

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 29, 2016

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THIS WEEK:

- **Statements; Intoxication**
- **Voir Dire; Excusals for Cause**
- **Merger; Drinkard**
- **Search & Seizure; Procedural Double Jeopardy**
- **Probation Revocation; Sentencing Orders**
- **Indictments; General Demurrers**
- **Allen Charges; Manifest Necessity for Mistrial**

Statements; Intoxication

Lewis v. State, S16A0389 (4/26/16)

Appellant was convicted of murder and other crimes related to a home invasion. He contended that the trial court erred in failing to suppress his two custodial statements to the police. Specifically, he argued that he was on drugs at the time and therefore, his statements were not freely and voluntarily made. The Court disagreed.

The evidence showed that appellant gave his initial statement at 4:50 a.m. Appellant was read his *Miranda* rights, stated he understood them, and signed a waiver of rights form. Appellant did not appear intoxicated. About thirty minutes into the interview, appellant claimed that he had been up for a couple of days straight and was high on methamphetamine. The police decided to terminate the first interview at that time, not because of any concern about appellant being intoxicated or not knowing what was going on, but because appellant had also indicated that he was tired and needed to get some sleep. The police proceeded with a second interview of appellant

about twelve hours later. Before this second interview, the investigator again reminded appellant of his *Miranda* rights and appellant again consented to be interviewed. Appellant was more forthcoming in this interview, and he appeared to know what he was doing — even stating to police that he knew what was going on. In this interview, appellant made more incriminating statements.

The Court stated that the mere fact that a defendant was intoxicated at the time of the statements does not automatically render them inadmissible. Here, there was nothing to indicate that appellant's statements, even if made while he was intoxicated, were not the product of rational intellect and free will. Therefore, after reviewing the evidence, including the videotapes of the two interviews, the Court concluded that the trial judge was authorized to find that appellant was rational and coherent and that his statements were given knowingly and voluntarily.

Voir Dire; Excusals for Cause

Gray v. State, S16A0278 (4/26/16)

Appellant was convicted of murder and other crimes. She argued that the trial court erred when it refused to excuse a prospective juror for cause based upon his inability to properly apply the law concerning the burden of proof. The Court disagreed.

The Court stated that for a prospective juror to be excused for cause, it must be shown that the juror holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence or the court's charge upon the

evidence. Every prospective juror is assumed to be impartial. The burden of proving partiality is on the party seeking disqualification, and the trial court's exercise of its discretion about whether to strike a juror will not be set aside absent a manifest abuse of discretion.

Here, the Court found, the only issue about which the prospective juror expressed confusion was whether appellant was required to produce any evidence of her own. When the burden of proof was explained to the juror, he was rehabilitated by the court. At that point, appellant asked no further questions to inquire whether the prospective juror's rehabilitation was only illusory or the extent, if any, to which he still held a belief that a defendant ought to present evidence. The trial court was particularly well suited to determine if the prospective juror was merely confused about the burden of proof and capable of rehabilitation, on the one hand, or biased against appellant in a way that could not be cured, on the other. In looking to the voir dire of a prospective juror as a whole (and not just too isolated portions of the voir dire), a trial court does not abuse its discretion when it fails to strike someone who initially expresses confusion about the burden of proof. Thus, the Court found, the trial court acted within its discretion when it found that the prospective juror in this case had only been confused about the burden of proof, and it did not err when it refused to strike the prospective juror for cause.

Merger; Drinkard

Crankshaw v. State, A15A1975 (3/9/16)

Appellant was convicted of conspiracy to possess oxycodone with intent to distribute, conspiracy to possess Roxycodone with intent to distribute, criminal attempt to sell oxycodone, and possession of oxycodone with intent to distribute. She argued that the trial court erred in failing to merge the offenses of attempt to sell oxycodone and possession of oxycodone with intent to distribute because they were based on the same conduct. The Court disagreed.

