

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING NOVEMBER 20, 2009

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## THIS WEEK:

- **Jury Charges; OCGA § 24-3-36**
- **Escape; Sentencing**
- **Jury Charges; Sole Defense**
- **Plea in Bar; Prosecutorial Misconduct**
- **Cruelty to Animals; Vagueness**
- **Venue; Merger**
- **Jury Selection; Victim's Violent Acts**
- **Ineffective Assistance of Appellate Counsel**
- **Double Jeopardy; Prosecutorial Mistrial**
- **Search & Seizure**
- **Res Gestae; Discovery**

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### **Jury Charges; OCGA § 24-3-36**

*Ruiz v. State, S09A0821*

Appellant was convicted of three counts of malice murder. He argued that the trial court improperly instructed the jury that “[a]cquiescence or silence, when the circumstances require an answer, a denial, or other conduct, may amount to an admission.” OCGA § 24-3-36. The Court held that a charge in the language of OCGA § 24-3-36 has no place in a criminal trial because it can be construed as a comment on defendant’s constitutional right to remain silent. However, the Court held, it does not follow that reversal is required. Here, the erroneous charge was given in the context of a larger charge on impeachment of witnesses. It was immediately followed by a pattern instruction that the defendant is under no duty to present evidence

or to testify and “[i]f the defendant elects not to testify, no inference hurtful, harmful, or adverse to the defendant shall be drawn by the jury.” Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, 1.32.10. The Court determined that the charge as a whole contained sufficient clarity so as not to mislead the jury concerning the exercise of the right to remain silent. Moreover, the evidence of guilt was overwhelming, and the erroneous charge in no way pointed directly at the substance of appellant’s defense.

### **Escape; Sentencing**

*Allen v. State, S08G1733*

Appellant was convicted of escape. He was convicted for four felonies in 1987: theft by taking, robbery by sudden snatching, robbery by force, and aggravated assault. He was given 20 years, 10 to serve. At some point he was paroled. The record showed that his parole was revoked in March of 2000 for committing numerous felonies related to a series of armed robberies. He escaped in February 2001. He was convicted of those numerous felonies in August 2001. He was convicted of the escape in October 2001.

Appellant contended his indictment for escape was solely predicated on his 1987 convictions and any conviction occurring after the date of his escape should not have been referenced or used to support his escape conviction or sentence. The Court agreed. The August 2001 convictions could not be used to prove the underlying offense of felony escape because neither the August 2001 convictions nor the pre-conviction charges stemming therefrom were the felonies listed in the indictment for his escape. Thus, the Court of Appeals erred when it determined that appellant’s August 2001

convictions could be used as proof of a prior felony conviction under OCGA § 16-10-52.

The Court also found that the trial court erred in using the August 2001 convictions to sentence appellant as a recidivist under OCGA § 17-10-7 (a). For purposes of OCGA § 17-10-7, a conviction must be final before it may be used to sentence a defendant as a recidivist. A conviction is final when the defendant has been adjudicated guilty and has been sentenced, and no appeal on the prior charges remains pending. Here, appellant was found guilty and sentenced on the armed robberies in August 2001. He appealed those convictions and they were affirmed three years later by the Court of Appeals. Accordingly, at the time of appellant's sentencing for escape in October 2001, the August 2001 convictions were unavailable for recidivist treatment under OCGA § 17-10-7 (a) because they were pending on appeal.

