

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 10, 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

Robert W. Smith, Jr.
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **Right of State to Appeal; Indictments**
- **Evidence; Prior Convictions**
- **Search & Seizure; Good Faith Exclusionary Rule**
- **Drug Forfeitures; Close Proximity**
- **Aggravated Child Molestation; "Physical Injury"**
- **Mutually Exclusive Verdicts; Inconsistent Verdicts**
- **Indictments; Demurrers**
- **Inconsistent Verdicts; Conspiracy**
- **Double Jeopardy; O.C.G.A. § 16-1-8(c)**

Right of State to Appeal; Indictments

State v. Green, A14A2294, A14A2296 (3/11/15)

The State appealed from orders granting Carl and Quintavis Green's motions to suppress and motions to dismiss the counts of an indictment relating to them. The record showed that the Greens were arrested on September 11, 2011 and indicted as part of a 116-count indictment naming 32 defendants. After the trial court granted the motions to dismiss and to suppress on September 13, 2013, the State filed a direct appeal.

The Court found that it lacked jurisdiction to review the motion to dismiss the indictment. The Court noted that O.C.G.A. § 5-7-1(a)(1) now provides that the State may appeal "[f]rom an order, decision, or judgment setting aside or dismissing any indictment, accusation, or petition alleging that a child has committed a delinquent act *or any count thereof.*" (Emphasis supplied). But, the italicized language was added in 2012 and

the enacting legislation specifically provided that "this Act shall become effective on July 1, 2012, and shall apply to offenses which occur on or after that date. Any offense occurring before July 1, 2012, shall be governed by the statute in effect at the time of such offense." Since the Greens were arrested and charged in 2011, the law as it existed in 2011 applied.

Citing *State v. Outen*, 289 Ga. 579 (2011), the Court held that since the trial court did not dismiss all the counts in the indictment, the State was required to obtain a certificate of immediate review and make application for interlocutory appellate review rather than by direct appeal. Since the State failed to do so, the Court lacked jurisdiction. In so holding, the Court rejected the State's argument that since the trial court dismissed all the counts relating to the Greens, it was a final order as to them and therefore directly appealable.

Finally, the Court found, because it affirmed the trial court's dismissal of all the counts of the indictment as to which the motions to suppress would be applicable, the State's appeals of the trial court's orders granting the Greens' motions to suppress were dismissed as moot.

Evidence; Prior Convictions

Johnson v. State, A14A1726 (3/12/15)

Appellant was convicted of armed robbery. The evidence showed that he went into a bank and told the teller that if she did not comply with his demands, she would be shot; but there was no evidence that he actually had a gun. He argued that the trial court erred in not allowing him to introduce evidence that he had pled guilty as part of

a plea bargain to two counts of robbery by intimidation in connection with two other robberies in a neighboring county, as support for his defense that he did not have a gun in this case. The Court disagreed.

The evidence showed that one of the neighboring robberies was used as evidence in this case. In both of the neighboring robberies, appellant entered pleas to robbery by intimidation. He sought to use these convictions in order to create an inference that he did not use a gun in any of the robberies. The Court stated that under the circumstances, the trial court did not abuse its discretion in determining that evidence of appellant's plea was not admissible. Plea bargaining flows from the "mutuality of advantage" to defendants and prosecutors, each with their own reasons for wanting to avoid trial. Therefore, the plea bargain struck between appellant and the neighboring county prosecutors may have been based on any number of reasons. The reasoning behind the plea did not appear on the face of the document itself, and appellant would not have been able to testify as to the prosecutor's reasons for accepting his plea, leaving the jury to speculate why the deal was struck. Thus, evidence regarding appellant's plea would not have made appellant's desired inference that he did not use a gun during this robbery any more probable than it would have been without the evidence.

Search & Seizure; Good Faith Exclusionary Rule

State v. New, A14A1876 (3/12/15)

New was charged with VGCSA. The trial court granted his motion to suppress and the State appealed. The evidence showed that officers went to New's house to search his property based on a Fourth Amendment waiver of a prior conviction. New told the officers that the probation terminated early and the waiver was no longer valid. The officers checked NCIC, GCIC and a representative from the probation office; all confirmed that New was still on probation. Based on this information, the officers conducted the search. However, New was correct; his probation had terminated eight months prior to the search and therefore, his Fourth Amendment waiver was not valid.

