

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 20, 2015

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Lalaine Briones
State Prosecution Support Director

Sharla Jackson
Domestic Violence, Sexual Assault,
and Crimes Against Children
Resource Prosecutor

Todd Hayes
Sr. Traffic Safety Resource Prosecutor

Joseph L. Stone
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Leah Hightower
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Nedal S. Shawkat
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **Jury Charges; O.C.G.A. § 17-8-57**
- **Immunity; O.C.G.A. § 20-2-1001**
- **Sentencing; Durden v. State**
- **Verdicts; Polling of Jury**
- **Merger; Proximate Cause**
- **Appellate Standard of Review; Probable Cause**
- **Special Purpose Grand Juries; Perjured Testimony**

Jury Charges; O.C.G.A. § 17-8-57

Palmer v. State, A14A1941 (3/3/15)

Appellant was convicted of two counts of aggravated child molestation and one count of statutory rape. He contended that the trial court violated O.C.G.A. § 17-8-57 in its charge to the jury by commenting on the credibility of the victim. The Court agreed and reversed.

The record showed that during its charge to the jury, the trial court gave the following instruction on statements made by a child describing sexual contact or physical abuse: "A statement made by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another shall be admissible in evidence by the testimony of the person to whom made if the child is available to testify in the proceedings and *if the court finds that the circumstances of the statement provide sufficient indicia of reliability.*" (Emphasis supplied.) The Court noted that *Rolland v. State*, 296 Ga.App. 889 (2009) and *Starr v. State*, 269 Ga.App.

466 (2004), had previously determined that virtually the same jury instruction on a child's statements describing sexual contact or physical abuse, in which the court expressed an opinion regarding the reliability of those statements, violated O.C.G.A. § 17-8-57 and required reversal. Therefore, based on binding precedent, the Court concluded it must reverse and remand for a new trial.

Immunity; O.C.G.A. § 20-2-1001

State v. Pickens, A14A1593 (3/3/15)

Pickens was a special education teacher who was indicted on six counts of cruelty to children and five counts of false imprisonment for actions involving five of her students. Pickens' indicted charges involved five different special education students and were based on three types of conduct: confining students in a restrictive chair in the classroom or confining them and leaving them alone (six counts), recording a child's screams and playing them back to the child or imitating a child's screams or cries to the child (three counts), and "slamming" a child against school walls and lockers (two counts). She filed a motion to dismiss the indictment for immunity from prosecution under O.C.G.A. § 20-2-1001, contending that she acted to maintain discipline and order and that she acted in good faith. After a three-day hearing, the trial court agreed with Pickens and the State appealed.

The Court stated that to be entitled to immunity from prosecution under O.C.G.A. § 20-2-1001, a defendant must establish three things: (1) she is an educator; (2) the acts or omissions in questions were related

to or resulting from disciplining a student or reporting a student for misconduct; and (3) the educator acted in good faith. The State conceded that Pickens was an educator, but contended that the record did not support the trial court's conclusions that Pickens' actions were "used to discipline the misbehaving student and maintain order and safety in the classroom," or that Pickens acted in good faith. The Court disagreed.

As to whether Pickens' actions were for disciplinary purposes, the State argued that Pickens acted "from an inability to control her anger and frustration with the job." But, the Court found, the record showed that in a classroom like Pickens', with five to seven developmentally disabled children, a single child's actions could disrupt the entire classroom. Thus, actions taken to address the source of the disruption could constitute disciplinary actions, whether or not a teacher was frustrated when she took them.

As to whether Pickens acted in good faith, the Court stated that good faith is a subjective standard and generally, the existence of good faith is a question for the trier of fact, and a trial court's finding on the issue of good faith will be upheld if there is any evidence to support it. The Court agreed with the State that violations of school policy are relevant to whether an educator acted in good faith, if not determinative. But here, although the State elicited testimony that there were no county policies permitting the use of restraint and isolation of developmentally disabled students during this time period, the evidence also established that there were also no county- or state-wide policies prohibiting the practice then, as there are now. Thus, Pickens was left to develop her own coping strategies to manage "a rough group of kids," including one 13-year-old who was larger than she and who grew progressively more aggressive as the year passed. Accordingly, the Court stated, considering the evidence presented at the hearing, the trial court was authorized to find that a preponderance of evidence showed that Pickens acted in good faith and was entitled to the benefits of the immunity statute.

