

# Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING DECEMBER 1, 2017

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## THIS WEEK:

- **OCGA § 16-15-9; Constitutionality**
- **Discovery; Search & Seizure**
- **State's Right to Appeal; Pleas in Bar**
- **Sentencing; Constitutionality**
- **Sufficiency of the Evidence; Felony Murder**
- **Mental Competency; Requirement of a Hearing**
- **DUI; Rule 417**

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## OCGA § 16-15-9; Constitutionality

*State v. Jefferson, S17A1085 (10/30/17)*

The State indicted Jefferson and others with attempted murder, aggravated battery, kidnapping, and violations of the Georgia Street Gang Terrorism and Prevention Act (OCGA § 16-15-1 et seq.). In connection with the State's efforts to build its case, the State gave notice of its intention to introduce into evidence at trial four certified copies of convictions relating to various gang members pursuant to OCGA § 16-15-9. This Code section provides in part as follows: "For the purpose of proving the existence of a criminal street gang and criminal gang activity, the commission, adjudication, or conviction of any offense enumerated in paragraph (1) of Code Section 16-15-3 [criminal gang activity] by any member or associate of a criminal street gang shall be admissible in any trial or proceeding. Evidence offered under this Code section shall not be subject to the restrictions in paragraph (22) of Code Section 24-8-803." The trial court ruled that OCGA § 16-15-9 was unconstitutional on its face and the State appealed.

The Court noted that over a hundred years ago, in *Kirby v. U. S.*, 174 U.S. 47 (19 SCt 574;

43 LE 890) (1899), the U. S. Supreme Court held that an attempt by the United States to introduce certified copies of convictions of three individuals for theft of government property as evidence in the prosecution of Kirby for being in receipt of that stolen property was improper, as the introduction of such evidence violated Kirby's Sixth Amendment rights. Specifically, the Kirby Court stated, to allow such evidence to be used to prove an element of the crime with which Kirby had been charged would "impair the very substance of [the] right [of confrontation] long deemed so essential for the due protection of life and liberty that it is guarded against legislative and judicial action by provisions in the Constitution of the United States and in the constitutions of most if not of all the States composing the Union." Accordingly, the high Court found that the portion of a federal law that allowed such evidence to be admitted was unconstitutional, because the statute operated in violation of the clause of the Constitution of the United States declaring that in all criminal prosecutions the accused shall be confronted with the witnesses against him.

The Court found that the decision in Kirby is controlling in this case, and the Supreme Court has not abandoned its prior holding in Kirby in the 100 plus years since that case was decided. To the contrary, the U. S. Supreme Court has consistently reaffirmed its holding in Kirby, and the continued viability and importance of that case is only made more evident under the circumstances created by OCGA § 16-15-9. Thus, because OCGA § 16-15-9 on its face deprives criminal defendants of their fundamental right of confrontation in violation of the Sixth Amendment to the United States Constitution, the statute cannot pass constitutional muster and must be declared void to the extent that it authorizes the admission of the convictions of non-testifying non-parties as evidence of a criminal street gang.

## Discovery; Search & Seizure

*Williams v. State, S17A1216 (10/30/17)*

Appellant was convicted of malice murder and other crimes. The evidence, briefly stated, showed that appellant stabbed the victim, who was the brother of his ex-girlfriend. When police arrived on the scene, appellant locked himself in a house and SWAT was called. Eventually, appellant came out. Appellant had cut wounds to his wrist and upper chest. The police did a protective sweep of the house in which evidence was noticed in plain view. The police then obtained a search warrant for the house. At trial, the emergency room doctor testified that the wounds on appellant's wrists and chest appeared to be self-inflicted.

Appellant argued that the trial court erred in overruling his objection to the emergency room doctor's opinion testimony because the State failed to satisfy the conditions of OCGA § 17-16-4 (a) (4). The Court noted that Georgia law requires the prosecution to reduce any relevant oral portions of physical examination reports to writing, and to timely serve the reports on opposing counsel. Appellant contended that the State failed to comply with this rule, and that if the State had complied, appellant could have retained his own expert to review a written report of the doctor's opinion and possibly rebut his testimony. He further argued that the trial court's admission of the doctor's opinion testimony was harmful because his opinion that appellant's wounds appeared self-inflicted undercut appellant's assertion of self-defense.