The State conceded that there was no consent, no probable cause for the search,

and no exigent circumstances justifying the search. Nevertheless, the State contended, the search was valid because the officers acted in good faith given their reasonable belief that New was on probation and subject to a Fourth Amendment waiver of rights. Thus, it contended, the search was reasonable and legal. However, the Court found, the State's arguments were foreclosed by *Gary v. State*, 262 Ga. 573 (1992) which held that the good faith exception to the exclusionary rule of *United States v. Leon*, 468 U. S. 897 (1984) does not apply in Georgia.

The State further contended that because the primary purpose of the exclusionary rule is to deter police misconduct, its purposes would not be served in the instant case where the officers in the field acted in good faith and the trial court erred in suppressing the evidence. While conceding that the State's argument had some merit, the Court stated that its decision was "not dictated by policy, but by O.C.G.A. § 17-5-30 and by *Gary*. Georgia recognizes no good faith exception. However, our legislature might wish to consider the rationale in *Leon*." Finally, the Court stated, "[w]ithout a good faith exception... we essentially demand perfection from police, yet do not require it of prosecutors, defense counsel, or even judges."

Note: The above decision was written by Judge Ray. The other two Judges on the panel, Andrews and McFadden, concurred in judgment only.

Drug Forfeitures; Close Proximity

State v. West, A14A1619 (3/30/15)

The State appealed from an order denying the forfeiture of a vehicle. The evidence showed that officers executed a search warrant at an apartment in which West resided. The officers located and seized large amounts of marijuana, as well as scales and other equipment indicative of distribution. They also seized West's vehicle which, as held by the trial court, "was parked in the front yard of the residence directly in front of the door." No contraband or money was found in the vehicle, no statement was made to police relating to drug activity involving the vehicle, and no observation was made of West in or around the vehicle prior to the execution of the search warrant. West subsequently entered a guilty plea to possession of marijuana with

intent to distribute. Thereafter, the trial court issued an order on the forfeiture complaint, holding that the vehicle was not subject to forfeiture on the basis of close proximity alone, in the absence of facts connecting the vehicle to West's illegal activity. Implicit in the order was the trial court's finding that the vehicle was, as a factual matter, located in "close proximity" to the marijuana seized from the apartment.

The State argued that the trial court misinterpreted O.C.G.A. § 16-13-49(d) (6) in holding that close proximity alone was insufficient to authorize the forfeiture. In a 4-3 decision, the Court agreed and reversed. The Court found that the plain and unambiguous language of O.C.G.A. § 16-13-49(d)(6) requires nothing more than a geographical connection between the drugs and the property sought to be forfeited. Nevertheless, in acknowledging that the dissent questioned both the interpretation of the close proximity provision and the constitutionality of it, the Court stated as follows: "Arguably, the forfeiture laws have sometimes led to unfair results and failed to protect the rights of innocent individuals. However, it is equally true that such criticism is more appropriately addressed to the General Assembly, which can change the law, or to the Supreme Court, which has jurisdiction on appeal of constitutional challenges. Given that West did not raise before the trial court or on appeal a constitutional challenge to the breadth of the statute or to its application to him under these facts, the dissent's discussion of the same is not apt."

Aggravated Child Molestation; "Physical Injury"

Kendrick v. State, A14A1786 (3/13/15)

Appellant was convicted of aggravated child molestation, statutory rape, child molestation, contributing to the delinquency of a minor and criminal trespass. He argued that the evidence as to the aggravated child molestation count was insufficient on the ground that there was no physical injury to the victim. The evidence showed that appellant had a sexual relationship with a 13 year old girl and that she became pregnant and gave birth. The Court noted that the evidence was somewhat unusual in that there was no physical exam near in time to the molestation,

and the victim, who believed she was in a romantic relationship with appellant, did not testify that the intercourse was physically forceful, painful, or otherwise physically injurious. Thus, there was no evidence presented depicting the physical injuries one might expect in a case such as this. Moreover, there was no evidence of any act of sodomy. Thus, in relevant part, the indictment against appellant alleged "...said act involving physical injury to said child by impregnating her causing said child to endure childbirth..."

The Court noted that O.C.G.A. § 16-6-4 does not define what "physically injures" means, and it found no Georgia case law explicitly defining the term in this context. Nevertheless, the Court found that it is axiomatic that a full-term pregnancy involves at least some impairment of physical condition, and furthermore, there was evidence in this case that the victim experienced pain during the two-day labor and delivery process. Turning to the definitions of "injury" and "bodily injury" according to Black's Law Dictionary (6th Ed. 1990), the Court found that the record supported a finding of a physical injury to the victim caused by the molestation. Thus, the Court concluded, the evidence was sufficient to support appellant's conviction for aggravated child molestation.

