Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JUNE 9, 2017

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## THIS WEEK:



## Marijuana; Sufficiency of the Evidence

*Holmes v. State, S17A0077 (5/15/17)*

Appellant was convicted of a multi-victim crime spree, including murder and possession of marijuana, less than an ounce. He contended that the evidence was insufficient to convict him on the marijuana charge. Specifically, that the officer who testified was not qualified to conduct the field test. The Court disagreed.

The Court noted that the officer testified he had over nine years of experience in law enforcement and that he was qualified to conduct field tests in order to identify substances such as marijuana. The officer described how he used a chemical testing kit to test the substance confiscated from appellant and stated that the substance in question tested positive for marijuana. No evidence was presented showing that the officer was unqualified to conduct the field test, that the chemical testing kit was faulty, or that the test results were inaccurate or erroneous. The Court stated that expert testimony is not necessary to identify a substance, including drugs. And even if police officers are not formally tendered as expert witnesses, if an adequate foundation is laid with respect to their experience and training, their testimony regarding narcotics is properly admitted.

Here, the Court found, while the foundation laid by the State regarding the officer's experience was unelaborate, the evidence presented about his being qualified to conduct a field test for the presence of marijuana was adequate. Therefore, the Court concluded, the evidence was sufficient to authorize a rational trier of fact to find appellant guilty beyond a reasonable doubt of misdemeanor marijuana possession as well as the other crimes for which he was convicted.

## Dying Declarations; Induced Error

*Adkins v. State, S17A0111 (5/15/17)*

Appellant was convicted of murder and other related charges stemming from a drive-by shooting. Appellant contended that the trial court erred in permitting the State to introduce a purported dying declaration by the murder victim to Baynes, another victim. Specifically, the murder victim was heard to say "Fly, Fly, Fly," after he was shot and appellant was known as "Fly Monkey" and went by the street name of "Fly."

In the State's opening statement, the prosecutor referenced the testimony concerning the dying declaration and defense counsel objected on the basis of hearsay. The objection was overruled. However, the prosecutor did not elicit testimony about the statement in her direct examination of Baynes, although Baynes testified on direct examination that appellant went by the street name Fly. Defense counsel then elicited the dying declaration during cross-examination.

Appellant argued that he did not induce

the alleged error in admission of the purported dying declaration because he objected to the mention of the statement during the State's opening. But, the Court stated, although appellant objected to the admissibility of the evidence, his introduction of the evidence after the State failed to introduce it waived his previous objection. When the State did not introduce evidence of the statement during Baynes's direct testimony, appellant had the option to not do so either. Indeed, if neither party had introduced evidence of the statement, appellant might have pointed out in his closing argument to the jury that the State had failed to present a key piece of promised evidence. Instead, he elected to present that evidence himself. Consequently, the Court held, he cannot complain now that the jury heard that evidence.

## Indictments; General Demurrers

*Jackson v. State, S16G0888 (5/15/17)*

Appellant was indicted for "Failure to register as a sex offender." The body of the count read as follows: "for that the said accused, in the State of Georgia and County of Houston, on or about September 15, 2011, did fail to register his change of address with the Houston County Sheriff's Office within 72 hours of the change as required under O.C.G.A. § 42-1-12, contrary to the laws of said State, the good order, peace and dignity thereof." During trial, appellant made an oral general demurrer to the indictment, which the trial court denied. Appellant was convicted and the Court of Appeals held the indictment was not fatally defective and affirmed his conviction. See *Jackson v. State*, 335 Ga.App. 597, 598-599 (1) (2016). The Court granted appellant's petition for certiorari to examine whether the Court of Appeals erred in finding that the indictment was not fatally defective.

The Court stated that it has been a long-standing principle that an indictment is void to the extent that it fails to allege all the essential elements of the crime or crimes charged. Nevertheless, the State relied on *Shabazz v. State*, 291 Ga.App. 751, 752 (3) (2008) to support its argument that the indictment was not defective. But, the Court stated, in *Shabazz*, the Court of Appeals stated that so long as an indictment charges that the accused's acts violated a specified penal statute, it will withstand a challenge that it is defective "despite the omission of an essential element of the charged offense." *Id*. at 752 (2). But the Court of Appeals in *Shabazz* (and in *State v. Howell*, 194 Ga.App. 594 (1990). cited in *Shabazz*) deviated from its earlier opinions on the subject, which held that indictments or accusations must allege all essential elements of the crime charged in order to withstand a challenge to the legality of the indictment. Withstanding such a challenge requires more than simply alleging the accused violated a certain statute. Accordingly, the Court held, "*Howell* and *Shabazz* are overruled, along with later opinions relying on these two cases, to the extent they hold that an indictment alleging merely that the accused's acts were in violation of a specified criminal Code section is not defective."