Under O.C.G.A. § 16-1-7, when the same conduct of an accused establishes the commission of more than one crime, the accused may be prosecuted for each crime, unless one crime is included in the other. To determine if one crime is included in and therefore merges with another, the "required

evidence" test set forth in *Drinkard v. Walker*, 281 Ga. 211 (2006) must be applied. Under that test, the offenses do not merge if each offense requires proof of a fact which the other does not.

Here, the Court found, the attempt to sell oxycodone offense required the State to prove that appellant had the intent to sell the drug and that she took a substantial step toward that crime by arranging the sale of a certain amount of oxycodone pills, which the State proved through evidence that the co-conspirators had agreed over the phone to meet a drug dealer at their house and sell him 300 oxycodone pills for \$5,400. The possession of oxycodone with intent to distribute offense required the State to prove that appellant possessed the drug with the intent to distribute it. Thus, each offense required proof of a fact that the other did not — the substantial step element of the attempt charge was not required to prove the possession with intent charge, while the possession element of the possession with intent charge was not required to prove the attempted sale charge. Therefore, because appellant's convictions for offenses in this case each required proof of a fact which the other did not, the trial court did not err in not merging them and in sentencing her on both of these convictions

Search & Seizure; Procedural Double Jeopardy

Jackson v. State, A15A2244 (3/10/16)

Appellant was indicted for rape, aggravated sodomy, and making a false statement. After the trial court denied his motion to suppress and plea in bar, he appealed. The evidence, briefly stated, showed that an officer responded to a 911 call reporting a rape at an apartment complex. The rape allegedly occurred in Building Eight. The officer noticed a man matching the description of the suspect standing in front of Building Four. The officer approached the individual, who identified himself as appellant, and discovered that appellant had been barred from the apartment complex. At that point, the officer arrested appellant for criminal trespass, searched him, and found a knife and an open bottle of alcohol on his person. The officer then transported appellant to the police department, where detectives were investigating the rape report. A detective interviewed appellant at 2:30 after speaking to the rape victim and

her daughter. Twenty minutes later, the detective obtained a penile swab from appellant to preserve latent DNA or forensic evidence that might be on the surface of his penis. The detective did not secure a warrant for the swab because he believed, based on his training as a sexual assault investigator, that any potential evidence was "fleeting or ... could be compromised in a short amount of time."

Appellant first contended that the trial court erred in concluding that exigent circumstances permitted the penile swab. The Court disagreed. The Court noted that although no Georgia authority addresses the precise issue, other jurisdictions have approved similar warrantless searches and seizures. Here, the Court found, the rape investigation led authorities to appellant, who was discovered near the victim's apartment shortly after the alleged assault and fit the description of the man seen fleeing from the apartment. Although the victim was asleep during the incident, she discovered when she woke that her underwear had been removed, and she felt as though she had been vaginally penetrated. Given these circumstances, the detective had probable cause to conclude that appellant had assaulted the victim. Furthermore, the detective believed, based on his training and experience in sexual assault investigation, that latent DNA contained on the surface of a penis is fleeting and easily compromised. He reasonably feared that waiting to obtain a warrant for a penile swab risked "the imminent destruction" of any evidence in the area. Accordingly, the trial court properly denied appellant's motion to suppress.

Appellant also argued that the trial court erred in denying his double jeopardy plea in bar. The record showed that on January 8, 2013, the Solicitor General charged appellant with the misdemeanor offenses of criminal trespass, carrying a concealed weapon, and open container in connection with his arrest at the apartment complex. The following month, on February 22, 2013, the ADA handling the rape case emailed the solicitor's office, asking that the misdemeanor prosecution be placed "on hold" until the rape investigation was completed. Nevertheless, the misdemeanor charges proceeded to a plea hearing, and appellant pled guilty to the charges on March 1, 2013. Appellant was then indicted on the sex offenses a year later.

