

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 5, 2015

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THIS WEEK:

- **Judicial Commentary; O.C.G.A. § 17-8-57**
- **Indictments; Jury Charges**
- **Guilty Pleas; Mental Health**
- **Closing Arguments; Prosecutorial Misconduct**
- **Theft by Receiving; Sufficiency of the Evidence**
- **Self-Defense; Immunity**
- **Facebook; Authentication**
- **Death Sentence; Mitigation Evidence**
- **Statements; O.C.G.A. § 5-5-48**

Judicial Commentary; O.C.G.A. § 17-8-57

Smith v. State, S15A0614 (6/1/15)

Appellant was convicted of felony murder and other crimes. Appellant contended that the trial court violated O.C.G.A. § 17-8-57. The record showed that during the testimony of a witness who saw the encounter between appellant and the victim, the witness became visibly upset while on cross-examination. The trial court took a break in the trial for the benefit of the witness and questioned the witness out of the jury's presence about the reason for her distress. During this break, the witness stated that she had just come from the doctor; she was having medical problems; and she had a lot on her mind. When the court asked the witness if she wanted to take a break, she responded that she wanted to "get it over" and "go home." When the jury returned to the courtroom, the trial court, with the witness's permission, informed the jury that: "[The witness] doesn't feel well this morning. She's

having some personal medical issues. And she's not upset with any of the lawyers, but she doesn't feel well. But we're going to try to finish asking her questions. But I just wanted y'all to know that the stress is not really related to this case. So we're going to try to get her out of here as soon as we can." Appellant contended that the trial court's statement that the witness's stress was not related to the trial was an improper comment on her credibility and violated O.C.G.A. § 17-8-57. The Court disagreed.

The Court stated that one of the purposes of O.C.G.A. § 17-8-57 is to prevent the jury from being influenced by any disclosure of the trial court's opinion regarding the credibility of a witness. However, a trial court has considerable discretion to control the trial of the case to ensure a fair trial and the orderly administration of justice. A trial court also has discretion to propound questions to a witness to develop the truth of the case or to clarify testimony. Here, the Court stated, the issue was whether or not the judge's statement improperly bolstered the witness's credibility.

The Court found that it did not. During the witness's cross-examination, the trial court became concerned about how upset the witness was and stopped the proceedings to briefly question her about her well-being. In informing the jury of the source of her discomfort, the court did not express a favorable opinion on her abilities; did not compliment her or express a "high opinion" of her; and did not "clearly intimate the court's opinion that her testimony was believable. Instead, in an attempt to secure a fair trial and the orderly administration of justice by discovering the source of the witness's distress, the court objectively and matter-of-factly

told the jury of the reason for the distress. Accordingly, the trial court did not violate O.C.G.A. § 17-8-57 in doing so.

Indictments; Jury Charges

State v. Easter, S14G1628 (6/1/15)

The Supreme Court granted certiorari in this case to determine whether the Court of Appeals in *Easter v. State*, 327 Ga.App. 754 (1) (a) (2014) correctly held that the trial court charged the jury on aggravated assault in a manner not alleged in the indictment. The indictment alleged that Easter assaulted the victim “with a crowbar, an object which when used offensively against another person is likely to result in serious bodily injury.” The Court of Appeals held that the trial court erred by giving the jury a charge from which it could have found that Easter had committed aggravated assault by a method not charged in the indictment, i.e., by using a deadly weapon rather than merely an object likely to result in serious bodily injury.

Citing *Green v. State*, 291 Ga. 287, 294 (8) (2012), the Court reversed. The Court noted that in *Green*, it clarified that the “object, device, or instrument” phrase in former O.C.G.A. § 16-5-21(a) (2) simply describes a specific mode, rather than constituting an alternative mode, of “deadly weapon” aggravated assault, and that, therefore, it is not error to refer to a “deadly weapon” in instructing the jury on an aggravated assault count predicated on the use of an “object, device, or instrument.” The Court found that the relevant language of the indictment and jury instructions in *Green* were almost identical to those at issue here. Thus, the court’s use of the phrase “deadly weapon” in the jury instructions was a general reference to the aggravating circumstance in former O.C.G.A. § 16-5-21(a)(2), which also included “any object, device, or instrument which, when used offensively against a person, is likely to or actually does result in serious bodily injury.” Additionally, as in *Green*, the court instructed the jury that the assaulting object — here a crowbar — was not a deadly weapon per se. Therefore, the jury instructions were correct.