Appellant also argued that it was error for the trial court to use his 1987 convictions as evidence of an element of the crime of escape under OCGA § 16-10-52 and as evidence to sentence him as a recidivist pursuant to OCGA § 17-10-7 (a) because he contends the 1987 convictions were "used up" during the guilt phase of the trial. The record showed that in 1987, appellant pled guilty to four felonies. When he was indicted in 2001 for felony escape, the indictment only listed three of his 1987 felony convictions: two robberies and aggravated assault. At the sentencing phase of his escape trial, the State introduced all four of the 1987 felony convictions for recidivist purposes. Because the fourth 1987 conviction for theft by taking was not used by the State as the predicate felony for the offense of felony escape pursuant to OCGA § 16-10-52 (b), the 1987 felony theft by taking conviction remained available for sentence enhancement under OCGA § 17-10-7 (a). The Court held that inasmuch as the record was silent as to the specific felony conviction the trial court relied upon for sentence enhancement, it must be presumed that the trial court knew the state of the law and that it did not use any of the three 1987 felony convictions listed in the escape indictment to enhance appellant's punishment under OCGA § 17-10-7 (a).

### **Jury Charges; Sole Defense**

*Boyd v. State, S09A1484*

Appellant was convicted of felony murder

while in the commission of aggravated assault in connection with the death of his girlfriend's four-year-old son. He argued that the trial court erred by refusing to charge the jury on misdemeanor-involuntary manslaughter as a lesser included offense, as it was warranted by the evidence and was his sole defense. The Court disagreed. The evidence at trial did not warrant an instruction on involuntary manslaughter in the commission of an unlawful act because this offense requires evidence of an unintentional killing by the commission of an unlawful act other than a felony. Here, the uncontroverted forensic evidence of the repeated blows to the victim's head and the severity of the victim's injuries were inconsistent with the commission of an unlawful act other than a felony, and certainly not consistent with appellant's cited misdemeanors of reckless conduct or simple battery. Moreover, under appellant's version of events, the victim's death was the direct result of the child's unintended fall down the stairs and a charge on involuntary manslaughter is not warranted even if it is the sole defense if the evidence does not support the charge. Moreover, the jury returned a verdict of guilty on felony murder, thereby determining that all of the elements of the underlying felony offense of aggravated assault existed.

### **Plea in Bar; Prosecutorial Misconduct**

*Roscoe v. State, S09A1639*

Appellant was indicted for malice murder, felony murder, and hijacking a motor vehicle. His trial date was set for April 27, 2009. Bernadette Davy, a firearms examiner for the State, had not been performing the required number of ballistics tests in each of her cases, and was terminated for this breach of protocol. Davy had performed the testing on the alleged murder weapon in appellant's case. During pre-trial proceedings on April 24, 2009, the prosecutor informed the trial court that he intended to call George Stanley, a FBI firearms examiner who had been asked to retest all firearms that had been previously examined by Davy. Because the State had not notified the defense at least 10 days prior to trial of its intention to call Stanley as a witness or introduce his report, the trial court granted appellant's motion in limine to exclude this evidence, and the State was instructed to go

forward with Davy as its sole expert firearms witness in its case in chief.

During opening statements on April 28, 2009, however, the prosecutor told the jury that the alleged murder weapon had been linked to appellant by Davy's testing, that Davy had since been terminated, and that another examiner would be called to testify that he had reached the same result as Davy. At this point, appellant made a motion for a mistrial, contending that the prosecutor had violated the trial court's grant of his motion in limine. The prosecutor responded that, although retesting had not yet been completed, he intended to call an additional expert from the crime lab other than Stanley to rehabilitate Davy's testimony following her impeachment regarding the reasons for her termination. The trial court rejected this argument and granted the motion for a mistrial. However, upon a motion for reconsideration and a hearing, the trial court changed its mind and denied the plea in bar.

The Court held that when a mistrial is granted at the defendant's request due to prosecutorial misconduct, the general rule is that the Double Jeopardy Clause does not bar the State from retrying the case. However, there is a "narrow exception" where the prosecutorial misconduct was intended to goad the defendant into moving for a mistrial.