The Court noted that under O.C.G.A. § 16-1-7(b), if several crimes 1) arising from

the same conduct are 2) known to the proper prosecuting officer at the time of commencing the prosecution and are 3) within the jurisdiction of a single court, they must be prosecuted in a single prosecution. A second prosecution is barred under O.C.G.A. § 16-1-8(b)(1) if it is for crimes which should have been brought in the first prosecution under O.C.G.A. § 16-1-7(b). In order for this procedural aspect of double jeopardy to prohibit a prosecution, all three prongs must be satisfied. Crimes arise from the same conduct if they emerge from the same transaction or continuing course of conduct, occur at the same scene, occur on the same date, and occur without a break in the action. Moreover, if it is necessary to present evidence of the one crime in order to prove the other, then the State must prosecute those charges at the same time.

Appellant argued that the misdemeanor and felony-related offenses arise from the same conduct because they are intertwined and each offense requires proof of the others. The Court disagreed. Although the offenses occurred on the same date and close in time, they took place in different locations (inside a particular apartment and outside a separate building in the apartment complex). Furthermore, a significant “break in the action” occurred between the felony and misdemeanor offenses. Appellant allegedly assaulted the victim, then fled the scene. Sometime later, an officer saw appellant standing in another location and discovered facts leading to the criminal trespass, open container, and concealed weapon charges. Thus, the Court concluded, there was no continuing course of conduct here.

Moreover, the Court found, the State can establish each set of offenses without proving the other. Appellant notes that during the sexual assault prosecution, the State will likely offer evidence that he was located trespassing at the apartment complex, and a trial of the unrelated misdemeanor offenses might have included evidence that the officer spotted appellant while responding to a possible rape report. But the State does not need to prove that the unrelated misdemeanors occurred to establish that appellant committed sexual assault or made a false statement during the sexual assault investigation. And evidence that appellant sexually assaulted the victim or made a false statement about the assault was not necessary to convict him of the other misdemeanors. Accordingly, the Court

concluded, the trial court did not err in denying the plea in bar because the misdemeanor and felony-related offenses in this case did not arise from the same conduct.

Probation Revocation; Sentencing Orders

Page v. State, A15A1952 (3/10/16)

Appellant appealed from an order revoking his probation and first offender status. The Court granted him a discretionary appeal. The evidence showed that on August 26, 2014, appellant pled guilty to burglary under the First Offender Act and received 10 years, with 12 months confinement. He was orally told by the court to turn himself in on Aug. 29, 2014 at 8:00 a.m. to begin his sentence and was told that his failure to do so would be a violation of probation. Although the trial court signed the written judgment of conviction on August 26, the order was not entered onto the docket until September 2, 2014; the order contained the sentence as pronounced on August 26, including the special condition of probation requiring that appellant report to the jail at 8:00 a.m. on August 29. When he failed to turn himself in on Aug. 29, officers went to find appellant and he was arrested that day for a variety of crimes including VGCSA and felony obstruction. On Nov. 24, 2014, the trial revoked his probation and his first offender status on the burglary and re-sentenced him to 20 years to serve 10 in confinement.

Appellant contended that his trial counsel on his probation revocation was ineffective for failing to argue at the revocation hearing that his probation could not be revoked when a written judgment of conviction had not yet been entered. The Court disagreed. The trial court pronounced appellant’s sentence and signed the judgment of conviction on August 26, and therefore, when appellant failed to appear at the jail on August 29, the trial court was authorized to revoke his probation. To the extent that appellant argued that an order is not effective until it is entered on the docket, the Court found that those cases which appellant cited in support of his argument are inapposite to the situation at hand — whether appellant was required to comply with the trial court’s order that he appear at the jail on a date certain — and deal with procedural issues of appeal or with juvenile court proceedings. Finally, the Court stated, because appellant was a first

offender, the trial court was withholding final adjudication of guilt pending completion of the sentence, and therefore, no double jeopardy concerns existed when the court imposed a new sentence of confinement after appellant committed acts leading to several additional charges while serving the August 26 sentence. Accordingly, because any objection to the revocation or motion to dismiss the revocation proceeding made by counsel on this ground would have been denied, appellant failed to establish that his attorney performed deficiently during the proceeding by failing to raise such an argument.

