

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 6, 2014

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THIS WEEK:

- **Grand Juries; Bias or Impartiality**
- **Indictments; Special Demurrers**
- **Judicial Comments; Jury Instructions**
- **Polygraph Tests; Motions for Mistrial**
- **Character Evidence; Motive**
- **Search & Seizure; Radio Dispatches**
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Grand Juries; Bias or Impartiality

Brown v. State, S13G1612 (6/2/14)

Appellant, the President and CEO of Cobb Electric Membership Corp (EMC) was indicted on various crimes, including RICO violations, relating to the alleged theft of millions of dollars from EMC members. He filed a motion to abate the indictment because the grand jury was composed in part of persons, i.e., EMC members, who were victims of the alleged crimes. The trial court denied his plea in abatement and the Court of Appeals affirmed.

The Court stated that in determining whether or not grand jury proceedings are biased against an accused, it is an unquestioned rule of law that members of a grand jury may not be selected in a manner that discriminates against persons of a particular race or religion. However, the basic theory of the functions of the grand jury does not require that grand jurors should be impartial and unbiased. In this respect, their position is entirely different from that of petit jurors.

Thus, under Georgia, law, grand jury challenges depend on whether the challenge is propter defectum or propter affectum. If propter defectum, i.e., if a grand juror lacks the capacity to serve, a timely filed plea in abatement will lie. A claim of disqualification propter affectum, on the other hand, i.e., for favor or bias in a particular case, provides no ground for a plea in abatement. Here, appellant's plea in abatement claimed four grand jurors were members of the EMC and presumably biased. Because this was a challenge propter affectum, appellant's motion in abatement was properly denied.

Indictments; Special Demurrers

State v. Wyatt, S14A0317 (6/2/14)

The State was granted an interlocutory appeal following the grant of Wyatt's special demurrer to several counts of the indictment relating to the death of a two-year-old. The record showed that Wyatt was initially indicted for felony murder (Count 1), two counts of aggravated battery (Counts 2 and 3), and cruelty to children in the first degree (Count 4). Counts 1 and 2 alleged that Wyatt committed aggravated battery by depriving the victim "of a member of her body, to wit: her brain, by striking her head against a hard object." Count 3 alleged that Wyatt "seriously disfigur[ed] a member of [the victim's] body, to wit: her back and thighs with bruises, by striking her against a hard object." Count 4 alleged that Wyatt did "willfully deprive [the victim] of necessary sustenance, to wit: did fail to seek medical attention in a timely manner, to the extent that the child's health was jeopardized."

The State later re-indicted Wyatt, charging him with three counts of felony murder (Counts 1-3), aggravated battery (Count 4), aggravated assault (Count 5), and cruelty to children (Count 6). In the new indictment, the State removed the language alleging that Wyatt struck the victim against a hard object. Count 1, felony murder based on aggravated battery, and Count 4, aggravated battery, alleged that Wyatt rendered useless the brain of the victim, a child, “by causing bleeding to and damage to her brain.” Count 2, felony murder based on aggravated assault, alleged Wyatt caused the death of the victim “by causing bleeding to and damage to the brain,” and Count 5, aggravated assault, alleged that Wyatt assaulted the victim, a child, “with an object the exact nature of which is unknown to the members of the Grand Jury, which, when used offensively against another person is likely to result in serious bodily injury.” Count 3 charged felony murder based on cruelty to children in the first degree by failing to seek medical attention for the victim, which was the offense charged in Count 6. The trial court granted Wyatt’s special demurrer to Counts 1, 2, 4, and 5.

The Court stated that the true test of the sufficiency of an indictment to withstand a special demurrer is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged, and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. Here, Wyatt’s special demurrers were based on his contention that the aggravated assault accusation, which stated that the object used to assault the victim is unknown and was silent as to how the object was used, and the aggravated battery accusation, which was silent as to the way in which the battery was committed, did not allow him to prepare for trial on those charges and their corresponding felony murder charges.