In order to prevail on such a claim the defendant must show that the State was purposefully attempting through its prosecutorial misconduct to secure an opportunity to retry the case, to avoid reversal of the conviction because of prosecutorial or judicial error, or to otherwise obtain a more favorable chance for a guilty verdict on retrial. The bar of double jeopardy is not raised by even intentional prosecutorial misconduct, notwithstanding the fact that the defendant was thereby deprived of due process of law, unless the prosecutor's actions were intended to subvert the protections afforded by the Double Jeopardy Clause. Here, the trial court made the following conclusions: 1) Davy was not missing as the trial court thought, but was immediately located and would have been available to testify; (2) the prosecutor honestly believed that another examiner could rehabilitate Davy's testimony; (3) the prosecutor intended to secure a conviction, not a mistrial; (4) the State would reap no benefit from a delay in the case; and (5) although the State mishandled Davy's sub-

poena and retested the weapon after opening statements, there was no evidence that the State intended to cause a mistrial. The Court found that the trial court's findings were supported by the evidence and affirmed its ruling in denying the plea in bar.

## **Cruelty to Animals; Vagueness**

*In the Interest of C. B., S09A1749*

Appellant was convicted of cruelty to animals. He contended that OCGA § 16-12-4 (b), is unconstitutionally vague and violates due process in that it is not sufficiently definite and certain in its description of the prohibited conduct. The Court disagreed. Under OCGA § 16-12-4 (b), a person can be held criminally responsible for cruelty to animals if he "causes death or unjustifiable physical pain or suffering to any animal by an act." However, according to OCGA § 16-12-4 (f), a person is not prohibited from "[d]efending his or her person or property, or the person or property of another, from injury or damage being caused by an animal" or "[i]njuring or killing an animal reasonably believed to constitute a threat for injury or damage to any property" so long as "[t]he method used to injure or kill such animal shall be designed to be as humane as is possible under the circumstances." A statute is unconstitutionally vague only if it fails to convey sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices, so that persons of common intelligence need not necessarily guess at its meaning nor differ as to its application. Furthermore, in order to determine the scope of prohibited conduct, the statute must be read as a whole. The Court held that "[r]eading the statute as a whole, it is clear that OCGA § 16-12-4 (b) explains when a person is liable for cruelty to animals, while OCGA § 16-12-4 (f) (1) explains some circumstances in which the killing or wounding of an animal can be justified. OCGA § 16-12-4 (f) (2) goes on to state that the killing or wounding of an animal will be justified only if the action is humane and occurs under the circumstances described in OCGA § 16-12-4 (f) (1)." The phrases "humane" and "humanely," as used in the statute, are not unconstitutionally vague. The language of a criminal statute will be given its natural and obvious import. Merriam-Webster's Dictionary defines "hu-

mane" as "marked by compassion, sympathy, or consideration for . . . animals." Thus, the Court held, "[r]ead in context, a person of common intelligence would understand that the statute provides that killing or wounding an animal is justified under subsection (f) (1) only if done in such a way as to demonstrate compassion for the animal, as the circumstances allow." Therefore, the statute is sufficiently definite to satisfy due process.

## **Venue; Merger**

*Coleman v. State, S09A1144, S09A1922*

Appellants, Coleman and Jackson, were convicted of malice murder and aggravated assault on respective victims and they were also convicted of VGCSA. The evidence showed that the two appellants each shot and killed a victim at a service station in Muscogee County and then fled into Alabama in Coleman's Jeep where they were eventually apprehended. They first challenged the sufficiency of the evidence of venue with regard to the convictions for possession of methamphetamine and of the less than an ounce of marijuana that were discovered in a search of Coleman's impounded Jeep conducted in Muscogee County pursuant to a warrant after the vehicle was recovered from Lee County, Alabama, where appellants had abandoned it. The Court found that the State presented no evidence that the methamphetamine residue and the marijuana found in the vehicle appellants abandoned in Lee County, Alabama, were in the possession of appellants while they were in Muscogee County. However, on cross-examination, Coleman admitted he had hand-rolled the marijuana cigarette found in the Jeep the morning of the shooting. That testimony, coupled with the undisputed fact that appellants and the Jeep were at the Muscogee County service station at a time following the point at which Coleman admitted having made the cigarette, established beyond a reasonable doubt that appellants possessed the marijuana cigarette in Muscogee County and established venue for that crime as being in Muscogee County. However, there was no direct evidence of possession in Muscogee County of the pipe upon which traces of methamphetamine were found, and neither appellant made an admission concerning the pipe as Coleman did with regard to the marijuana. Both appellants testified they went to an apartment complex in Alabama im-