Sentencing; *Durden v. State* *Jeffrey v. State, S14A1418 (3/16/15)*

Appellant was convicted of malice murder, four counts of felony murder,

four counts of aggravated assault, and two counts of possession of a firearm during the commission of a felony, all relating to the shooting death of the victim. The trial court imposed a life without parole sentence for malice murder, plus five years consecutive for firearm possession during the commission of the murder. The court then purported to "merge" all four felony murder verdicts and all four aggravated assault verdicts into the malice murder verdict. The Court, sua sponte, found that the trial court erred in its sentencing.

First, the Court stated, the felony murder counts did not "merge" with the malice murder, but rather were vacated by operation of law. With the felony murder verdicts vacated, the four aggravated assaults on which the felony murder counts were predicated must be evaluated to determine whether any of these verdicts merged as a matter of fact into the malice murder. The test for determining whether one crime is included in another, and therefore merges as a matter of fact, is the "required evidence" test-whether conviction for one of the offenses is established by proof of the same or less than all the facts required to establish the other crime. The Court noted that each of the aggravated assault counts relates to the one single transaction with no "deliberate interval" separating any of the shots; the first charging assault with a deadly weapon; the second charging assault by shooting the victim in the shoulder; the third charging assault by shooting her in the chest; and the fourth charging assault by shooting her in the head. And, the Court noted, significantly, each aggravated assault count also stated pursuant to O.C.G.A. § 16-5-21(k), that "at the time of said offense the parties were parents of the same child," thus drawing the offenses within the realm of family violence aggravated assault.

Ordinarily, the Court stated, in the case of a single victim in a single transaction, an aggravated assault verdict will merge into a verdict for murder. However, this is not so when the aggravated assault involves family violence as defined in O.C.G.A. § 16-5-21(k). The Court noted that in *Durden v. State*, 293 Ga. 89(1)(c) (2013), it expressly predicated its finding that the family violence aspect of the aggravated assault - which elevates the mandatory minimum sentence from one year to three years - was merely a sentencing factor and not an element of the aggravated assault offense. However, a mere two weeks

after its decision in *Durden*, the United States Supreme Court in *Alleyne v. United States*, ___ U. S. ___ (III)(B) (133 S.Ct. 2151, 186 L.E.2d 314) (2013) disagreed with this rationale, concluding that, under the Sixth Amendment and Due Process Clause, any fact that serves to enhance a mandatory minimum sentence is an element of the crime that must be found by a jury beyond a reasonable doubt. "In conformity with *Alleyne*, our contrary holding in *Durden* is thus overruled." Accordingly, the Court held, because the aggravated assault counts here all allege family violence as an *essential element*, these offenses require proof of a fact that the malice murder count does not, and the guilty verdicts on these counts did not merge into the malice murder verdict. Consequently, the Court vacated the sentencing order insofar as it purported to "merge" the four felony murder verdicts into the malice murder verdict; vacated the sentencing order insofar as it merged all four of the family violence aggravated assault verdicts into the malice murder verdict; and directed the trial court to enter judgment on one of the four verdicts, merge the verdicts on the other three aggravated assault counts, and impose a lawful sentence on the single count on which judgment is entered.

Verdicts; Polling of Jury *Allen v. State, S14A1884 (3/16/15)*

Appellant was convicted of murder, felony murder, possession of a firearm during commission of a felony, and two counts of aggravated assault. He contended that the trial court should have sua sponte declared a mistrial because of irregularities in the verdict. The Court disagreed.