Mutually Exclusive Verdicts; Inconsistent Verdicts

Carter v. State, A14A1741 (3/17/15)

Appellant was convicted of multiple counts of voluntary manslaughter and aggravated assault. The evidence showed that appellant and his two co-defendants engaged in a shoot-out at an apartment complex. One of the bullets travelled through an apartment wall and struck the victim, killing her. In relevant part, the jury returned the following verdict: "Count 1, malice murder, not guilty; *voluntary manslaughter, not guilty*. Count 2, felony murder, not guilty; *voluntary manslaughter, guilty*. Count 3, felony murder, not guilty; *voluntary manslaughter, guilty*. Count 5, felony murder, not guilty; *voluntary manslaughter, guilty*. Counts 6, 7, and 8, aggravated assault, guilty."

Appellant argued that the verdicts were mutually exclusive under *Jackson v. State*, 276 Ga. 408, 410 (2) (2003) and its progeny because the jury both convicted and

acquitted him of the same crime. The Court noted that in *Jackson*, the Supreme Court ruled that a repugnant or mutually exclusive verdict is one in which the jury, in order to find the defendant guilty on both counts, necessarily reached two positive findings of fact that cannot logically mutually exist. The State argued that the verdicts were merely inconsistent and therefore valid.

The Court agreed that this case was unlike cases in which verdicts of guilty for multiple offenses cannot be reconciled. But it was also unlike cases in which verdicts of guilty and not guilty were held to be merely inconsistent rather than repugnant. Nonetheless, the Court stated, the crime of voluntary manslaughter is *not identical* whether it is a lesser included offense of malice murder or a lesser included offense of felony murder. Thus, the jury did not have to make two irreconcilable factual determinations about appellant's intent to reach the verdict it did, and that the crimes of voluntary manslaughter under malice murder or felony murder are not the same. The jury could have determined that appellant fired at the co-defendants solely as the result of a sudden, violent, and irresistible passion resulting from the co-defendants' provocative act of shooting at him, thus mitigating his offense and rendering him guilty of voluntary manslaughter as a lesser included offense of felony murder. Along those lines, the jury could also have logically found that appellant was not guilty of malice murder because he did not intend to kill the victim, and was not guilty of voluntary manslaughter as a lesser included offense of malice murder because the victim did not provoke him to act. Accordingly, the Court concluded that the verdict was not legally repugnant and that appellant's acquittal for voluntary manslaughter as a lesser included offense of malice murder did not bar his conviction for voluntary manslaughter as a lesser included offense of felony murder.

Indictments; Demurrers

State v. Thomas, A14A1974 (3/17/15)

Thomas was indicted on one count of felony theft by taking in violation of O.C.G.A. § 16-8-2, alleging that "between [November 17, 2012,] and [December 15, 2012, Thomas] did unlawfully take United States funds, the property of Robert Lee, with a value greater

than \$5,000.00, with intent to deprive said owner of said property" Thomas demurred to the indictment alleging that it failed to provide sufficient notice regarding the manner of commission or identify the date of the crime with sufficient particularity. The evidence at the pretrial hearing showed that Thomas worked as a caretaker through a nursing business for Lee and his wife. After Mrs. Lee passed away, Thomas's employment with Lee ceased, and thereafter, a new employee of Lee's discovered that someone had been using during the alleged time frame a credit card issued to Lee, which card he had never used and which he had not authorized any other individual to use. This discovery was made after the employee found a \$2,500 deduction from Lee's bank account was made to cover the charges on the credit card. While investigating the purchases made with the credit card, surveillance video identified Thomas and her husband as individuals who were making unauthorized purchases with the credit card. The trial court granted the motion and the State appealed.

The State contended that the trial court erred by granting the special demurrer because it was sufficient to allege the date range of all the financial card transactions, and specific dates were not necessary. The Court disagreed. First, the indictment failed to mention the manner of commission of the alleged thefts, that is, whether the thefts were separate instances of use of the credit card or whether the theft was the \$2,500 taken from Lee's account to cover that balance. Conceivably, Thomas could later be charged with some other violation for the individual unauthorized uses of the card separately from the theft of the \$2,500, or perhaps Thomas was not the individual using the card in all those instances. Moreover, the State could easily ascertain the dates the alleged crimes occurred, and could have stated the manner in which the theft occurred and it was, therefore, appropriate for the trial court to grant the motion to quash.