mediately after the shootings and visited two apartments there. They then decided to drive to the Alabama home of Coleman's parents, but they were spotted by the Alabama deputy sheriff before they could arrive. Since there was no evidence placing the pipe in the Jeep while the vehicle was in Muscogee County and there was a possibility the pipe was put in the Jeep after the shootings during one of several stops appellants made while in Alabama, venue for possession of methamphetamine was not proven to be in Muscogee County.

Appellant Jackson contended the trial court erred when it did not find that his conviction for the aggravated assault of one victim merged as a matter of fact into his conviction for the malice murder of the same victim, and when it imposed sentences on both convictions. The Court held that when a victim suffers multiple wounds inflicted in quick succession, each infliction of injury does not constitute a separate assault. However, a separate judgment of conviction and sentence is authorized if a defendant commits an aggravated assault independent of the act which caused the victim's death. When a series of shots is separated by a "deliberate interval" and a non-fatal injury is sustained prior to the interval and a fatal injury is sustained after the interval, the earlier, non-fatal infliction of injury can serve to support a conviction for aggravated assault. Here, the testimony was that the wounds were inflicted in "quick succession." The medical examiner who performed the autopsy testified that the cause of death was "gunshot wounds," did not identify any injury as the fatal shot, acknowledged he could not testify as to the order in which the bullets entered the victim's body, and stated no single wound would have instantly stopped the victim. Thus, the Court held, there was insufficient evidence to support the infliction of an aggravated assault separate and apart from the malice murder. Accordingly, the Court vacated appellant's conviction for aggravated assault because it merged as a matter of fact into the conviction for malice murder, and remanded the case to the trial court for resentencing.

## **Jury Selection; Victim's Violent Acts**

*Coleman v. State, S09A1144, S09A1922*

Appellants, Coleman and Jackson, were convicted of malice murder and aggravated

assault on respective victims and they were also convicted of VGCSA. Appellant Coleman argued that the trial court erred during jury selection when it dismissed a member of the venire for cause. The record showed that after the potential juror stated she knew Coleman's family, attended the same church as the family and had talked with members of the family, the trial court asked if the venire member knew about the case. The venire member stated, "A little, yeah" and the trial court dismissed the venire member from the courtroom, instructing her to return to the jury assembly room. Appellant contended the trial court erred by dismissing the potential juror for cause before first ascertaining whether she held an opinion so fixed and definite that she could not set it aside and decide the case based on the evidence or the court's charge on the evidence. However, the Court held, a defendant has no vested interest in a particular juror but rather is entitled only to a legal and impartial jury. Thus, the dismissal for cause for a reason that is not constitutionally impermissible, even if erroneous, affords no grounds for relief if a competent and unbiased jury is selected. Since appellant made no such showing that a competent and unbiased jury was not selected, the assertion of error was without merit.

Appellant Coleman contended that the trial court erred by not permitting two witnesses to testify about statements purportedly made by the victims to the witnesses in which the victims admitted having had a confrontation with appellants the night before they were shot and having removed the electric utility meter from Coleman's home. Coleman contended the testimony was critical to his defense and therefore admissible pursuant to *Chambers v. Mississippi*, 410 U.S. 284, 302, 93 SC 1038, 35 LE2d 297, (1973), because it demonstrated the violence perpetrated by the victims against Coleman just hours before the shootings and it established the reasonableness of Coleman's fear of the victims. In *Chambers*, the U.S. Supreme Court determined that a defendant's right to a trial meeting the standards of due process is violated when the trial court refuses to admit hearsay testimony which is critical to the defense and bears "persuasive assurances of trustworthiness. . . ." In *Turner v. State*, 267 Ga. 149, 154 (1996), trial courts were advised that when faced with such an evidentiary question, to analyze the matter as if the hearsay evidence were proffered under the "necessity"