The record showed that the verdict form contained a choice of malice murder or voluntary manslaughter on Count 1 of the indictment. When the verdicts were initially presented to the court, the verdict form had both murder and voluntary manslaughter filled in with the word "Guilty." The jury foreman then requested the verdict form be returned to him, and he then wrote, on the back of it: "Change Voluntary Manslaughter to NOT GUILTY," but no change was made to the front of the form. The foreman then read the verdict, stating that jury found the defendant guilty to Count 1, murder, and then guilty as to the remaining four counts.

The Court noted that the trial court polled the jurors as to whether the verdicts of guilty were indeed the verdicts of each juror. In criminal cases, the privilege of polling a jury is the legal right of the defendant, and does not depend upon the discretion of the court. The purpose of the rule is to insure that each member of the jury assents to the verdict, and for the court to discern possible coercion. A negative response to a poll question is enough to raise the inference that the finding of the jury was not concurred in by each of the jurors, and, consequently, there was no legal verdict. But, where, as here, when the jury is polled, and there are no negative responses, the court does not err in determining that the jury reached unanimous verdicts. Accordingly, the trial court did not err by not declaring a mistrial.

Merger; Proximate Cause

Cordero v. State, S14A1336 (3/16/15)

Appellant was convicted by a jury of felony murder and other serious crimes stemming from events on and between Jan.16-18, 2008, which resulted in the death of his four-year-old son. For assaults on the victim that occurred on and between Sept.1 to Dec. 31, 2007, the jury convicted appellant of cruelty to children in the first degree. He contended that the cruelty to children conviction for events that occurred on and between Sept.1 to Dec. 31, 2007 merged as a matter of fact into the felony murder verdict and that the trial court therefore erred by sentencing him on that verdict. The Court disagreed.

The Court initially noted that it had not addressed the precise merger question presented, which involved both 1) a deliberate interval between acts causing injury and 2) expert testimony affirmatively opining that none of the acts causing injury, either before or after the deliberate interval, would have on its own resulted in the victim's death. The issue thus presented was: when a defendant inflicts non-fatal injuries on a victim, followed by a deliberate interval, and then inflicts more non-fatal injuries, which in combination with the earlier non-fatal injuries cause the victim's death, is the earlier, non-fatal crime independent of the subsequent homicide, such that the defendant may be sentenced for both crimes?

The Court stated that in situations where a non-fatal injury is followed by a deliberate interval and then the infliction of a fatal injury, the crime resulting in the initial non-fatal injury does not merge as a matter of fact into the crime resulting in the fatal injury. In this context, the crime resulting in the non-fatal injury is an independent act that does not merge with the crime resulting in the fatal injury. Similarly, where one crime is completed before another crime, the "same conduct" does not establish the commission of both offenses, and the rule prohibiting more than one conviction if one crime is included in the other does not apply.

Here, the Court concluded, under the unique circumstances of this case, the crime of cruelty to children, based on the non-fatal injuries that occurred from September to December 2007, was an independent crime that does not merge with the crime of felony murder, based on the events of January 16-18, 2008. Moreover, the Court noted, to conclude that the multiple acts of cruelty committed over many months against the victim here, when separated by a significant interval, constitute only one crime would mean that appellant was permitted to brutalize the victim for many months with impunity. In so holding, the Court distinguished *Coleman v. State*, 286 Ga. 291 (2009) in which the Court found merger because there was no deliberate interval between the multiple wounds.

Appellate Standard of Review; Probable Cause

Hughes v. State, S14G0622 (3/16/15)

Hughes was indicted on vehicular homicide in the first degree premised on DUI alcohol or various drugs and VGCSA. The trial court granted his motion to suppress, finding that under O.C.G.A. § 40-5-55(a), the officers did not have probable cause to believe Hughes was under the influence. An en banc Court of Appeals reversed, with three judges dissenting. On writ of certiorari, the Supreme Court found that although the Court of Appeals applied the wrong standard of review, it nevertheless reached the right result.

