation; Party to a Crime**
- **Trafficking in Cocaine; Sufficiency of Evidence**
- **Statute of Limitations; Indictments**
- **Jury Instructions; Child Molestation**

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### **Merger**

*Gutierrez v. State, S09A0843*

Appellant was convicted of felony murder, malice murder, three counts of aggravated assault, and other related offenses. He contended that trial court erred in failing to merge the aggravated assault charge relating to the victim with the murder charges relating to that same victim. Specifically, he argued that because the same facts to support the aggravated assault conviction were used to support the murder conviction, the aggravated assault charge had to merge into the murder charge for sentencing purposes. The Court held that the evidence showed otherwise. Viewed in the light most favorable to the verdict, the record revealed that, in his initial confrontation with the victim, appellant fired a non-fatal shot that wounded the victim in the arm, thus completing the offense of aggravated assault. After already being shot, the victim then lunged at appellant and engaged in a brief struggle with him. During that second confrontation, appellant fired a second set of gunshots, killing the victim. Because the State used different evidence to prove

the two crimes and showed that appellant completed the aggravated assault before firing the additional shots that caused the victims death, the trial court had authority to enter a separate judgment of conviction and sentence for the aggravated assault.

### **Prior Difficulties**

*Powell v. State, S09A1561*

Appellant was convicted of the malice murder of his wife. He argued that the trial court erred in excluding evidence demonstrating that his wife previously engaged in extramarital affairs. The Court disagreed. Although evidence that on previous occasions appellant argued with the victim and she attacked him with a knife was admissible because it showed a previous encounter (i.e., a specific act of violence by the victim against defendant) evidence of a prior extramarital affair does not constitute evidence of a previous difficulty or encounter. Unless a defendant can show that he killed his wife under a violent, sudden impulse of passion due to his wife's adultery, such evidence is irrelevant and inadmissible. Appellant made no such showing in this case. In fact, in proffering evidence that his wife had been unfaithful, he admitted that his knowledge of his wife's affairs did not incite him to commit the crime.

### **Child Molestation; Party to a Crime**

*Naylor v. State, A09A0835*

Appellant was found guilty as a party to eight counts of sexual abuse of her minor twin daughters, S. N. and K. N., when they were between four and eight years of age. She was tried together with her husband who

was convicted of the same eight counts. She contended that the evidence was insufficient to prove that she was a party to the eight offenses. The Court agreed with the exception to one count, and reversed. A person who intentionally aids or abets in the commission of a crime directly committed by someone else may be charged and convicted as a party to the crime even though the person did not directly commit the crime. While mere presence at the scene of the commission of a crime is not sufficient evidence to convict one of being a party thereto, presence, companionship, and conduct before and after the offense are circumstances from which one's participation in the criminal intent may be inferred. If the defendant had knowledge of the intended crime and shared in the criminal intent of the principal actor, he is an aider and abettor. Hence, if the defendant was at the scene and did not disapprove or oppose the commission of the offense, a trier of fact may consider such conduct in connection with prior knowledge and would be authorized to conclude the defendant assented to the commission of the offense, that he lent his approval to it, thereby aiding and abetting the commission of the crime.

After a detailed review of the facts, the Court held that with respect to the offense of child molestation in which appellant's co-defendant husband caused one of the twins to touch his penis with her hand, there was evidence that appellant knew about and saw this offense, lent her approval to his conduct, and thereby aided and abetted the commission of the offense. Therefore, the evidence was sufficient to prove beyond a reasonable doubt that appellant was guilty as a party to this offense. However, as to the remaining offenses, the only evidence that appellant had knowledge (prior to the outcry) of any of these offenses was one twin's statement to a social worker that, at age four, she told her mother on one occasion that her father had touched her vaginal area. Otherwise, both girls said that their mother was not present at the house when the offenses occurred, and that their mother had no knowledge of the offenses because they never told her. To the extent the State relied on circumstantial evidence to prove that appellant was guilty as a party—the family's nudist lifestyle (including appellant's knowledge that the girls took a bath with their father and touched

his genitalia), the girls' unusual knowledge of sexual matters, pornographic movies at the house, and evidence that, at some point in therapy, appellant told the girls not to talk about their father—the evidence does not exclude every reasonable hypothesis save that of guilt, and consequently, was insufficient to prove beyond a reasonable doubt that appellant was guilty as a party to the other seven offenses.