In so holding, however, the Court chastised the State because the State failed to cite *Green* in its brief to the Court of Appeals, and even after the Court of Appeals issued

a decision that was inconsistent with *Green*, the State filed no motion for reconsideration and otherwise, did nothing to bring *Green* to the attention of the Court of Appeals. “We take this occasion to remind lawyers of their obligation to bring pertinent legal authority to the attention of the courts and to do so in a timely manner.”

Guilty Pleas; Mental Health

Smith v. Magnuson, S15A0281 (6/1/15)

Magnuson was indicted on charges of enticing a child for indecent purposes (two counts), possession of child pornography, and attempted kidnaping. In 2001, during a group plea, Magnuson entered non-negotiated guilty pleas to all counts of the indictment. During the plea hearing, the judge asked if any defendant had ever been a patient in a mental health facility or under the care of a psychiatrist, and Magnuson incorrectly answered that he had not. Plea counsel informed the judge prior to acceptance of Magnuson’s pleas that Magnuson had in fact been institutionalized and treated for mental health problems but added that he could not say whether psychiatrists had been involved. Counsel then stated that Magnuson had been found competent to stand trial, to which the court responded, “he appears as such.” The court ultimately accepted Magnuson’s pleas without making any further inquiry into his mental health history or his then-current mental state. After a sentencing hearing, Magnuson was sentenced to 45 years of imprisonment to be followed by 20 years of probation.

In 2008, he filed a habeas petition alleging that his mental condition prevented him from entering valid guilty pleas and challenging the effectiveness of plea counsel on numerous grounds, all relating to counsel’s failure to investigate his mental health history and mental condition at the time of the plea hearing. After a hearing, the habeas court granted his petition, finding Magnuson’s pleas were invalid because “his mental health condition prevented him from understanding the questions of the court and answering them truthfully due to the circumstances of the group plea.” The State appealed and the Court affirmed.

After a review of the record, the Court concluded that there was evidence supporting

the habeas court’s determination that at the time he entered his guilty pleas, Magnuson’s mental condition prevented him from understanding the consequences of his pleas. Specifically, the habeas court considered the undisputed evidence of Magnuson’s history of mental disorders and found persuasive his expert’s testimony regarding Magnuson’s inability to comprehend the import of the plea court’s questions and to answer those questions truthfully. This evidence was bolstered by appellant’s second expert’s testimony, also credited by the habeas court, showing that just prior to entering his pleas, Magnuson believed he would be incarcerated for weeks, not years. At the same time, because plea counsel died prior to the habeas proceedings and the plea court failed to make an independent inquiry related to Magnuson’s mental state or his understanding of the proceedings, there was no evidence in the record showing that Magnuson gained a more accurate understanding of the consequences of his pleas through conversations with plea counsel.

In so holding, the Court rejected the State’s evidence that Magnuson, who was 23 years old at the time of sentencing and had completed the 12th grade, was advised at the plea hearing of all of the rights he was waiving by pleading guilty and stated that he understood he was entering a blind plea and what that meant. While these assertions were supported by the record, the Court found, they did not contradict the habeas court’s findings that Magnuson suffered from a mental disorder at the time of his pleas which prevented him from understanding and truthfully answering the plea court’s questions. Similarly, the Court also rejected the State’s argument that the habeas court’s findings regarding Magnuson’s mental condition at the time his pleas were entered are inconsequential because counsel corrected Magnuson’s misstatement. It was not the veracity of the information provided to the plea court that formed the basis of the habeas court’s findings, but rather, the fact that the group dynamic and Magnuson’s disorder prevented him from making an intelligent and knowing decision to enter his pleas. The plea colloquy also highlighted counsel’s unfamiliarity with at least one important detail of Magnuson’s mental health history and counsel’s failure to disclose the full extent of this history to the court. Given the state

of the record in this case and the deference afforded a habeas court's factual findings, the Court concluded that it could not say that the habeas court's determination that Magnuson's pleas were not knowingly and intelligently entered was erroneous.

Closing Arguments; Prosecutorial Misconduct

Williams v. State, S15A0310 (6/1/15)

Appellant was convicted of malice murder, two counts of fleeing a police officer, and possession of a firearm during the commission of a crime. Appellant contended that during closing argument, the State misstated the law regarding justification and told the jury that, as a matter of law, appellant's failure to admit that he fired the fatal shot would preclude the affirmative defense of justification. The State asserted that the argument was essentially a comment on appellant's credibility and his inconsistent defenses, i.e., his claims that he did not fire any gunshot that killed the victim, and that if he did fire the fatal shot, he was justified in doing so.