The Court first focused on Counts 2 and 5 regarding aggravated assault. The Court noted that Count 5 charged Wyatt with aggravated assault, alleging that he “unlawfully ma[d]e an assault [on the victim] with an object the exact nature of which is

unknown to the members of the Grand Jury, which when used offensively against another person is likely to result in serious bodily injury.” Count 2, charging felony murder based on aggravated assault, added that the assault “cause[d] bleeding to and damage to [the victim’s] brain.” Wyatt argued that the lack of detail about the dangerous object he allegedly used and the manner in which he used it left him without adequate notice of what he must defend against at trial. The State argued in response that the indictment was as specific as it can be because the nature of the victim’s head wounds and the surgery performed in the attempt to save her life made it impossible to determine the exact nature of the object that inflicted her injuries.

The Court stated that an indictment under § 16-5-21(a)(2) need not specify the manner in which the defendant committed the simple assault, when that is a lesser included offense within the greater offense of aggravated assault. Furthermore, while an indictment under § 16-5-21(a)(2) must allege that the assault was committed with a deadly weapon or an object that was likely to or actually did result in serious bodily injury, the indictment is not required to identify the exact weapon or object used if the circumstances of the case do not allow such specificity. Alleging that the object used to commit the aggravated assault is unknown can be sufficiently definite to advise the defendant of what he must be prepared to confront. Thus, the Court found, based on the indictment he will defend against at trial, Wyatt knows that the State intends to prove that at a time when Wyatt admits the victim was in his custody, he used an object that was likely to result in serious bodily injury when used offensively to fatally injure her by causing damage to her brain. Wyatt also knows that the State claims not to know—and thus does not intend to prove—what specific object he used to assault the victim. That is sufficient notice for Wyatt to prepare a defense to the charges of aggravated assault and felony murder based on aggravated assault—notice that may be supplemented, of course, by the pretrial discovery he receives and any investigation his counsel conducts. If at trial the State proves the case differently, definitively specifying the object used to assault the victim, then Wyatt might raise a claim of fatal variance between the allegations in the indictment and the proof at trial, but

that is a different claim than the one now before the Court. Accordingly, the trial court erred in granting Wyatt’s special demurrer as to Counts 2 and 5.

The Court then turned to the counts relating to aggravated battery. Count 4, alleged that Wyatt “unlawfully and maliciously caus[ed] bodily harm to [the victim] . . . by rendering useless a member of her body, to wit: her brain, by causing bleeding to and damage to the brain.” Count 1 charged felony murder based on that aggravated battery. Wyatt contended that the State should have alleged the acts that constituted the aggravated battery, not just the resulting injury. The State responded that, just as it could not specify the object used to assault the victim, it could not specify the manner in which Wyatt committed aggravated battery against her, because the nature of her brain injuries and the attempts to treat them obscured the source of those injuries.

The Court noted that “[a]s best we can tell, Georgia’s appellate courts have never before decided whether the manner of an aggravated battery must be alleged in an indictment in order to survive a special demurrer.” But, the Court found, the indictment’s allegation that Wyatt “unlawfully and maliciously cause[d] bodily harm” to the victim, particularly when read in conjunction with the charge of aggravated assault, provided all the detail required to charge battery, and “we see no reason to require a charge of aggravated battery to detail the manner of the underlying battery with greater specificity.” The element that distinguishes aggravated battery is not the way the battery was committed, but rather the resulting injury, and here the indictment properly identified the injury by alleging that Wyatt caused bleeding and damage to the victim’s brain, rendering it useless.