### **Trafficking in Cocaine; Sufficiency of Evidence**

*Foster v. State, A09A1315*

Appellant was convicted of cocaine trafficking. He contended that the evidence was insufficient to support his conviction. The Court agreed and reversed. The evidence showed that a vehicle in which appellant was a passenger was stopped for a traffic violation. The officer asked and received identification from the driver and appellant, the passenger. The officer noticed appellant looked nervous. When the officer went back to his own vehicle, he observed the driver and appellant "associating back and forth. A lot of movement seems like it was going around" and then "the car took off." A high speed chase ensued in which the officer chased the vehicle across the state line. The vehicle entered into a residential area and eventually ran into a ditch and hit a telephone pole. The driver and appellant ran from the car in the same general direction, and the deputy pursued them on foot up to the tree line, where he abandoned the chase. The vehicle was towed back to Georgia and cocaine was found in the back of the truck behind some clothing.

The evidence of appellant's guilt was all circumstantial, and therefore must exclude every other reasonable hypothesis other than guilt. The driver of a vehicle is presumed to have exclusive possession of contraband substances found in the vehicle. While the presumption that the driver possessed the drugs is rebuttable by evidence that others had equal access to the contraband, appellant did not own, drive, or otherwise "possess" the car, so that presumption never even arose in the first place. There was no direct evidence that appellant had any control (possession) or even knowledge (constructive possession) of the contraband. The only direct evidence was that he looked nervous, was present when

another committed a crime, and fled from the police. The Court stated that the "other factors argued by the State that [appellant and the driver] were in the same band, that [the driver] ditched the car in a neighborhood where [appellant] had family, and that they ran in the same general direction—are not even circumstantial evidence of a crime." Therefore, the evidence was insufficient to support appellant's conviction.

### **Statute of Limitations; Indictments**

*Rader v. State, A09A1552; A09A1553*

Appellants appealed from the denial of their respective pleas in bar. The record showed that in October 2002, Debra Post retained appellants to defend her against charges that she had murdered her husband, Jerry Post. On October 2, 2002, Post conveyed to appellants real property belonging to her husband's estate, of which she was the primary beneficiary and for which she served as executrix; later that Fall she also conveyed other estate assets to appellants. In 2003, appellants sold the real property to another party. Later that year, Post pled guilty to the murder, thereby forfeiting her right to inherit from the estate. Appellants were subsequently indicted for felony theft by taking and theft by receiving.

Appellants argued that the trial court should have granted their pleas in bar because the indictment showed on its face that the statute of limitation had run and did not sufficiently allege an exception to the statute. The State must commence prosecutions for felony theft by taking and theft by receiving within four years of the commission of these offenses. The four-year limitation period, however, does not include any period in which the crimes were unknown to the State. Knowledge of the prosecution, of someone interested in the prosecution, or of someone injured by the offense may be imputed to the State for purposes of determining if this exception to the limitation period applies. Where the State seeks to rely on an exception to the statute of limitation, it must allege the exception in the indictment. Here, the indictment revealed that the prosecution commenced more than four years after the alleged offenses were committed. But the indictment also alleged that "the commission

of the said crime[s] was unknown to Brian Post, the natural son of Jerry Post, and a lawful beneficiary of the estate of Jerry Post, until October 8, 2004.” Although this date fell within four years of the commencement of prosecution, appellants contend that the indictment did not sufficiently allege the statute of limitation exception because the State may have had imputed knowledge of the crimes from someone other than Brian Post. The Court disagreed. This language was sufficient to apprise appellants of what they “must be prepared to defend against.” The State’s potential inability to prove at trial that it lacked knowledge of the alleged crime before October 8, 2004, because of earlier knowledge imputed from another source, did not render the language in the indictment insufficient.

