

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 7, 2014

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THIS WEEK:

- **Plea Bargains**
- **Possession of Tools for the Commission of a Crime**
- **Voluntary Manslaughter; Evidence of Infidelity**
- **Motions for New Trial; Parties to a Crime**
- **Jury Charges; Sexual Battery**

Plea Bargains

Lewis v. State, A14A1320 (10/23/14)

Appellant and two others were charged with RICO violations and felony theft by taking. As part of a negotiated plea agreement, the State agreed to dismiss the RICO and related theft charges against Appellant in exchange for his guilty plea to one misdemeanor count of hindering and obstructing a law enforcement officer conditioned upon appellant testifying truthfully at the trial against his co-defendants. Appellant entered his negotiated plea with the understanding that the State would be recommending a sentence of 12 months probation, a \$500 fine, and 240 hours of community service if he satisfied his obligation to testify truthfully against his co-defendants. The trial court accepted his plea and deferred sentencing until the end of trial. After appellant testified, the trial court sentenced him to 12 months in confinement.

The Court, finding this to be a matter of first impression, stated that it must determine whether appellant, after relying on the plea agreement to his detriment, has a right to force the trial court to adhere to the terms of the negotiated plea that it had earlier accepted. Relying on *Santobello v. New York*, 404

U. S. 257 (1971), the Court held that when a trial judge accepts a negotiated plea and the defendant later relies on the terms of a plea agreement to his detriment by waiving certain constitutional rights that cannot be recovered, the failure of the trial judge to adhere to the terms of the negotiated plea would likely offend the integrity and reputation of the criminal justice system even more than any unkept promise made by a prosecutor. This is so because judges are neutral, whereas prosecutors are adversarial by nature. Thus, the Court held the interests of justice require that appellant be sentenced according to the State's recommendation pursuant to the negotiated plea, provided that he testified truthfully on behalf of the State at the trial of his co-defendants.

As to appellant's truthfulness, the trial court found that appellant did not testify truthfully, but the Court noted, both the State and appellant disagreed with this finding by the trial court. Therefore, the Court stated, in light of the parties' non-adversarial posture with regard to this issue, and to ensure the fairness and integrity of the plea bargain in this case, the parties are entitled, upon remand, to notice of the specific portions of appellant's testimony that were material to the State's case against the co-defendants that the trial court may have considered questionable and an opportunity to present additional evidence and argument with regard to such testimony.

Possession of Tools for the Commission of a Crime

Kenemer v. State, A14A0928 (10/21/14)

Appellant was convicted of possession of tools for the commission of a crime pursuant

to O.C.G.A. § 16-7-20. He was charged with possessing “gloves, lights, and cutting tools, devices commonly used in the commission of a crime, to wit: theft, with the intent to make use thereof in the commission of said crime.” He contended that the evidence was insufficient to support his conviction.

The Court disagreed. However, in so holding the Court stated that it would “take this opportunity to clarify an issue that has been tacitly acknowledged in the many cases construing O.C.G.A. § 16-7-20, but never directly addressed.” The Court stated that in the vast majority of cases construing this Code section, whether a tool is commonly used in the commission of a crime is within the ken of the average juror. But, there are some cases in which this general rule does not apply. On the one hand, it is probable that lockpicks, “slim jims,” blackjacks, masks, and similar items are “commonly used” for the commission of crime as a matter of law. In fact, wire cutters and gloves have been explicitly held to satisfy the first element of the statute as they are commonly used in the commission of burglary, theft, or other crimes. On the other hand, some items are so specialized, (e.g. bulletproof vests), or so widely used in completely unrelated ways (e.g. pieces of two-by-four lumber), that their common use in crime—or even that they are “tools” or “devices”—is not within the ken of the average juror and expert testimony to that effect may be required. Nevertheless, the Court found, such expert testimony was not necessary here. Instead, it was well within the jury’s ability to determine both whether the tools were “commonly” used in the commission of a crime, and whether appellant had the necessary intent to use them in that manner.

Voluntary Manslaughter; Evidence of Infidelity

Lynn v. State, S14A0910 (11/3/14)

Appellant was convicted of the murder of his wife, Tonya. At trial, appellant did not dispute that he killed Tonya, but he claimed that her killing was only voluntary manslaughter, arguing that it was provoked by, among other things, her admission that she recently had been unfaithful. The trial court permitted appellant to testify about this admission, but it refused to allow additional evidence of her recent infidelity, including

the testimony of two men with whom she allegedly was having extramarital affairs around the time of her death.

Appellant contended that the trial court erred when it disallowed this additional evidence as irrelevant. The Court agreed and reversed his conviction. The Court found that if the jury had accepted appellant’s testimony about Tonya confessing her renewed and recent infidelity just before he killed her, that testimony might properly have formed a basis for the jury to find that the killing only amounted to voluntary manslaughter. Whether that testimony was credible, however, was hotly disputed, the prosecuting attorney suggesting on cross-examination that it was fabricated. As a result, whether Tonya, in fact, told appellant that she was having extramarital affairs with the two men just before appellant killed her appeared to have been an important and disputed issue at trial. Proof of any circumstance that would tend to make it more or less likely that Tonya actually confessed recent infidelity just before appellant killed her would bear upon this issue and would be relevant. Therefore, the trial court erred when it concluded otherwise.