Finally Wyatt argued that if the State contends that the object used in the aggravated assault or the means by which the aggravated assault and aggravated battery were committed are unknown, it must support those contentions with evidence at a pretrial hearing, which Wyatt stated the State did not do at the demurrer hearing. The Court disagreed. Although the State is required to allege the use of a deadly weapon or other dangerous object when charging aggravated assault under O.C.G.A. § 16-5-21(a)(2), that requirement does not entitle the defendant to

a pretrial evidentiary hearing if the indictment also alleges that the weapon or object used is unknown. Indeed, the only way for the State to truly *prove* that it cannot specify the weapon or object the defendant used would be to present all of the evidence the State has in order to show that the evidence does not allow identification of the weapon or object—that is, to make a full presentation of the State’s evidence before actually trying the case. “Nothing in our cases dealing with material elements that are alleged to be unknown has indicated that we would impose such an impractical requirement.”

But the Court warned, if the State offers evidence at trial that definitively identifies the specific object that Wyatt used in the alleged aggravated assault—that is, if the State deviates from the representation made before the Court that “it is impossible to define with more certainty the object or objects [Wyatt] used to kill [the victim]”—Wyatt’s recourse will be to argue that the indictment’s allegation that the object was unknown prevented him from adequately preparing a defense to the evidence actually presented by the State and thus, there was a fatal variance from the indictment.

Judicial Comments; Jury Instructions

Murray v. State, S14A0504 (6/2/14)

Appellant was convicted of murder and other related offenses. The evidence showed that appellant shot the victim during a drug deal. Appellant claimed self-defense. As part of the jury instructions, the trial judge stated: “A crime is no less punishable if committed against a bad person than if it were perpetrated against a good person.” Appellant conceded this is a correct statement of the law, but argued that given this was a killing arising out of a drug deal in which the defense was self-defense, the statement represented an improper comment on the evidence in violation of O.C.G.A. § 17-8-57. Specifically, the statement to the jury improperly implied appellant, as a participant in the drug deal, was also a bad person, and improperly permitted the jury to infer that appellant’s right to defend himself was somehow reduced under the “bad” circumstances of a drug deal.

The Court disagreed. The charge did not intimate that a crime had been committed or that appellant was in any way responsible, nor

did it negatively reflect upon his self-defense claim. The fact that the trial court used the term “punishable” did not invade the jury’s province, as the challenged statement did not imply that appellant should be punished but simply instructed the jury not to let the victim’s character influence their deliberations with respect to whether appellant should be punished. Further, the challenged remark was not a comment on the evidence and did not lessen the State’s burden to disprove appellant’s defense of self-defense. Consequently, it did not violate O.C.G.A. § 17-8-57, as this Code section is only violated when the trial court’s instruction assumes certain things as facts and intimates to the jury what the judge believes the evidence to be. Finally, the jury was instructed not to construe any comment by the trial court as an expression of opinion upon the facts or evidence, the credibility of the witnesses, or upon the guilt or innocence of the accused. Considering the charge as a whole, therefore, the Court found no reversible error as a result of the complained-of statement by the trial court.

Appellant also argued that the trial court committed plain error in its jury instructions regarding witness impeachment. The record showed that when the trial court read from the written instructions that had been supplied to trial counsel after the jury instruction conference, the court inadvertently omitted a page of the instructions relating to impeachment of witnesses. Once it was brought to the trial court’s attention that an incomplete charge on impeachment of witnesses may have been given, appellant’s counsel acquiesced in the decision that an oral recharge was unnecessary because the written instructions to be supplied to the jury would be sufficient. In fact, the trial court drew the error to the jury’s attention and directed them to the page number of the written instructions on which the complete instructions on impeachment of witnesses could be found. Appellant acknowledged that the written instructions on witness impeachment that were supplied to the jury were proper and complete. Nevertheless, appellant argued, because this was a life without parole case, due process and fundamental fairness required a jury to be properly instructed orally by and from the trial judge with appellant, and his counsel present, in order to ensure a fair and impartial jury, and also that the jury should

not have been required to rely upon the written charge.

The Court, however, found that appellant’s due process argument unpersuasive. Instead, the Court concluded, under these facts, the trial court did not err in finding that appellant failed to show plain error in the impeachment charge given.