The Court stated that appellant was entitled to claim both justification and lack of causation, and a defendant who pursues alternative defense theories is entitled to requested charges on both theories, if there is some evidence to support each theory. Also, the State was free to comment upon appellant's choice to defend against the charges in that manner. However, the Court did not agree with the State's assertion that the prosecutor's argument can be seen as something other than a statement regarding the law, i.e., an attempt to inform the jury that the affirmative defense of justification was not, as a matter of law, available to appellant. Here, the prosecutor specifically told the jury that "the affirmative defense requires *by law* that the defendant admits the doing of the act." (Emphasis supplied.) The prosecutor also told the jury that "if you don't admit it ... then you don't get justification," and that appellant's attorney "knew [this] and he's supposed to know." The prosecutor thus misstated the law so as to potentially mislead the jury.

But, the Court concluded, no harm arose from the State's argument. Rather, the court informed that jury that it would provide the law to be used in the jury's deliberations, and it did so. The court instructed the jury that

the closing arguments were not evidence, and that it was the court's "duty and responsibility to determine the law that applies to this case and to instruct you on that law. You are bound by these instructions. It is your responsibility to determine the facts of the case from all the evidence presented. Then you must apply the law I give you in the charge to the facts as you find them." Furthermore, the court fully instructed the jury on the defenses of mistake of fact and justification. Accordingly, the court made it clear that instruction on the law would come from the court, negating any harmful effect of the prosecutor's misstatement of the law. Moreover, the Court found, at the conclusion of the court's charge, appellant stated that he had no objections to the charge; if appellant believed that the court's charge did not go far enough to correct the prosecutor's misstatement, he could have asked for additional instructions.

Theft by Receiving; Sufficiency of the Evidence

Daughtie v. State, S15A0591 (6/1/15)

Appellant was convicted of malice murder, theft by receiving and other related crimes. He argued that the evidence was insufficient to support his theft by receiving conviction. The Court agreed and reversed.

Under O.C.G.A. § 16-8-7, a person commits theft by receiving stolen property when he disposes of, receives or retains stolen property which he knows or should know is stolen. Thus, to convict appellant of theft by receiving the handgun used to kill the victim, it was incumbent upon the State to prove beyond a reasonable doubt that appellant knew, or should have known, the gun was stolen when he received and retained it. Knowledge that the gun was stolen may be inferred from circumstances, when the circumstances would excite suspicion in the minds of ordinarily prudent persons. However, knowledge that a gun was stolen cannot be inferred even when defendant bought a gun on the street at a reduced price, or when the gun was labeled for law enforcement use. Nor can such knowledge be inferred when there is only evidence that a defendant found a gun that had been reported stolen.

The Court noted that at trial, the owner of the handgun testified the gun was stolen from him in North Carolina by a friend.

The only other evidence introduced by the State concerning the stolen gun was an orally recorded statement appellant made in response to police questioning at the station. Asked where he obtained the handgun, appellant told police he found it behind a club in North Carolina, adding "the way [he] found it, looks like somebody put it there." The Court held that because this evidence sheds no light on appellant's knowledge of the provenance of the handgun, it was insufficient to enable a rational jury to find appellant guilty beyond a reasonable doubt of theft by receiving stolen property.

In so holding, the Court rejected the State's argument that the evidence was sufficient to convict appellant of theft by receiving based on appellant's statement to police that he found the gun. In this regard, citing *Ferguson v. State*, 307 Ga.App. 232, 235-236 (2010), the State argued that the jury could have regarded appellant's statement as substantive evidence of guilt if the jury rejected it as false. But, the Court stated, *Ferguson* is distinguishable because in *Ferguson* there was other evidence pointing to the defendant's guilt and here, there was no other evidence of appellant's guilt. A statement by a defendant, if disbelieved by the jury, may be considered as substantive evidence of a defendant's guilt at least where some corroborative evidence exists for the charged offense. Moreover, the Court stated, if the State were correct that jury disbelief of a testifying defendant could sustain a conviction without anything more, it would render appellate review of the sufficiency of the evidence meaningless in any case in which the defendant exercised his right to testify. In other words, a decision along the lines the State proposed would mean that in cases in which defendants testify, the evidence invariably would be sufficient to sustain the conviction. Thus, because *Ferguson* could be of no help to the State in the absence of other evidence, and because the other evidence was insufficient to sustain appellant's conviction for theft by receiving stolen property, the Court reversed his theft by receiving conviction.

Self-Defense; Immunity

State v. Sutton, S15A0355 (6/1/15)

The State indicted Sutton for malice murder in connection with the shooting of his brother-in-law, Anderson. The trial court

subsequently granted Sutton's motion to dismiss the indictment, finding that Sutton acted in self-defense in shooting Anderson and was thus immune from prosecution under O.C.G.A. § 16-3-24.2. The State argued that the trial court erred in granting Sutton's motion to dismiss. The Court disagreed and affirmed.