The Court disagreed. The evidence showed that the State provided appellant's trial counsel with all of his medical records arising out of the incident, including the doctor's written medical reports and records. There was no evidence that the doctor made a "report [that] is oral or partially oral." The State was under no duty to reduce to writing a non-existent oral report. Accordingly, the Court held, there was no violation of OCGA § 17-16-4 (a) (4), and appellant's argument to the contrary failed.

Appellant also contended that the trial court erred in denying his motion to suppress evidence, including a bloody shirt and knife, seized during the execution of the search warrant on his residence because the police unlawfully searched the residence under the pretense of a "protective sweep" and used observations from that sweep to obtain the search warrant. The Court again disagreed.

A cursory warrantless search limited to spaces where a person may be found, known as a "protec-

tive sweep," is permissible when officers reasonably believe, based on articulable facts known to them at the time together with rational inferences drawn from those facts, that the sweep is necessary to protect or preserve life or to avoid serious injury to officers or others because of the potential presence of other dangerous persons or of additional victims. Evidence observed in plain view during a lawful protective sweep may be seized or used to support the swearing out of a search warrant.

Here, the Court found, the evidence supported the trial court's finding that the officers' sweep of appellant's home immediately after he was taken into custody was lawful. Appellant's arrest was part of a rapidly unfolding situation in which officers responded to a 911 call regarding people fighting in the street and a possible stabbing. They found a dying victim in the street upon arrival at the scene and another victim in hysterics. Appellant had locked himself inside his residence causing a brief standoff with law enforcement, and when appellant exited the residence, he too had cuts to his body. Officers on the scene testified that they did not know whether other assailants or victims remained inside the residence, and they swept the residence to make sure no one else was inside. Under these circumstances, the officers acted reasonably in conducting a protective sweep and their sweep was no more extensive than necessary to detect immediate danger. Thus, the Court concluded, no illegal search occurred, the items officers observed in plain view were permissibly used in obtaining a search warrant, and the trial court properly admitted the subject evidence.

## State's Right to Appeal; Pleas in Bar

*State v. Cash, S17A1059 (10/30/17)*

Cash and her daughter, Weathington, were convicted of malice murder, felony murder, two counts of aggravated assault, and possession of a firearm during the commission of a felony. The trial court granted their motion for new trial on the general grounds. The State appealed, but the Court affirmed. *State v. Cash*, 298 Ga. 90 (2015). Upon return of the remittitur, Weathington filed a "Double Jeopardy Plea in Bar," claiming that the evidence at trial was insufficient under the standard of *Jackson v. Virginia*, and consequently, that the State could not again put her in jeopardy for the same offenses. Cash adopted her daughter's motion as her own. The superior court sustained the motion, finding that the defendants had not waived their rights to challenge the sufficiency of

the evidence under *Jackson v. Virginia*, and that the evidence was insufficient under such standard. The trial court then expressly directed that a judgment of acquittal be entered as to both defendants on all counts of the indictment. The State appealed.

Weathington moved to dismiss the State's appeal, arguing that in *Cash I* the Court already ruled that jeopardy attached at her first trial. The Court stated that appeals by the State in criminal cases are construed strictly against the State and the State may not appeal any issue in a criminal case, whether by direct or discretionary appeal, unless that issue is listed in OCGA § 5-7-1. Applicable OCGA § 5-7-1 (a) (3) provides that the State may appeal to from "an order, decision, or judgment sustaining a plea or motion in bar, when the defendant has not been put in jeopardy." (Emphasis supplied.) Relying on *United States v. Jorn*, 400 U.S. 470 (91 SCt 547, 27 LE2d 543) (1971), the Court held that there is no dispute that the "Double Jeopardy Plea in Bar" was sustained prior to any impaneling of a jury for a retrial; thus, OCGA § 5-7-1 (a) (3) allows the State's appeal.

The State argued that the trial court erred in sustaining defendants' "Double Jeopardy Plea in Bar" and then dismissing the charges against them on the ground of insufficiency of the evidence because defendants had abandoned the sufficiency issue in *Cash I* and because the superior court was without jurisdiction to entertain the motion in the first place. However, the Court held that the defendants did not abandon the issue by virtue of their withdrawals of their cross-appeals in *Cash I*. Moreover, there was no ruling in *Cash I* which precluded the filing and consideration of defendants' "Double Jeopardy Plea in Bar." Consequently, the Court found that it had jurisdiction to review the legal sufficiency of the evidence at defendants' trial.

