

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MAY 15, 2009

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## THIS WEEK:

- **Jury Charges; Adulterous Behavior**
- **Motions for New Trial; Appellate Review**
- **Prior Consistent Statements**
- **Right of Confrontation**
- **Sexual Offender Registration**

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### **Jury Charges; Adulterous Behavior**

*Shields v. State, S09A0250*

Appellant was convicted of malice murder, felony murder, aggravated assault, aggravated battery, and other charges related to the death of his girlfriend. He argued that the trial court erred by charging the jury that, “to kill another person for past acts of adulterous behavior or to prevent apparent commission or the completion of adulterous behavior between them, nothing else appearing is murder,” without also giving the jury the language which follows from the pattern charge (Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, § 2.10.13 (4th ed.2007)), that reiterates that adultery can amount to provocation. He argued that this omission misled the jury by implying that adultery can never provide the necessary provocation to mitigate a killing from murder to manslaughter. In a 4-3 decision, the Court held that the charge as given “left the door open for the jury to consider whether such killing was committed in circumstances which would constitute voluntary manslaughter.” Moreover, in the

context of the trial court’s charge as a whole, the instruction in no way misled the jury or hindered appellant’s ability to attempt a defense of voluntary manslaughter.

### **Motions for New Trial; Appellate Review**

*O’Neal v. State, S08G2011*

The Court of Appeals reversed the trial court’s first grant of a motion for new trial filed by appellant. The Court granted certiorari to determine whether the Court of Appeals erred by failing to apply OCGA § 5-5-50 as the proper standard of review when considering the trial court’s first grant of a motion for new trial in a criminal case. OCGA § 5-5-50 provides that “[t]he first grant of new trial shall not be disturbed by an appellate court unless the appellant shows that the judge abused his discretion in granting it and that the law and facts require the verdict notwithstanding the judgment of the presiding judge.” First, the Court held that OCGA § 5-5-50 applies to criminal cases. However, the statute is not applicable in all situations where a trial court has entered a first grant of a motion for new trial. Thus, the first grant of a new trial on general grounds will ordinarily not be disturbed by an appellate court absent an abuse of discretion in that the evidence demanded the verdict rendered. But, where, as here, the first grant of a new trial was on special grounds involving a question of law, an appellate court should review such a question of law de novo and reverse if the trial court committed legal error. The Court of Appeals therefore properly held that OCGA § 5-5-50 was not applicable and properly considered the propriety of the trial court’s ruling on the question of law regarding severance appellant’s offenses.

## Prior Consistent Statements

*Duggan v. State, S09A0046*

Appellant was convicted of murder. He argued that the trial court erred in admitting the prior consistent statement of the victim's stepbrother who witnessed the murder. A witness's prior consistent statement is admissible only where: (1) the veracity of a witness's trial testimony has been placed in issue at trial; (2) the witness is present at trial; and (3) the witness is available for cross-examination. A witness's veracity is placed in issue so as to permit the introduction of a prior consistent statement if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination. Even then, to be admissible to refute the allegation of recent fabrication, improper influence, or improper motive, the prior statement must predate the alleged fabrication, influence, or motive. The Court held that the admission of the statement was error, but given the overwhelming evidence and the fact that the very nature of the error in admitting the prior consistent statement is that it is repetitive of that to which the witness has already testified, the error was harmless.

## Right of Confrontation

*Soto v. State, S09A0225*

Appellant was convicted of malice murder and possession of a knife during the commission of a crime. The victim was appellant's co-defendant's girlfriend who they decided to kill after she announced that she was pregnant with the co-defendant's child. The evidence showed that the co-defendant entered a guilty plea and the State called him as a witness. He testified that appellant walked with him to the victim's neighborhood, but waited at a supermarket while he alone killed the victim by hitting her with a barbell and stabbing her with a knife. Suddenly, in the midst of further questioning by the State, the co-defendant announced that he would not answer any more questions. He also refused to answer questions posed by the defense. The State was allowed to impeach him through the testimony of a police officer and a fellow prisoner by introducing hearsay statements he gave to those individuals. Appellant argued that the trial court erred in admitting these hearsay statements because he was unable to cross-examine

his co-defendant as to whether, or why, he made them, and arguing that, therefore, his Sixth Amendment right of confrontation was violated.

The Court held that the statements made to the police were inadmissible under *Crawford*. The statements made to a fellow prisoner were also inadmissible. The State argued that the latter testimony was admissible as prior inconsistent statements. But, the Court held that the mere fact that the co-defendant's trial testimony was inconsistent with his prior statements does not mean that his prior statements were admissible at trial because prior inconsistent statements remain inadmissible in the absence of an opportunity for effective cross-examination. Similarly, the hearsay testimony was not admissible under the necessity exception because the out-of-court statements of an accomplice are inherently unreliable. Likewise, the statement was inadmissible as the statement of a co-conspirator because, even if it can be said that the conspiracy was ongoing when the statement was made, defendant did not have an opportunity to cross-examine the declarant. However, the Court reviewed the evidence and determined that in light of the overwhelming evidence of guilt, the admission of the statements by the co-defendant was harmless.

## Sexual Offender Registration

*Rogers v. State, A09A0425*

Appellant argued that the trial court erred in requiring him to register as a sexual offender. Georgia law requires a person to register as a sex offender if, among other things, he or she is convicted on or after July 1, 1996 of a "criminal offense against a victim who is a minor." OCGA § 42-1-12 (e) (1). For convictions after June 30, 2001, "criminal offense against a victim who is a minor" is defined expansively to include any criminal offense under Title 16 of the Georgia Code that consists of "[c]riminal sexual conduct toward a minor." OCGA § 42-1-12 (a) (9) (B) (iii). In determining whether the conduct toward the minor was sexual in nature, courts must look to the underlying facts of the conviction in question. This inquiry may include looking to the underlying facts as set forth in the indictment or accusation. Here, the Court held, appellant pled guilty to two counts of aggravated assault as lesser included offenses

of one count of aggravated child molestation and one count of rape. As such, his aggravated assault convictions were predicated upon the facts alleged in those indictments showing how the charged crimes were committed. These factual allegations of those indictments showed that the underlying conduct for the first aggravated assault was the performance of oral sodomy on one victim, and the underlying conduct for the second aggravated assault was the rape of the other victim. Moreover, there was no dispute that the victims were minors at the time of the offenses. The record therefore showed that appellant pled guilty to crimes falling within the category of criminal sexual conduct toward a minor.

The Court also stated that the designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Thus, the fact that the sentencing court did not expressly impose registration upon him did not mean he did not have to register. Furthermore, although he was allegedly not required to register for the first two and a half years after his sentence, the Court noted that the sexual offender registration statute has been amended multiple times over the years. Regardless of what version was in effect at the time of appellant's sentencing, it is the current version of the statute which determines whether registration is required. Consequently, whether appellant was required to register in the past was irrelevant to whether he must register at the present time under the current version of the statute.