Polygraph Tests; Motions for Mistrial

Slaughter v. State, S14A0536 (6/2/14)

Appellant was convicted of murder. The record showed that during the playback of appellant’s videotaped confession, the jury heard a GBI agent ask whether appellant had submitted to a polygraph test and appellant’s affirmative response. The tape was stopped at that point and appellant moved for a mistrial. The trial court denied the motion but gave a curative instruction to the jury admonishing the jurors to disregard the reference to the polygraph test. Although appellant conceded that there was no mention of the results of the polygraph test, she argued she was nevertheless entitled to a new trial because the jury could infer the results of her polygraph test. Specifically, since the test was referenced during her videotaped confession, the jury likely inferred that she passed the polygraph test and that her statements during the videotaped confession were true.

However, the Court found, the fact that a jury is apprised that a polygraph test was taken is not necessarily prejudicial if no reference to the results of the test is made. Citing *Gulley v. State, 271 Ga. 337(16) (1999)*, the Court concluded that appellant failed to show that a mistrial was essential to her right to a fair trial, especially where, as here, the trial court gave an immediate curative instruction admonishing the jury to disregard the reference to the polygraph test.

Character Evidence; Motive

Desire v. State, S14A0218 (6/2/14)

Appellant was convicted of felony murder and theft by taking. Appellant contended that the trial court erred in allowing the State to present irrelevant and improper character evidence. The record showed that appellant’s sister testified appellant had been living with her, but that prior to the date of the crimes,

she asked appellant to leave because of his drug use and because he had stolen a sound system from her vehicle. Appellant then moved his belongings to the home of his other sister, who testified that appellant had a problem with crack cocaine and had stolen an X-Box from her children.

The Court stated that whether to admit evidence is a matter resting in the sound discretion of the trial court, and evidence that is relevant and material to an issue in a case is not rendered inadmissible by the fact that it incidentally places the defendant's character in issue. Here, the Court found, the State's theory at trial was that appellant, desperate to get money to buy drugs, attacked the victim in order to steal money from him. In addition to the challenged testimony, the State's theory of appellant's motive was supported by evidence introduced showing that on the day of the crimes appellant, who was acting as if he was under the influence of drugs or alcohol, was asking people for money and knocking on doors, including the victim's door, trying to sell a stereo speaker. There was also evidence that after the crimes, appellant went to a friend's house seeking to purchase drugs.

Although motive is not an essential element in proving the crimes charged, the State is entitled to present evidence to establish that there was a motive, and evidence of appellant's extensive drug use and need to obtain money for drugs was relevant to prove that he had a motive for committing the crimes. Accordingly, the trial court's decision to allow the challenged testimony in support of the State's theory of motive in this case was not an abuse of discretion.

Search & Seizure; Radio Dispatches

Wing v. State, A14A0136 (5/27/14)

Appellant was convicted of failing to report an accident and DUI. She argued that the trial court erred in denying her motion to suppress. The evidence showed that an officer on patrol received a call from dispatch requesting him to respond to the scene of an accident. According to dispatch, a vehicle had struck a parked vehicle in a church parking lot. The officer proceeded to the reported location. As the officer arrived, he observed a blue car leaving the parking lot. About three to five individuals standing in the parking lot

motioned toward the blue vehicle and verbally identified it as the one that had just struck a parked vehicle. The officer immediately pursued the blue car and initiated a traffic stop, believing that its driver was attempting to leave the scene of an accident. The officer stopped the car about a mile or two from the parking lot and made contact with the driver, who was later identified as appellant.

Appellant contended that the stop was not justified by articulable suspicion. The Court disagreed. Citing *Brown v. State*, 261 Ga. App. 228 (2003), the Court stated that a dispatcher who reports a crime at a specified location gives police an articulable suspicion to investigate and detain individuals at the scene, particularly where police observations on arriving at the scene corroborate the dispatcher's report. Even if the dispatcher's information comes from a citizen or an unidentified informant, the investigatory detention is valid, for patrolling officers are not required to question dispatchers about the source of the information.