exception found in OCGA § 24-3-1(b), and attorneys were instructed that when seeking the admission of hearsay under due process grounds to make a proffer thoroughly setting out the reliability and necessity of the hearsay. Here, defense counsel asserted that the persons who would testify to the utterances purportedly made by the victims were friends of the victims who reported the utterances to police shortly after the victims were killed. But, this presentation was insufficient to authorize the admission of hearsay pursuant to the necessity exception because there was no showing of the required special relationship between the deceased declarants and the proffered witnesses. As it is error to admit hearsay under the necessity exception in the absence of a showing that the deceased declarant placed great confidence in and turned for help to the proffered witness, the trial court did not err when it declined to admit the hearsay after finding the party seeking to use the hearsay had not made the necessary proffer.

### **Ineffective Assistance of Appellate Counsel**

*Wilson v. State, S09A0809*

Appellant was convicted of felony murder, aggravated assault, possession of a firearm during the commission of a crime, and theft by receiving stolen property. Appellant's first appellate counsel filed a motion for new trial that, among other things, asserted ineffective assistance of trial counsel on four grounds. After a hearing at which trial counsel testified, the trial court denied the motion, expressly rejecting the ineffective assistance claims. Appellant, represented by new appellate counsel, contended before the Court that his first appellate counsel was ineffective because he should have asserted two additional claims of ineffective assistance of trial counsel in the motion for new trial. He argued that the Court should remand the case to the trial court for an evidentiary hearing on the new ineffective assistance claims. Relying on Court of Appeals precedent, the Court found that where the issue of trial counsel's effectiveness has been raised on motion for new trial, any claims of ineffective assistance by trial counsel not raised at that time are waived. Such claims unasserted at the trial level are procedurally barred and may not be raised under the guise of an ineffective assistance of appellate coun-

sel. A defendant cannot resuscitate claims of ineffectiveness that are procedurally barred simply by bootstrapping them to a claim of ineffectiveness of appellate counsel. Once a claim is procedurally barred, there is nothing for an appellate court to review. To hold otherwise would eviscerate the rule requiring that ineffectiveness claims be raised at the earliest practicable moment.

### **Double Jeopardy; Prosecutorial Mistrial**

*Olivaria v. State, A09A1140*

Appellant appealed from the denial of his plea in bar on double jeopardy grounds. The record showed that during appellant's trial for VGCSA, a police officer who was waiting to testify on behalf of the State wrote on a chalkboard in the jury room "James Dunn [the prosecutor] is my hero." Appellant moved for a mistrial, which the trial court granted. The trial court subsequently denied appellant's plea in bar on double jeopardy grounds. When a defendant seeks, and a court grants, a mistrial due to prosecutorial misconduct, retrial of the defendant does not cause double jeopardy provided the State did not intend such misconduct to goad the defendant into moving for a mistrial. For a defendant to succeed on a plea in bar under such circumstances, the defendant must demonstrate that the State was attempting through mistrial to secure an opportunity to retry the case, avoid reversal of a conviction, or otherwise obtain a more favorable outcome on retrial. Such an inquiry requires the trial court to make findings regarding the prosecutor's intent. Here, the police officer testified at a hearing on the plea in bar that while the police officer knew that the room in which he wrote "James Dunn is my hero" was a jury room, he did not intend to influence the jury, and he was not acting as a result of information about the way the trial was then proceeding. Moreover, the trial court specifically found no evidence that the prosecutor actively participated or promoted the police officer's conduct and appellant failed to point to any evidence supporting his contention that the prosecutor directed the police officer's actions. Therefore, absent evidence that the prosecutor actively aided, counseled, or became a willing party to the error generated by the officer, the Court held that the trial court did not err in denying the plea in bar.