Indictments; General Demurrers

Sneiderman v. State, A15A1774 (3/11/16)

Appellant was convicted of hindering the apprehension of a criminal in violation of O.C.G.A. § 16-10-50 (count 1); concealing a material fact from the Dunwoody Police Department in violation of O.C.G.A. § 16-10-20 (count 2); three counts of making a false statement to the Dunwoody Police Department in violation of O.C.G.A. § 16-10-20 (counts 3, 8, and 10); and perjury in violation of O.C.G.A. § 16-10-70 (count 6). The charges stemmed from the November 2010 shooting death of appellant’s husband; appellant’s conduct during the Dunwoody Police Department’s investigation of the fatal shooting; and appellant’s testimony during the February 2012 murder trial of Hemy Neuman, who was her workplace supervisor at the time of the shooting. At the murder trial, Neuman admitted that he had an affair with appellant; that he planned to murder her husband; and that he shot and killed her husband.

Appellant contended that the trial court erred by denying her general demurrer, filed during the jury trial, in which she asserted that counts 1 and 2 of the indictment were void because they failed to allege all the essential elements of the charged crimes. A general demurrer challenges the very validity of the indictment and may be raised anytime. An indictment is void to the extent that it fails to allege all the essential elements of the crime or crimes charged.

As to count 1, appellant argued that the indictment was void for failing to allege the essential mens rea or intent element contained in the charged offense under O.C.G.A. § 16-10-50. The mens rea of O.C.G.A. § 16-10-

50 is an intent to hinder the apprehension or punishment of a person who the actor knows or has reason to believe is either (1) a felon, (2) an escaped inmate, or (3) an escaped prisoner. Appellant contended that count 1 was void because it failed to expressly charge the essential mens rea element of O.C.G.A. § 16-10-50 that she intended to hinder the apprehension or punishment of Neuman who she knew or had reason to believe was a felon.

But, the Court found, count 1 of the indictment sufficiently set forth the essential mens rea element of O.C.G.A. § 16-10-50. Count 1's express reference to O.C.G.A. § 16-10-50 on which the charge was based, along with the other factual allegations, adequately informed appellant of the charged offense. Moreover, count 1 further alleged that appellant "did knowingly and willfully conceal facts and destroy evidence of Hemy Neuman's guilt in the murder of [appellant's husband], which she knew was evidence of the crime of Murder. ..." These allegations necessarily raised an inference that appellant acted with the intent required under O.C.G.A. § 16-10-50 to hinder the apprehension or punishment of Neuman who she knew was a felon. The failure to expressly allege the essential element of mens rea or intent does not render an indictment defective where the indictment employs language that necessarily raises an inference that the requisite criminal intent existed. Consequently, the Court held, the allegations of count 1 warranted an inference that the grand jury found probable cause to support the essential mens rea element contained in O.C.G.A. § 16-10-50. The trial court therefore did not err by denying the general demurrer to count 1.

As to count 2, appellant contended that the indictment was void for failing to allege the essential element of materiality contained in the charged offense under O.C.G.A. 16-10-20. The Court noted that because count 2 involved the portion of O.C.G.A. § 16-10-20 dealing with concealment of a fact, an essential element of the offense was proof that the concealed fact was material in a matter within the jurisdiction of the alleged department or agency. Appellant contended that count 2 was void because it failed to expressly charge that the concealed fact (a romantic relationship between herself and Neuman) was material to decisions of the Dunwoody Police Department (DPD) in its

investigation into the murder of her husband. The Court disagreed.