Nevertheless, the Court considered whether the erroneous refusal to admit evidence of infidelity by Tonya—beyond the testimony of appellant—might have been harmless. The Court concluded that it was not. The Court found this to be so because 1) appellant offered no defense at trial and claimed only that the killing was voluntary manslaughter and not murder; and 2) whether Tonya said the things about adultery that appellant attributed to her was a critical issue at trial.

Motions for New Trial; Parties to a Crime

Davis v. State, S14A1179 (11/3/2014)

Appellant and Babbitt were indicted together for murder, but they were tried separately. After appellant was convicted, Babbitt was tried by another jury and acquitted of the murder. Citing *White v. State*, 257 Ga. 236 (1987), appellant contended that he was entitled to a new trial at which he could present evidence of Babbitt’s acquittal. The Court disagreed.

In *White*, it was held that one charged distinctly as an accessory to a crime may

be entitled under Georgia law to present evidence of the acquittal of another charged distinctly as the principal. The Court reasoned that such evidence is relevant in the trial of the accessory because proof of the guilt of the principal is a necessary element in the crime of one who does not directly commit the crime but is charged as an aider, abettor, encourager or counselor in the commission of the crime. The acquittal of the principal is some evidence that the accessory did not aid or abet the crime of which the principal was acquitted.

But, the Court stated, even assuming *White* was correctly decided, unlike *White*, it was not essential in the case against appellant for the State to prove that Babbitt also was guilty. Appellant was not charged distinctly as having aided or abetted Babbitt in the commission of the murder. Rather, appellant (like Babbitt) simply was charged with murder, and that charge permitted the State to make out its case against appellant with proof beyond a reasonable doubt that he was a party to that crime in any way, whether as the principal or an accessory to Babbitt. The evidence presented at the trial of appellant was legally sufficient to prove his guilt as a party to the crime in any of these ways, and so, the case against appellant for murder did not depend necessarily upon proof that Babbitt committed the murder. By its own terms, *White* concerns prosecutions in which a defendant is charged *distinctly* and *exclusively* as an accessory to an *identified* principal, such that the theory of liability asserted by the State necessarily makes the factual guilt of the identified principal an essential part of the case against the accessory. But, the Court stated, that is not how appellant was charged or tried. That Babbitt was guilty of murder as a principal was not an essential element of the case against appellant, and appellant was not entitled under *White* to a new trial at which he can present evidence that Babbitt was acquitted of the murder.

Jury Charges; Sexual Battery

Watson v. State, A14A0742 (10/22/14)

Appellant was convicted of two counts of sexual battery (as lesser included offenses to the indicted offenses of child molestation) against his teenaged daughter, and one count of child molestation against his daughter’s friend. He argued that the trial court erred

when, in the charge on sexual battery, the trial court instructed the jury over his objection that “under Georgia law, a person under the age of sixteen lacks legal capacity to consent to sexual conduct.” He argued that the rule regarding a minor’s inability to consent should not apply to the offense of sexual battery because it removes the element of “lack of consent” from that offense, rendering the offense overly broad.

The Court stated that the trial court’s charge was an accurate statement of the law and was adjusted to the facts of this case and the age of consent in Georgia is 16. Also, the Court noted, it had upheld the giving of charges regarding the inability of a person under the age of 16 to consent in sexual battery cases. Nevertheless, appellant argued, the rule that someone under 16 cannot consent to sexual conduct, when applied to the sexual battery statute, O.C.G.A. § 16-6-22.1, renders that statute overly broad. That statute provides that “[a] person commits the offense of sexual battery when he or she intentionally makes physical contact with the intimate parts of the body of another person without the consent of that person,” and it defines “intimate parts” to mean “the primary genital area, anus, groin, inner thighs, or buttocks of a male or female and the breasts of a female.” O.C.G.A. § 16-6-22.1(a), (b). Appellant argued that, if persons under the age of 16 can never consent to the touching of their intimate parts, then the statute criminalizes conduct that, he asserted, does not necessarily involve immoral/indecent conduct and does not always involve a sexual act. He offered, as examples of overbreadth, scenarios such as a mother putting diaper rash cream on a child, a grandfather (or a mall Santa Claus) allowing a child to sit on his lap, and teenage basketball players blocking each other from rebounds with their buttocks and hips.

The Court acknowledged the possibility that the language of O.C.G.A. § 16-6-22.1 could be construed to include non-sexual scenarios such as those proposed by appellant. But appellant’s challenge to the statute’s potential overbreadth is a challenge to its constitutionality and the appellate courts of this state will not pass upon the constitutionality of a statute when the challenge was not directly and properly made in the trial court and distinctly ruled on by the trial court. Here, the Court found, although appellant

argued generally in his motion for new trial that the trial court’s jury charge violated his constitutional rights, he did not properly raise a constitutional challenge to O.C.G.A. § 16-6-22.1. Moreover, the trial court did not distinctly rule on the constitutional challenge. Consequently, appellant was procedurally barred from raising a constitutional challenge to O.C.G.A. § 16-6-22.1 on appeal.