The evidence, viewed in the light most favorable to the trial court's ruling, showed that Sutton had two sisters; one of whom was married to Anderson. The mother of the three siblings was in ill-health and had dementia. Sutton and one sister were angry with the other sister and her husband, Anderson, because they kept taking money from their mother. When Sutton told Anderson's wife that this had to stop, Sutton received from Anderson and Anderson's nephew two profanity-laced voicemails threatening Sutton with bodily harm. The next day, while Sutton was visiting his mother, Anderson's wife stopped in and an argument arose over her continued attempts to get money from their mother. The police were called. The mother spoke to the officer who answered the call and she told the officer that she did not want Anderson coming to her home anymore. The officer conveyed that message in person to Anderson.

Nevertheless, the next morning, Anderson and his wife went to the mother's home for the purpose of getting money from her. Anderson had been drinking for the last eight hours and had cocaine in his system. Sutton was already there, sitting on a sofa and had a gun. Anderson's wife came in first, leaving the door wide open. When she saw the gun, she told Sutton, "We have one too." She and Sutton then began arguing about their mother's money. When Anderson heard the argument, he jumped out of his vehicle and ran towards the door to the residence. When Sutton saw Anderson, he chambered a round into his firearm and repeatedly told Anderson not to come any closer, but Anderson nevertheless "continu[ed] to] proceed through the doorway." Sutton then fired his weapon once, and Anderson fell into some shrubs by the entrance to the apartment. He died from a gunshot wound to the abdomen. No weapon was found on or near him. At the time of the shooting, Sutton knew of three prior acts of violence committed by Anderson

The Court stated that to prevail on his immunity claim, Sutton was required

to establish his justification defense under § 16-3-21 by a preponderance of the evidence. Here, the Court held, the trial court did not err in finding that Sutton had shown by a preponderance of the evidence that he shot the deceased because he reasonably believed such force was necessary to prevent death or great bodily injury to himself or his mother from the deceased's imminent use of unlawful force. The trial court thus properly ruled that Sutton was immune from prosecution.

Nevertheless, the State contended, whether Sutton acted in self-defense under the standard of O.C.G.A. § 16-3-21 is a question for a jury and the trial court therefore erred in ruling on Sutton's self-defense claim before trial. However, the Court stated, citing *Bunn v. State*, 284 Ga. 410, 412-413 (2008) and *Fair v. State*, 284 Ga. 165, 166 (2008), it has clearly held that, upon the filing of a motion for immunity, a trial court must determine before trial whether a person is immune from prosecution under O.C.G.A. § 16-3-24.2. In this case, therefore, the trial court had to determine before trial whether Sutton acted in self-defense according to the standards set forth in O.C.G.A. § 16-3-21. "Although [the State] asks us to overrule *Bunn* and *Fair*, we continue to find their reasoning sound and decline to do so."

Facebook; Authentication

Cotton v. State, S15A0590 (6/1/15)

Appellant was convicted of murder and other crimes related to the killing of his sister's boyfriend. Appellant argued that the trial court erred when it admitted evidence of two incriminating messages that he sent through Facebook. In the first message, appellant wrote that "I KILLED TY AND IT FELT REAL GOOOOOOOD DOING IT," and in the second message he wrote, "im [sic] happy i killed ty." The evidence showed that appellant sent the messages to Facebook accounts set up in fictitious names by the victim's mother and her friend. Specifically, the mother testified that, after appellant killed her son and fled to Pennsylvania, she and her friend used false names to become Facebook "friends" with "Bucky Raw," which appellant acknowledged was a "rap name" that he used. The mother testified that, while her friend was at her house, they contacted appellant via Facebook using their fake names and were

able to engage him in online conversations, in the course of which he sent the incriminating messages to them.

Appellant contended that these messages were not properly authenticated. But, the Court noted, appellant's only objection to the Facebook messages at trial was that they were "prejudicial and not probative." As a result, appellant waived any other claim about the admissibility of the messages.

But, the Court stated, even if he had properly objected, appellant's claim about the authentication of the Facebook messages appeared to be meritless. Documents from electronic sources such as the printouts from a website like Facebook are subject to the same rules of authentication as other more traditional documentary evidence and may be authenticated through circumstantial evidence. Here, the victim's mother testified that she knew appellant went by the name "Bucky Raw" because she saw videos that he had posted — and in which he appeared — on YouTube using that alias; because she saw that appellant's friends and family were Facebook "friends" with "Bucky Raw;" and because she was able to discern appellant's identity through the conversations she had with him on the accounts that she and her friend had set up. As a result, even if appellant had made an objection to this evidence on authentication grounds, the trial court would not have abused its discretion in overruling it.