Count 2 alleged that, in violation of O.C.G.A. § 16-10-20, appellant had a romantic relationship with Neuman, and that, while the DPD was conducting an investigation into the murder of appellant's husband, she knowingly and willfully concealed that relationship from DPD representatives. Count 2's express reference to O.C.G.A. § 16-10-20 on which the charge was based, along with the other factual allegations, adequately informed her of the charged offense. Although count 2 did not expressly allege that the concealed relationship was material to decisions of the DPD in its murder investigation, the failure to expressly allege the essential element of materiality in O.C.G.A. § 16-10-20 did not render the indictment defective because the language of the indictment necessarily raised an inference of the requisite materiality. The allegations that appellant "knowingly and willfully" concealed her romantic relationship with Neuman from DPD representatives while the DPD was investigating the murder of her husband necessarily raised an inference that she acted intentionally to conceal that fact from the DPD representatives with knowledge that the fact was material (i.e. of consequence) to the investigation. Accordingly, the allegations of count 2 warranted an inference that the grand jury found probable cause to support the essential element of materiality contained in the offense charged under O.C.G.A. § 16-10-20. Therefore, the Court concluded, trial court did not err by denying the general demurrer to count 2.

Allen Charges; Manifest Necessity for Mistrial

Honester v. State, A15A2235 (3/11/16)

Appellant appealed from the denial of his plea in bar, arguing that the trial court erred when it terminated his first trial on a felony obstruction charge before the jury reached a verdict. Appellant contended that instead of declaring a mistrial, the trial court should have provided the jury with an appropriate *Allen* charge and instructed it to continue deliberating. Appellant also contended that because the trial court declared the mistrial over his objection and in the absence of any manifest necessity for doing so, he was entitled to a plea in bar as a matter of law. The Court agreed.

The facts, briefly stated, showed that appellant was tried on a single felony obstruction charge. After 3 hours of deliberation, the jury announced a deadlock. The trial court, over appellant's objection, asked the numerical division of votes as to guilt or innocence. The jury replied not guilty, 11-1. Defense counsel requested an *Allen* charge. The trial court asked the jury if anyone was refusing to deliberate and the jury said, "no." Again, the defense requested an *Allen* charge. The trial court, however, finding that such a charge would place "undue pressure on a juror," declared a mistrial, to which defense counsel also objected.

The Court stated that the question of whether a jury is "hopelessly deadlocked," and thus the existence of manifest necessity for a mistrial, is within the discretion of the trial court. Given the severe consequences of ordering a mistrial without the accused's consent, it is "highly important" that the trial court undertake a consideration of alternative remedies before declaring a mistrial based on a jury's alleged inability to reach a verdict. The exercise of such discretion requires the trial court to take additional steps to determine whether there is little or no possibility of the jury reaching a verdict. Such steps may include polling the jurors individually or questioning them as a group to determine how close they are to an agreement and/or whether one or more jurors is refusing to deliberate.

Here, the Court found, the trial court abused its discretion. Thus, the Court noted, the information known to the trial court at the time the jury pronounced itself deadlocked supported the giving of an *Allen* charge. Yet, the trial court declined despite repeated requests by appellant that it do so. But, the Court found, the trial court's reasoning — the charge would place undue pressure on the lone jury — was flawed. First, an *Allen* charge is not coercive. Second, the trial court failed to consider appellant's right to have his trial completed before this particular tribunal.

Additionally, the Court found, the trial court abused its discretion when, before deciding whether to give the requested *Allen* charge and over appellant's objection, the trial court specifically asked the numerical division of the jury as to guilt or innocence. The trial court then compounded this error when it appeared to consider the nature of the jury's numerical division in deciding whether to require the jury to deliberate further or to declare a mistrial.

Therefore, the Court held, the flawed reasoning employed by the trial court in refusing the requested *Allen* charge did not provide a valid basis for the sua sponte declaration of a mistrial over the objection of the defense. Consequently, the trial court abused its discretion in sua sponte declaring a mistrial rather than instructing the jury to deliberate further. Accordingly, appellant was entitled to a plea in bar as a matter of law.