Appellants contended that the trial court erred in not granting her plea in bar after hearing evidence. The trial court heard evidence on the plea in bar, but made no factual findings or credibility choices. Instead, it reserved ruling for a jury determination. The Court held that in *Jenkins v. State*, 278 Ga. 598 (2004), the proper procedure for litigating a plea in bar based upon the statute of limitations should be analogous to a pretrial *Jackson v. Denno* hearing. Under *Jackson v. Denno*, a court must conduct a pretrial hearing to determine whether, based on the totality of the circumstances, a preponderance of the evidence demonstrates that a defendant’s statement was made freely and voluntarily. This determination necessarily requires the court to resolve factual disputes; a mere ruling by the court that the issue is in dispute and will go to the jury is insufficient. Therefore, the trial court erred in expressly declining to make such a determination here and the Court vacated that part of the order reserving the statute of limitations issue for the jury and remanded the case for the trial court to make a determination of the factual issues necessary for ruling on the statute of limitations defense presented by the plea in bar.

Appellants also argued that the indictment should have been dismissed because, in light of *Levenson v. Word*, 294 Ga. App. 104 (2008), the State cannot prove that the property belonged to and was stolen from the Jerry Post estate. In *Levenson*, the subsequent administrator of the Jerry Post estate brought a civil action for conversion against

another law firm involved in Debra Post’s defense, seeking the return of funds that appellants had paid that firm on Debra Post’s behalf. The Court affirmed the trial court’s grant of summary judgment to the law firm, finding that under OCGA § 53-1-5, “Debra’s interest in the decedent’s estate had not been forfeited at the time she paid the retainers, [and thus she] had title and ownership of the funds paid to her attorneys.” The trial court correctly determined that *Levenson* did not require the dismissal of the charges against appellants. The decision in *Levenson* concerning Debra Post’s ownership of the property at issue is not *res judicata* over this criminal prosecution. Moreover, the standard used in *Levenson* to determine when an estate beneficiary must forfeit benefits under OCGA § 53-1-5 expressly applies to civil proceedings; the Code section makes no mention of the applicable standard in criminal proceedings. Georgia criminal procedure does not provide for a court to dismiss a facially sound indictment based upon facts not appearing therein. A motion seeking to dismiss an indictment on the ground that the State cannot prove facts essential to the charge is analogous to a motion for summary judgment in a civil case, and “[t]here is no basis in Georgia criminal practice for what, in civil practice, would be termed a motion for summary judgment.”

## ***Jury Instructions; Child Molestation***

*Machado v. State*, A09A0971

Appellant was convicted of criminal attempt to commit child molestation. Appellant argued that the trial court erred in its charge on child molestation because the indictment alleged that he had performed an immoral and indecent act with the intent to arouse and satisfy his sexual desires, whereas the court charged the statutory definition, which includes the intent to arouse or satisfy the sexual desires of either the child or the person. He contended that this violated his right to due process because the charge constructively amended the indictment. A criminal defendant’s right to due process may be endangered when an indictment charges the defendant with committing a crime in a specific manner and the trial court’s jury instruction defines the crime as an act which may be committed in a manner other than

the manner alleged in the indictment. The giving of a jury instruction which deviates from the indictment violates due process where there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed to limit its consideration to the manner specified in the indictment. The Court held that premitting whether the statutory definition of child molestation alleges different methods of committing the crime or whether there was evidence that appellant acted with the intent to arouse or satisfy the victim’s sexual desires, no due process violation occurred. While instructing the jury that a crime can be committed in a manner different from that charged in the indictment can constitute reversible error, a reversal was not mandated here because the charge as a whole limited the jury’s consideration to the specific manner of committing the crime alleged in the indictment. The trial court read the indictment to the jury, instructed the jury that the State had the burden of proving every material allegation in the indictment beyond a reasonable doubt and sent the indictment out with the jury during its deliberations. These instructions cured any complained of problem with the child molestation charge.