Death Sentence; Mitigation Evidence

Chatman v. Walker, S15A0260 (6/1/15)

In 2005, Walker was convicted of malice murder and sentenced to death. A court denied Walker's petition for habeas corpus on the merits of his case, but granted his petition regarding sentencing. The habeas court found that his trial counsel rendered ineffective assistance by failing to investigate and present mitigation evidence during his sentencing. The State appealed and in a 39 page opinion, the Court affirmed.

Very briefly stated, the habeas court found that Walker's trial counsel rendered deficient performance. Counsel recognized the need to hire a mitigation specialist, but Scott, the person they hired without any investigation into his qualifications, was ill-prepared to do the job. Once hired, Scott was delegated the

responsibility for the mitigation investigation and then was not adequately supervised. On Scott's recommendation, the defense hired Dr. Miller as their psychiatric expert and Miller provided a report that identified and detailed five areas for potential mitigation.

However, by January 2005, trial counsel were aware that Scott had not traveled as promised, had not secured records as expected, had not followed up on Dr. Miller's recommendations, and had produced little work product. Scott's failings were apparent from his half-page summary of the case to defense counsel, which showed that he had not secured or reviewed records and that he was relying on Dr. Miller's work, rather than his own, to reach his conclusions. Further, even though Scott reported that he was relying on Dr. Miller's work, Scott's summary should have alerted trial counsel that Scott and Dr. Miller had very different impressions of Walker. Specifically, Scott found Walker to be a "good kid" and generally "unremarkable," and he recommended that trial counsel focus on Walker's "absentee mother" and the death of Walker's "drug-dealing father." In contrast, Dr. Miller concluded that Walker came from a dysfunctional home; that Walker was exposed to domestic violence and drug use; and that Walker had a family history of substance abuse and mental illness. Thus, the Court agreed with the habeas court that, "at this point, counsel were aware that their mitigation specialist had not conducted much of an investigation" and that trial counsel unreasonably failed to request a continuance to allow for further investigation or take other remedial measures.

Moreover, the Court found, the circumstances of the mitigation investigation, including a lack of preparation and the competing conclusions about Walker, were evident at trial. Scott's trial testimony conflicted with Dr. Miller's and, Scott's testimony was actually damaging to Walker. Thus, the Court also agreed with the habeas court's conclusion that this was "a situation in which grossly inadequate preparation" combined with "an unqualified mitigation specialist yielded a predictably poor result." Thus, the Court concluded, trial counsel's mitigation investigation and preparation were not reasonable and that trial counsel's performance was constitutionally deficient. In so holding, the Court rejected the State's

argument that the habeas court erred as a matter of law by relying upon the American Bar Association Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

The Court then addressed the prejudice prong of the *Strickland* test. The Court found that had trial counsel conducted an adequate mitigation investigation, they would have discovered additional evidence in a number of areas. Specifically, a history of domestic violence between Walker's parents and that Walker was the victim of physical abuse and extreme physical discipline as a child. The Court noted that the habeas presentation of this evidence demonstrated how a more complete mitigation investigation could have allowed trial counsel to present a consistent and detailed narrative that provided insight into Walker's life and decisions. Thus, considering the combined effect of the deficiencies, the Court concluded that there was a reasonable probability that the absence of those deficiencies would have changed the outcome of the sentencing phase of Walker's trial.

Statements; O.C.G.A. § 5-5-48

Trimble v. State, S15A0040 (6/1/15)

After obtaining a new trial, appellant was convicted a second time of felony murder and related offenses. He contended that the trial court erred, following its grant of a new trial, in refusing to conduct a second Jackson-Denno hearing to consider anew the admissibility of his custodial statement. In support, appellant cited O.C.G.A. § 5-5-48 which provides, "[w]hen a new trial has been granted by the court, the case shall be placed on the docket for trial as though no trial had been had, subject to the rules for continuances provided in this Code." The Court disagreed.

The Court noted that it was undisputed that the trial court held a Jackson-Denno hearing prior to the first trial, at which several witnesses testified, and after which the trial court held appellant's statement to have been voluntary, and therefore admissible at trial. Contrary to appellant's assertion, O.C.G.A. § 5-5-48 does not require de novo reconsideration of rulings made prior to the first trial, particularly where, as here, there was no contention that additional evidence or

changed circumstances would justify altering the prior ruling.