Here, the Court found, the indictment was based upon several assumptions of fact not set forth in the indictment. The caption of the indictment implied that appellant is a convicted sexual offender who was required to register his address. Nevertheless, while the indictment did reference a change of address and that defendant was required to register it with the Houston County Sheriff's officer, it did not assert that appellant previously was registered there as a sexual offender and has now established a new address within Houston County, or that appellant has moved from Houston County to an address in another county, or that he has moved to Houston County from an address in another county where he was previously registered. In other words, the indictment did not inform the accused of what alleged action or inaction would constitute a violation of even subsection (f)(5) of O.C.G.A. § 42-1-12, which subsection was not even referenced in the indictment. Nor did it inform the parties what facts the grand jury considered in arriving at its conclusion that probable cause was shown that the accused committed a specific crime.

Moreover, the Court found, the offense denominated in the indictment is "failure to register as a sex offender" and the Court of Appeals concluded appellant could not admit he violated the referenced Code section "and still be innocent of the charged offense." But, the Court stated, this simply illustrated the problem with the indictment, since failure to register is not the offense for which appellant was tried. The record reflected that appellant properly registered his original address after his guilty plea conviction; thus, he did not fail to register as required by O.C.G.A. § 42-1-12. The evidence presented at trial related to appellant's *failure to update* his required registration information with a change of address, not an initial failure to register as a sexual offender. Thus, although the indictment cited the statute appellant was accused of violating (O.C.G.A. § 42-1-12), and it referenced some of the language of that statute, it did not recite a sufficient portion of the statute to set out all the elements of the offense for which he was tried and convicted. Likewise, the indictment did not allege all the facts necessary to establish a violation of subsection (f)(5) of O.C.G.A. § 42-1-12. Accordingly, the Court held, the indictment was not sufficient to withstand a general demurrer and as such, was deficient and void. Consequently, appellant's conviction was reversed.

## Jury Instructions; Plain Error

*Lyman v. State, S17A0209 (5/15/17)*

Appellant was convicted of murder and other crimes. At trial, an accomplice testified against him. The defense did not request a jury instruction on accomplice testimony or object when the court did not give one. Appellant contended that the trial court erred in not instructing the jury on accomplice testimony.

The Court noted that under controlling precedent at the time of appellant's trial, it was not error for the trial court to refuse to give an "accomplice corroboration" instruction, even if requested, when an alleged accomplice's testimony was in fact corroborated by independent evidence. In *Hamm v. State*, 294 Ga. 791, 795 (2) (2014), the Court overruled prior precedent and held that it is error for a trial court to refuse to give a requested instruction on accomplice corroboration so long as the State relies in part on other evidence connecting the defendant to the crime. And, the *Hamm* Court specifically noted that when no request was made for such an "accomplice corroboration" instruction, reversal would be warranted only under the "plain error" standard. Thus, the Court stated, since appellant did not request such a jury instruction, reversal depends on whether he can meet the plain error test.

The test for finding plain error is as follows: First, there must be an error or defect—some sort of deviation from a legal rule—that

has not been intentionally relinquished or abandoned, i.e., affirmatively waived, by the appellant. Second, the legal error must be clear or obvious, rather than subject to reasonable dispute. Third, the error must have affected the appellant's substantial rights, which in the ordinary case means he must demonstrate that it affected the outcome of the trial court proceedings. Fourth and finally, if the above three prongs are satisfied, the appellate court has the discretion to remedy the error—discretion which ought to be exercised only if the error seriously affects the fairness, integrity or public reputation of judicial proceedings.

The Court found that appellant did not intentionally relinquish his right to an accomplice instruction and there was no question that the failure to give an accomplice corroboration instruction is error under *Hamm* even though *Hamm* was decided after appellant's trial. The question, then, is whether the error was clear and obvious for the purposes of the second prong of the plain error test. The Court stated, "We now take this opportunity to state distinctly that when conducting review of asserted plain error under O.C.G.A. § 17-8-58(b), just as under Federal Rule of Criminal Procedure 52 (b), whether an error is 'clear or obvious' is judged at the time of the appellate court's review." In other words, whether an error is considered "clear or obvious" under the second prong of the plain error test is judged under the law existing at the time of appeal, regardless of whether the asserted error in the trial court was plainly *incorrect* at the time of trial, plainly *correct* at the time of trial, or an *unsettled* issue at the time of trial. Accordingly, *Hamm* applies to appellant's appeal. And, under that authority, the failure to give a corroborating accomplice instruction was clear error, and appellant met the second prong of the plain error test.