Nevertheless, appellant argued, the officer who responded to the dispatch did not interview the driver of the parked vehicle, did not assess the amount of damage rendered to the parked vehicle, and, consequently, had not determined whether she had complied with O.C.G.A. §§ 40-6-271 and/or 40-6-273. Appellant argued that, had the officer more fully investigated the scene—instead of pursuing her, he would have discovered that she had no duty to remain at the scene.

The Court again disagreed. An officer may stop a vehicle for investigation if it is justified by specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct. This suspicion need not meet the standard of probable cause, but must be more than mere caprice or a hunch or an inclination. A founded suspicion is all that is necessary, some basis from which the court can determine that the detention was not arbitrary or harassing. Here, the collision at issue had been sufficiently compelling such that police were summoned; the officer, having received information from dispatch about the automobile collision, proceeded to the reported location; when the officer arrived, the car being driven away by appellant was pointed out by several onlookers who exclaimed that she was the one who had driven her car into another. These facts gave

the officer grounds for conducting a brief traffic stop of appellant's car for investigatory purposes, and demonstrated that such stop was not premised on mere caprice, hunch, or inclination, and was neither arbitrary nor harassing in nature.

Confessions

Smith v. State, S14A0399 (6/2/14)

Appellant was convicted of murder, multiple counts of armed robbery, aggravated assault and other crimes related to events occurring over a two day period. Appellant contended that the trial court erred in admitting his confession to the police. The evidence showed that appellant shot and killed the victim of the first armed robbery. After he was given his *Miranda* rights, the police told appellant that there was a surveillance tape showing that the victim lunged at appellant before appellant shot him. The police made statements to appellant to the effect that the shooting was an "accident" in response to the victim lunging at appellant and appellant eventually made inculpatory statements. Appellant contended that his confession was induced by the slightest hope of benefit because the hope of lighter punishment was clearly implied by the detective's excusable accident theory, in violation of the former O.C.G.A. § 24-3-50.

However, the Court stated, a hope of benefit generally arises from promises related to reduced criminal punishment—a shorter sentence, lesser charges, or no charges at all. But, the Court found, at no point did the detectives tell appellant that he would not be charged with murder, that he would be charged with a crime less than murder, or that he would receive lesser punishment if he confessed. In fact, appellant understood that he would be incarcerated for his actions because he twice asked about obtaining a bond and made statements to the effect that he knew he was going to jail. Under these circumstances, there was no violation of O.C.G.A. § 24-3-50.

Appellant also contended that even if his entire confession was not excludable, the portion of the interview in which he told authorities where to find the gun he used in the crimes should have been excluded. The evidence showed that appellant and an accomplice robbed a female and took her

camera. The camera was located in appellant's sister's room when the police executed a warrant at appellant's house. Appellant told the police that the camera was his sister's and the sister also told the police that the camera was hers. Nevertheless, the detectives interviewing appellant told appellant that they knew he was lying about the camera and that the sister was just covering for him. The detectives suggested to appellant that she should not be punished for loving her brother and suggested they would cut her loose if he told them the name of his accomplice. Appellant did not know the name of the accomplice, but offered up the location of the gun he used in the robberies instead. The detective accepted the "deal." Appellant argued that this portion of the confession should have been excluded because it was coercive and, likewise, the gun and ballistics evidence should have been excluded as "fruit of the poisonous tree."

The Court disagreed. The Court found that the statement that appellant's sister might be subject to arrest for lying to police about an item taken in a robbery is a "mere truism" and not the type of statement that would necessarily render a confession involuntary under former O.C.G.A. § 24-3-50 as being a hope of benefit or a threat of injury. The statements by police likewise did not involve physical or mental torture, the hallmark of inducement by a fear of injury. Furthermore, appellant told police that the camera belonged to his sister and so his own actions in lying to investigators placed his sister under suspicion. Accordingly, the trial court did not err in finding this portion of appellant's confession to be admissible.