In so holding, the Court rejected the State's argument that *Stack-Thorp v. State*, 270 Ga.App. 796, 798-799 (1) (2004), *Christian v. State*, 288 Ga.App. 546, 548-549 (2) (2007) and *Patterson v. State*, 289 Ga.App. 663, 798-791 (1) (2008) allows the State to allege many small instances of theft over time in one count as a felony rather than a misdemeanor. The Court held that these cases were inapposite

because they were post-conviction appeals addressing sufficiency of the evidence in which the indictment was not alleged to be infirm or in which the Court declined to review the alleged imperfect indictment after conviction.

Inconsistent Verdicts; Conspiracy

Thornton v. State, A14A2103 (3/16/15)

Appellant was charged with murder, conspiracy to commit murder, making false statements, and tampering with evidence; her co-defendant, was charged with murder, conspiracy to commit murder, and making false statements. A jury found appellant not guilty of murder but guilty of the remaining charges, and the same jury acquitted her co-defendant of murder and conspiracy to commit murder, but found him guilty of making false statements.

Appellant contended that the trial court should have vacated her conviction for conspiracy because the same jury acquitted her only alleged co-conspirator and therefore she was in essence convicted of conspiring with herself, which is an impossibility under Georgia law. The Court stated that our courts have not had a prior opportunity to apply the inconsistent verdict rule in this context, where in a joint trial, only one conspirator is convicted. Nevertheless, the Court found, the rationale underlying the abolishment of the inconsistent verdict rule applies in this case. Accordingly, the trial court did not err by refusing to vacate appellant's conviction for conspiracy to commit murder on the basis that such verdict was inconsistent or irreconcilable with the acquittal of appellant's alleged co-conspirator.

Double Jeopardy; O.C.G.A. § 16-1-8(c)

Stembridge v. State, A14A2150 (3/16/15)

Appellant appealed from an order denying his "Motion in Autrefois Convict/Plea in Bar" under O.C.G.A. § 16-1-8(c) against a charge of trafficking in cocaine. The record showed that he was charged with trafficking in cocaine for events occurring on Nov. 6, 2009. A month later, he was indicted in U. S. District Court for conspiracy to distribute and possess with intent to distribute cocaine for events between Nov. 1, 2006 and

Nov. 4, 2009. In April, 2010 appellant pled guilty to the federal indictment. He thereafter filed his unsuccessful "Motion in Autrefois Convict/Plea in Bar" in the state trial court.

The Court stated that under the dual sovereignty doctrine, where a single act violates the law of two sovereigns (e.g., the United States and a state), an accused may be prosecuted and punished by each sovereign without violating double jeopardy. Thus, even if appellant's state and federal prosecutions had arisen out of a single act, Georgia would not be barred from prosecuting him simply because the federal government had already done so. Nevertheless, although Georgia still adheres to the concept of dual sovereignty, it places a statutory limitation on the doctrine. That limitation, codified at O.C.G.A. § 16-1-8(c), provides that "[a] prosecution is barred if the accused was formerly prosecuted in a district court of the United States for a crime which is within the concurrent jurisdiction of this state if such former prosecution resulted in either a conviction or an acquittal and the subsequent prosecution is for the same conduct, unless each prosecution requires proof of a fact not required in the other prosecution or unless the crime was not consummated when the former trial began."

Here, the Court found, appellant pled guilty a conspiracy to violate 21 USC § 841 (a) (1) in violation of 21 USC § 846 and as a matter of federal law, the crime of conspiracy must involve the agreement of two or more persons to commit a criminal act or acts since the act of agreeing is a group act; unless at least two people commit it, no one does. In contrast, a trafficking charge under O.C.G.A. § 16-13-31(a)(1), does not require proof of an agreement between two or more people to commit a criminal act; it is a crime that may be committed by one person acting alone. And, unlike the federal conspiracy statute, the Georgia trafficking statute requires proof of a criminal act - in this case, possession of cocaine. Accordingly, the Court concluded, because each prosecution requires proof of a fact that the other does not, the State's prosecution of the trafficking charge against appellant did not violate O.C.G.A. § 16-1-8(c).