## Search & Seizure

*Lawrence v. State, A09A1454*

Appellant was convicted of possession of cocaine. He argued that the trial court erred in denying his motion to suppress. The evidence showed that one evening, a law enforcement officer observed a car swerving in the road before stopping in the middle of the road. A person emerged from a club known to the officer for drug activity and got into the car. As the car drove away, it swerved again and ran off the road. The officer initiated a traffic stop, and when he approached the car, recognized the driver as appellant's wife. The officer was familiar with appellant and was aware that he had a history of drug offenses. Appellant's wife at first denied picking up anyone in front of the club, but then admitted that she had picked up he husband, appellant. In response to his question concerning drugs in the vehicle, appellant's wife "told [him] she didn't think so." The officer said, "[L]ook here, if I search through the vehicle and find anything there is a good possibility you and your husband [are] going to jail.[" She said, ["W]ell, Jack put something in his pocket.[" The officer did not know what was in appellant's pocket. Nevertheless, he instructed appellant to get out of the car and empty his pocket, and appellant pulled from his pocket a bag of cocaine.

The State argued that the search was proper as incident to the arrest of appellant. The Court, however, disagreed. The Court found that the circumstances did not combine to show probable cause for arrest: The officer did not testify to observing any illegal or furtive behavior or any anxiety on the part of appellant; there was no evidence that the officer had received information from a reliable source that he was in possession of drugs that night; any suspicion that he had put drugs in his pocket arose not from the officer's observation of him but from an ambiguous comment made by appellant's wife; and the officer admitted that he did not know from that comment what appellant had placed in his pocket. The scope of the search performed on appellant exceeded that allowed in a *Terry* stop, and would have been lawful only if supported by probable cause. Because the officer lacked the probable cause needed to arrest him, the search performed incident to that arrest was unconstitutional. The trial

court erred therefore in denying appellant's motion to suppress.

## Res Gestae; Discovery

*Kohler v. State, A09A0834*

Appellant was charged and convicted of trafficking in cocaine. He argued that the trial court erred in admitting evidence of the seizure of 200 pounds of marijuana that was located with the cocaine during a search. Appellant contended that because he was not charged with possession of the marijuana, evidence concerning it was inadmissible. The evidence showed that appellant picked up 100 pounds of cocaine which had been packaged in boxes. He brought them to a residence where he stacked the boxes up next to the bales of marijuana. The DEA, which had been tracking the cocaine, obtained and then executed a search warrant for the residence.

The Court held that it is well settled that generally all of the circumstances connected with an accused's arrest, including any items taken from his person, are admissible as evidence at trial, even those that establish the commission of another criminal offense. Where the search reveals both the drug for which the defendant is on trial and another not included in the indictment, evidence of the other drug is nevertheless admissible as a part of the *res gestae*. Here, given the circumstances of appellant's arrest, the trial court did not err.

Appellant also argued that the trial court erred in admitting the statements made by his co-conspirators' during the commission of the crime because the State failed to produce audiotape recordings of the statements. Appellant opted-in to reciprocal discovery and the State furnished him with the DEA agents' written investigation report detailing the substance of wiretap communications that had transpired between the confidential informant and the co-conspirators. The audiotapes of these recorded communications were retained by the DEA for use in related federal court proceedings and were never actually possessed by the State. As such, the audiotapes were not introduced at trial. Appellant was aware of the existence of the tapes prior to trial, but he sought to have the testimony regarding the communications excluded because the audiotapes had not been provided during discovery. The Court held that to render evidence inadmissible for the

State's failure to comply with reciprocal discovery requirements, the defendant is required to show both prejudice and bad faith. Appellant neither alleged nor showed bad faith and thus, his claim failed. Furthermore, he did not request a continuance when he learned of the alleged discovery violation and generally a defendant has a duty to request a continuance to cure any prejudice which may have resulted from the State's failure to comply with the requirements of OCGA § 17-6-1 et seq.