As to the standard of review, the Court stated that when a motion to suppress is heard by a trial court judge, that judge sits as the trier of facts. An appellate court has three

rules regarding the standard of review from a grant or denial of a motion to suppress in which the trial court has made express findings of disputed facts. First, an appellate court generally must accept those findings unless they are clearly erroneous. Second, an appellate court must construe the evidentiary record in the light most favorable to the factual findings and judgment of the trial court. And third, an appellate court generally must limit its consideration of the disputed facts to those expressly found by the trial court. Here, the Court found, the majority of the Court of Appeals violated the second and third rules. Nevertheless, limiting its consideration of the disputed facts to those *found expressly* by the trial court, the Court concluded that the majority of the Court of Appeals reached the right result, notwithstanding its misapplication of the standard of review.

To reach this conclusion, the Court addressed the issue of probable cause in great length. First, the Court noted, the standard of probable cause is an objective one, and the subjective thinking of the actual officers in a particular case is not important. And where the totality of the facts and circumstances known to an officer would permit reasonable officers to draw differing conclusions about whether the suspect probably has committed a crime, probable cause exists, and it is for the officer - not judges, trial or appellate - to decide which of the several reasonable conclusions to draw.

Also, the Court stated, while it owes substantial deference to the way in which the trial court resolves disputed questions of material fact, it owes no deference at all to the trial court with respect to questions of law, and instead, it must apply the law de novo to the material facts. In doing so here, the Court found that the officers had probable cause to believe that Hughes had been driving under the influence of drug. In so holding, the Court noted that the trial court and the dissenting judges of the Court of Appeals misapplied the legal standard for probable cause. First, they erred by placing significance on the subjective views of the officers, because what matters is what a reasonable officer could have concluded from the facts and circumstances known to the officers. Second, they made the mistake of employing a "divide-and-conquer" approach, considering each of the several facts and circumstances known to the officers in isolation, rather than altogether. But, the

Court stated, courts must not look at any one circumstance alone; it is the totality of the circumstances that matters. Furthermore, they put too much weight on the notion that some of the facts and circumstances known to the officers — especially the unsteadiness, sleepiness, and glassy and red eyes that the officers observed at the scene — could have been susceptible of innocent explanations. However, the fact that there may be other explanations for Hughes’s unusual behavior and manifestations did not establish that it would have been unreasonable for an officer to draw the conclusion that Hughes probably had been driving under the influence.

Finally, the Court stated, the main problem with the trial court’s order was that the trial court was not charged with determining whether Hughes was, *in fact*, driving under the influence. The job of the trial court was to determine only whether reasonable officers could have concluded that he probably was. That is, the trial court was supposed to determine whether the officers had probable cause. The existence of probable cause is a legal question as to which the appellate courts owe no deference to trial judges. And in any event, if reasonable officers could have reached different conclusions — some concluding reasonably that Hughes probably had been driving under the influence, and others reasonably concluding otherwise — then probable cause by definition was established. Accordingly, the Court agreed with the majority of the Court of Appeals that the facts and circumstances known to the officers were sufficient to establish probable cause, and the trial court, therefore, erred when it granted the motion to suppress. “To the extent that *Gray v. State*, 267 Ga.App. 753, 756(2) (600 S.E.2d 626) (2004), *State v. Goode*, 298 Ga.App. 749, 750 (681 S.E.2d 199) (2009), and *State v. Encinas*, 302 Ga.App. 334, 336 (691 S.E.2d 257) (2010), conflict with our analysis, we disapprove those decisions.”

Special Purpose Grand Juries; Perjured Testimony

State v. Lampl, S14G0591 (3/16/15)

The Court granted the State’s petition for a writ of certiorari to determine whether the Court of Appeals properly affirmed the superior court’s order dismissing a perjury count of an indictment and suppressing statements made

by Lampl before a special purpose grand jury (SPGJ). The record, briefly stated, showed that a SPGJ was convened “for the purpose of investigating public corruption and various crimes allegedly committed by currently or previously elected county officials and county employees.” Lampl, a city employee, was called to testify concerning a city project. Thereafter, a regular grand jury indicted Lampl on numerous charges including the perjury charge relating to his testimony before the SPGJ. The trial court found that the SPGJ exceeded its authority in investigating the city project and in compelling Lampl’s testimony before it. Consequently, the court quashed and dismissed the perjury count and suppressed from evidence Lampl’s testimony before the SPGJ and all evidence derived therefrom. The Court of Appeals affirmed. *State v. Lampl*, 325 Ga.App. 344 (1) (2013).