The Court then reviewed the evidence in the light most favorable to support the verdicts and concluded that the evidence was more than sufficient under *Jackson v. Virginia* standard of review. Accordingly, the judgment sustaining the "Double Jeopardy Plea in Bar" based on insufficient evidence in the first trial was reversed and the case was remanded to the superior court.

## Sentencing; Constitutionality

*Pierce v. State, S17A0828 (10/30/17)*

Appellant was convicted of six counts of aggravated child molestation, two counts of child molestation, two counts of sexual battery, and one count each of sexual exploitation of a child,

distribution of Hydromorphone, and distribution of Alprazolam. The crimes involved acts with three teenage boys, B.M., M.T., and D.D.

Appellant argued that Georgia's statutory sentencing scheme for aggravated child molestation is unconstitutional both *per se* and as applied. He argued that the sentencing scheme violates the Due Process and Equal Protection Clauses of the Georgia Constitution and the United States Constitution, and violates the prohibition against cruel and unusual punishment found in the Eighth Amendment of the United States Constitution and Article I of the Georgia Constitution. The Court disagreed.

Appellant first argued that the sentencing scheme violates his right to due process because it allows a court to impose a term of years that could far exceed a person's life expectancy, for example, 300 years, but yet would still theoretically "not exceed life imprisonment." When combined with OCGA § 17-10-6.1 (c) (4), which requires that such defendant serve one hundred percent of the time imposed without any possibility of parole or early release, such a 300-year sentence, if imposed would constitute a *de facto* life sentence without the possibility of parole. But, the Court held, this argument is identical to that raised regarding rape and was rejected by the Court in *Merritt v. State*, 286 Ga. 650 (2010). Thus, for the reasons stated in *Merritt*, the sentencing scheme here did not violate due process on this ground.

Next, appellant argued that the aggravated child molestation sentencing scheme violates equal protection because a defendant could "be subjected to maximum terms of imprisonment substantially different than others charged in the same manner with the exact same offenses." For example, appellant argued, an individual sentenced to 50 years of incarceration for a first time conviction would have to serve every day of the 50-year term, while an individual in the same situation sentenced to life, "a theoretically longer sentence," would be eligible for parole after having served 30 years. But, the Court found, appellant failed to show that any such potential variation in application of the statute is without a rational basis. As with other sentencing statutes, allowing the court flexibility to fix sentences furthers the goal of individualized treatment at the punishment stage. Such flexibility includes the ability to decide whether under the facts presented, a defendant should be sentenced to life or to a split sentence with a term of no less than 25 years, with full knowledge of the minimum period of incarceration required under each option. Moreover, a statutory difference in treatment is not to be set aside if any state of facts

reasonably may be conceived to justify it; if there is some rational basis for the classification, it does not offend constitutional safeguards merely because the classification is not made with mathematical nicety or because in practice it may result in some inequality. Thus, appellant failed to meet his burden of showing that there is no rational basis for the sentencing options including different mandatory incarceration periods for defendants charged with aggravated child molestation.

Appellant also contended that the sentencing scheme for aggravated child molestation "on its face and as applied to him individually," violates the prohibition against cruel and unusual punishment found in both the United States Constitution and the Georgia Constitution. However, the Court held, the sentencing scheme, life or a minimum of 25 years to serve, is not so grossly disproportionate to the crime of aggravated child molestation, which involves molestation that physically injures the child or involves an act of sodomy, that would require the Court to find it "*per se*" cruel and unusual.

The Court also found that appellant's "as-applied" argument also fails. He contended that his life sentence with 30 years to be served and the remainder on probation was cruel and unusual because the evidence showed that the sexual intercourse was not forced, no violence was involved, he did not kidnap or restrain the teens, they were not physically injured, and he had no prior convictions. But, the Court noted, appellant was charged with six counts of aggravated child molestation, and the evidence showed that he engaged in acts of anal and oral sodomy with two 14-year-old boys. The evidence also showed that he offered M.T. and B.M. prescription medication just prior to engaging in sex acts with them. The trial court sentenced him to a life term on each count of aggravated child molestation to be served concurrently to the first count, resulting in a sentence of life with the first 30 years to be served in confinement. Also, a fourteen-year-old boy is not legally able to consent to sexual relations with an adult male. Thus, the Court concluded, appellant's concurrent life sentences with a total of 30 years to serve for multiple acts of aggravated child molestation do not raise even a threshold inference of gross disproportionality. Accordingly, the Court rejected appellant's claim that his sentence was cruel and unusual "as applied."