Search & Seizure

Arp v. State, A14A0390 (5/21/14)

Appellant was convicted of possession of marijuana and terroristic threats. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed his convictions.

The evidence showed that officers had an arrest warrant for Watson for misdemeanor obstruction. Watson was a known flight risk and had in fact, eluded police earlier in the day. Watson was not at home, but his mother said he was with a woman named Wilson and she had a red car. The police checked and got a "last known address" for Wilson

which the officers knew was not Watson's residence. They went to that residence and saw a red car in the driveway, but no one checked the license plate to see who owned the vehicle. The officers approached the front and back doors. The blinds were partially up on the window located beside the back door. An officer saw movement inside of the house from a point near the property line and that he and another officer then moved up to the back door and window to see what was happening and for officer safety, to make sure that the person was not grabbing a weapon. From his position at the back door, another officer looked through the window and saw a woman speak with another person in a hallway at the door to a bedroom. The officer then saw the woman run into the bedroom where she grabbed something, then run to the bathroom, run back to the bedroom to grab a closed, clear plastic container, and come back to the bathroom, passing so close to the officer that he could see what appeared to be marijuana in the container. The officer told the other two officers with him what he had seen, and the officers therefore decided to enter the back door of the house "for the sole purpose of preventing [the woman] from destroying what we believed to be . . . marijuana." The officers yelled "police," opened the unlocked back door, and seized the marijuana in the bathroom. Based on the seizure and appellant's statements at the time, appellant was charged with possession of more than an ounce of marijuana and with making terroristic threats. Neither Watson, the subject of the arrest warrant, nor Wilson was found in appellant's home. In fact, appellant had no connection to either of them.

Appellant did not contest that if the officers were properly located at the back door, they had authority to look in the window and, upon observing what appeared to be contraband and an attempt to dispose of it, authority to enter the home to prevent the destruction of evidence and to seize it. Rather, he contended that the officers were not authorized to enter his back yard or the back door area in the first place. The Court agreed.

Even when armed with an arrest warrant, police must have either a search warrant, exigent circumstances or consent to lawfully enter a third person's home to arrest someone who does not reside there. Here, the Court

found, the back yard and back door area of appellant's home fell within the general definition of the curtilage of the home. There was no evidence that the back door and window were visible or in plain view from the street or from anywhere the officers were authorized to be upon arriving at the home. Nor was there evidence that appellant and his wife treated the back door as a public entrance or that the officers were unable to approach the front door or received no response at the front door, any of which may have authorized the officers to proceed to the back yard and door. Thus, the State did not carry its burden of showing that the officers were authorized to proceed to the back door and window area of the appellant's home; the officers therefore entered the protected curtilage of the appellant's home before they could see the window through which they noticed activity that aroused a concern for officer safety. That concern, therefore, could not be used to justify the three officers' entry into the back yard in the first place.

Finally, the Court considered whether exigent circumstances existed to support the warrantless entry into appellant's home. The Court found that there was no evidence that the officers were in hot pursuit of Watson. The officers simply went to Wilson's "last known address" and saw a red Chrysler; they had not previously seen the car themselves and were simply following up on Watson's mother's statement about Watson leaving his own home. And they knew that the home was not Watson's residence. Although Watson was a flight risk, nothing stopped the officers from setting up a perimeter and attempting to obtain a warrant to search appellant's home. Because the officers were not authorized to enter the curtilage of appellant's home, they were not in a place that they were authorized to be when they saw movement inside of the house or saw appellant's wife carrying a plastic container of what appeared to be marijuana. The trial court therefore erred by denying appellant's motion to suppress. And, because all of the evidence against appellant presented by the State was discovered as a result of the officer's illegal search, there was insufficient evidence for a rational trier of fact to find appellant guilty on either charge.