Construing O.C.G.A. §§ 15-12-71, 15-12-100 and 15-12-102, the Court stated that a SPGJ has the power to compel testimony and other evidence only insofar as it relates “directly or indirectly to the subject of the investigation” as set forth in the order authorizing its impaneling. Here, the impaneling order on its face authorized the investigation of public corruption and crimes allegedly committed by current or former “county officials and county employees.” There was no dispute that Lampl was neither a current nor former county official nor employee and that it was a city, not county project. Thus, the Court agreed that the SPGJ lacked the authority to investigate the city project or Lampl’s conduct with regard to that project independent of any connection to potential criminal conduct by county officials or employees.

However, dismissal of an indictment and suppression of evidence are extreme sanctions, used only sparingly as remedies for unlawful government conduct. Unless expressly authorized by statute, such sanctions generally cannot be imposed absent a violation of a constitutional right, or in the rare case in which the State’s action has compromised the structural protections of the grand jury and thus rendered the proceedings fundamentally unfair. While in rare instances the exclusionary rule has been applied as a remedy for the violation of a statute, this generally holds only if the statutory violation implicates underlying constitutional interests.

And here, the violation of the impaneling order was, by definition, a statutory violation and nowhere do any of the grand jury statutes authorize either dismissal of an indictment or suppression of evidence as a remedy for a grand jury’s overreach. Moreover, Lampl failed to establish either a violation of his constitutional rights or a structural defect in the grand jury process.

Nevertheless, Lampl argued, the prosecutor violated his due process rights by purposefully misusing the SPGJ to investigate matters the prosecutor knew were outside the scope of the impaneling order. But, the Court found, the indictment was returned by a lawfully constituted grand jury. Furthermore, even if, as Lampl contended, some of the evidence presented to the regular grand jury emanated from the unlawful investigation by the SPGJ, this in itself is of no moment, for grand juries, unlike petit juries, are authorized to consider evidence without regard to its eventual admissibility at trial.

Lampl also argued that he was the “target” of the SPGJ’s investigation and that, therefore, the act of subpoenaing him to testify violated his constitutional right against compelled self-incrimination. But, the Court found, the Fifth Amendment does not prevent a grand jury from subpoenaing a prospective defendant, or target, to appear as a witness. Rather, the Fifth Amendment operates in grand jury proceedings to permit witnesses who are subpoenaed to refuse to answer specific questions, the answers to which the witness reasonably believes would be incriminating. And here, Lampl never sought to assert his privilege, either prior to or during his testimony before the SPGJ, and thus he suffered no violation of his Fifth Amendment rights.

Moreover, he also suffered no harm under our state constitutional privilege against self-incrimination. Our evidence code prohibits a grand jury from compelling the very *appearance* of a witness — as opposed to his incriminating testimony in response to specific questions — only where that witness has been charged in a criminal proceeding with a criminal offense. This prohibition applies only to those who have been charged with an offense — i.e., accused in a returned or proposed charging document — at the time they are called to testify. One who has not been so charged may be compelled to appear

before a grand jury, though he retains the option, during his appearance, of invoking his privilege against self-incrimination and refusing to testify regarding incriminating matters. This is true even if the witness is a “target” of the grand jury’s investigation. Here, there was no evidence in the record that, at the time Lampl testified before the SPGJ, he had been actually charged in any indictment or presentment. Accordingly, while the SPGJ lacked proper authority to subpoena Lampl, the act of doing so did not violate Lampl’s privilege against compelled self-incrimination in any of its constitutional or statutory incarnations. Consequently, the trial court erred in suppressing Lampl’s testimony before the SPGJ as sanctions to remedy the overbreadth of the SPGJ’s investigation.