## Sufficiency of the Evidence; Felony Murder

*Lebis v. State*, S17A0948 (10/31/17)

Appellant was convicted of felony murder,

numerous counts regarding possession of firearms and dangerous weapons, and four counts of misdemeanor obstruction. The evidence, briefly stated, showed that appellant and her husband, Tremaine, were staying in a rented motel room near their home. Tremaine had an outstanding arrest warrant out for him. Appellant rented the room under her son's name and Tremaine was hiding out with her at the motel to avoid arrest. The motel room was very small and there were very many weapons inside. Two officers, Brown and Callahan, arrived at the hotel in response to a 911 call concerning appellant's unruly behavior. At some point, the officers determined to arrest appellant and Tremaine. A struggle with Tremaine ensued and appellant yelled at the officers to leave Tremaine alone. Tremaine broke free and began to run around the back of the motel. Neither officer noticed that Tremaine was wearing a fanny pack. During the pursuit, Tremaine pulled a Glock from the fanny pack and shot Callahan, killing him. Brown then shot and killed Tremaine. Appellant was subsequently arrested.

Appellant contended that the evidence was insufficient to support her conviction for possessing the weapons found in the motel room. But, the Court found, significant evidence connected appellant to the weapons in the motel room. The State was not required to show that appellant solely or actually possessed the weapons at any point. Nor was it required to offer direct evidence that she possessed them. Instead, the State had to put forward enough evidence so that a properly-instructed jury could reasonably conclude that appellant at least jointly and constructively possessed the weapons in her motel room. The State did just that; the circumstantial evidence in this case showed a connection between appellant and the weapons in her motel room beyond mere presence and spatial proximity, or at least a rational trier of fact could find that it did. Accordingly, there was sufficient evidence to support the jury's verdict on the constructive possession charges in this case, and the Court affirmed her convictions of these crimes.

Appellant was also charged as party to the crime of felony murder. Specifically, the indictment charged that appellant, as a party to the crime, caused the death of Officer Callahan "while" she "did jointly possess a Glock .357 handgun" with her husband Tremaine, a convicted felon, when he shot Officer Callahan. The .357 Glock was the weapon that Tremaine had placed in his fanny pack at some point, and that he later used to shoot and kill Officer Callahan. The Court noted that in keeping with the indictment, the felony murder count against appellant required proof that she jointly possessed

the murder weapon at the time of the murder.

The Court found that “at the given time” that Tremaine shot Officer Callahan, the evidence showed that Tremaine, not appellant, had actual and sole possession of the .357 caliber Glock that he pulled from the fanny pack he wore. Tremaine had left the motel room, and there was no evidence that appellant had the intention or ability to exercise control over the weapon at that point. Under these circumstances, appellant did not jointly and constructively possess that firearm at the time of the murder.

In so holding, the Court stated that possession may be sole or joint. And, if one person alone has actual or constructive possession of a thing, possession is sole. The corollary is that where one person alone has actual possession of a thing, no other person may also have actual or constructive possession of the thing. That is not to say that actual possession and joint possession cannot coexist; they plainly can. But to the extent cases have found that a defendant is in constructive, and thus joint, possession of contraband possessed by another person alone, they are disapproved.

Appellant also challenged her convictions for misdemeanor obstruction based on her repeatedly yelling at Officers Callahan and Brown to leave Tremaine alone. When asked about the effect of appellant's screaming, Officer Brown testified that it was “not assisting” with the arrest of Tremaine. He did not testify, however, and the evidence did not show, that appellant intentionally hindered the arrest by her protestations. And there was no evidence that appellant refused or failed to comply with any directives from either officer at that time.

The Court noted that under certain circumstances, words alone can constitute obstruction. This case, however, is different than those in which our courts have found obstruction based solely on words or remonstrations. Misdemeanor obstruction convictions based on a defendant's words have survived appellate review where defendants' words affirmatively interfered with the officers' actions. The fact that appellant was “not assisting” with the arrest in this case when she yelled at officers to leave Tremaine alone, without anything more, did not rise to the level of obstruction, and so, the Court held, her convictions for obstruction based on her yelling at the two officers to leave her husband alone was reversed.

## Mental Competency; Requirement of a Hearing

*Jones v. State, A17A1053 (10/17/17)*

Appellant was convicted of rape, aggravated child molestation, and incest. He contended that the trial court erred in denying his counsel's pretrial request for a competency evaluation of him. The evidence showed that the parties negotiated a plea immediately prior to trial. During the plea colloquy, appellant told the court that before coming to court he had smoked marijuana and had taken a blood pressure medication and an antidepressant. He later informed the court that he previously was diagnosed with depression and bipolar disorder, and that in 2009 he had been hospitalized for depression. When asked if he understood the proceedings and everything that was happening in court, appellant affirmed that he did. He also told the court that there was nothing about his depression or bipolar disorder that interfered with his ability to understand the proceedings. Defense counsel stated that he was “absolutely certain” that appellant was competent and that he was not laboring under any mental defect. The judge also observed that appellant “looks the same as he's looked every time he's appeared before the [c]ourt. He appears to be coherent, alert, and does not appear, at least in my mind, to be laboring under any type of psychotic or psychiatric issues.”

After further discussion regarding the negotiated plea, appellant decided to withdraw his guilty plea and proceed with a jury trial. Defense counsel then made an oral request for a mental health evaluation of appellant. The trial court denied the request, explaining, “You've indicated to the [c]ourt repeatedly that you don't believe your client has any mental health issues and that he's otherwise competent to take this plea. And if he's competent to enter a plea of guilty, he's competent for trial.”

The Court stated that in determining whether the trial court violated appellants procedural due process rights by failing to hold a competency hearing, it focuses on three factors: (1) evidence of the defendant's irrational behavior; (2) the defendant's demeanor at trial; and (3) prior medical opinion regarding the defendant's competence to stand trial. Such an analysis focuses on what the trial court did in light of what it knew at the time of the trial or plea hearing. Here, the Court found, none of these three factors raised a bona fide doubt about appellant's ability to understand the proceedings and thus the trial court was not required to conduct a competency hearing. The record did not show that appellant engaged in any irrational behavior prior to the start of the trial or that his demeanor exhibited incompetence. Instead, the trial court expressly noted on the record that appellant appeared coherent and alert, and the transcript revealed that he

responded appropriately to questions. Moreover, his attorney concluded that he was fully competent to enter a guilty plea, and the court was authorized to consider this in determining the need for a mental evaluation. Although the trial court was informed that appellant had previously been diagnosed with depression and bipolar disorder, there was no evidence of a prior medical opinion that such diagnoses rendered appellant incompetent to stand trial. Indeed, appellant himself told the court there was nothing about those conditions that interfered with his ability to participate in the proceedings. Accordingly, the Court concluded, in light of what the trial court knew at the time of trial, the trial court did not err in proceeding without ordering a mental evaluation.

## DUI; Rule 417

*Miller v. State, A17A0651 (10/18/17)*

Appellant was convicted of DUI (less safe), and following too closely. The evidence showed appellant's vehicle rear-ended another vehicle and, after being arrested for DUI, she refused to submit to the state's requested blood test. Pursuant to OCGA § 24-4-417, the trial court allowed the State to produce evidence of appellant's eight year old DUI conviction. Appellant argued that the eight year span between the two DUI convictions lessens the probative value of the prior DUI and increases its prejudicial impact, and that because of its age, the prior conviction could “no longer” serve the State's purpose of knowledge and absence of mistake. The Court disagreed.

OCGA § 24-4-417 (a) (1) provides that evidence of a prior DUI charge “shall be admissible” in a DUI prosecution where the defendant refused to take a state-administered chemical test to show “knowledge, plan, or absence of mistake or accident.” The Court noted that while neither it nor the Supreme Court has conclusively held that Rule 403 applies to Rule 417, it would presume without deciding that Rule 403 applies to Rule 417. The Court found that despite appellant's contention, the lapse of time does not presumptively lessen the probative value of a prior act, but instead is a factor to be taken into consideration when balancing the probative value of the evidence against its potentially prejudicial impact. A trial court has considerable discretion in determining whether the potential for prejudice substantially outweighs any probative value.

Here, the Court found, the trial court admitted the prior DUI for proper purposes pursuant to Rule 417, including that such evidence tended to

show appellant's knowledge of the effects of alcohol consumption on her driving, and knowledge about the use of testing to determine impairment. Thus, the trial court was authorized to find that its probative value was not substantially outweighed by its prejudicial impact, despite the age of the prior DUI conviction. Accordingly, the trial court did not abuse its discretion in allowing this evidence to come in.