Nevertheless, the Court found, appellant failed to meet the third prong of the plain error test, as he failed to establish that omitting the instruction probably affected the outcome of his trial. Accordingly, the failure to give the accomplice instruction did not amount to plain error.

## Terroristic Threats; First Amendment

*Major v. State, S17A0086 (5/15/17)*

Appellant was indicted for threatening to commit a crime of violence against another "in reckless disregard of causing such terror" in violation of O.C.G.A. § 16-11-37. The stipulated facts showed that in September 2014 appellant, who was a student at Lanier Career Academy, posted the following message on his Facebook page: "Bruh, LCA ain't a school. Stop coming here. All y'all ain't going to graduate early. Why? Because there are too many of y'all f***ers to even get on a computer. I swear, and there's so much drama here now, Lord, please save me before, o (sic) get the chopper out and make Columbine look childish." The Court granted an interlocutory appeal to determine whether the former version of O.C.G.A. § 16-11-37(a) is unconstitutionally overbroad and vague.

The Court found that the plain language of former O.C.G.A. § 16-11-37(a) prohibits threats to commit any crime of violence with either the purpose of terrorizing another or in reckless disregard of the risk of causing such terror or inconvenience. While appellant conceded that the portion of the statute regulating purposeful threats is constitutional, he contended that the statute's reckless scienter was overly broad because it punished protected speech by looking to the mind of the person receiving the threat (i.e., the reasonable listener) rather than the state of mind of the speaker, and because recklessness does not require a showing of specific intent and therefore does not meet the definition of a "true threat." The Court disagreed.

The Court stated that it is well established that recklessness requires a person to act with conscious disregard for the safety of others, meaning that one is aware that his conduct might cause the result, though it is not substantially certain to happen. This is so because a reckless mindset requires a person to consciously act in a manner which they know could cause harm. In other words, someone who acts recklessly with respect to conveying a threat necessarily grasps that he is not engaged in innocent conduct. He is not merely careless. He is aware that others could regard his statements as a threat, but he delivers them anyway. Therefore, the Court found, contrary to appellant's assertions, recklessness clearly requires an analysis of the accused's state of mind at the time of the crime alleged. For the same reasons, the Court rejected appellant's contention that communicating a threat of violence in a reckless manner does not meet the definition of a true threat. Accordingly, the Court held, because former O.C.G.A. § 16-11-37(a) requires that a person communicate a threat of violence in a purposeful or reckless manner, both of which are true threats and not protected speech, it does not violate the First Amendment's right to free speech. Consequently, the reckless mens rea did not render the former version of O.C.G.A. § 16-11-37(a) unconstitutionally overbroad.

Appellant also argued that the statute's reckless scienter rendered the statute void because it lacks a clear and discernable definition as to what constitutes a threat. But, the Court stated, it is well established that the void for vagueness doctrine of the due process clause requires that a challenged statute or ordinance give a person of ordinary intelligence fair warning that specific conduct is forbidden or mandated and provide sufficient specificity so as not to encourage arbitrary and discriminatory enforcement. And here, the statute can clearly be read and understood by a person of ordinary intelligence seeking to avoid its violation. Therefore, the Court affirmed the trial court's decision upholding the constitutionality of former O.C.G.A. § 16-11-37(a) against a vagueness challenge.

Finally, appellant argued that the statute is unconstitutional as applied to him. Specifically, that, since he injected the phrase "Lord, please save me" into the post, the statement was therapeutic and/or religious in nature and did not reflect an intent to commit a violent act. The Court noted an as-applied challenge addresses whether a statute is unconstitutional on the facts of a particular case or to a particular party. Here, the crux of appellant's argument was that he did not possess the requisite intent in order for his Facebook post to qualify as a threat to commit a crime of violence However, whether an accused acted with the required criminal intent is a question of fact reserved for the jury. Thus, based on the evidence in the record before it, the Court found that the statute had not been unconstitutionally applied to appellant.

## Ineffective Assistance of Counsel; Voir Dire

*Veal v. State, S17A0255 (5/15/17)*

Appellant was convicted of malice murder, armed robbery and other related offenses. The evidence showed that appellant entered the Lake Sinclair branch of The Peoples Bank

and, without saying a word, he shot branch manager Larry Ellington in the stomach, causing injuries that led to Ellington's death. After shooting Ellington, the man approached a bank teller, pointed the gun at her, and demanded that she give him money, which she did. Appellant then fled.

Appellant contended that his counsel rendered ineffective assistance by failing to move to strike for cause five people who served on the jury and five other individuals who were on the panel of prospective jurors, because they stated during voir dire that they either banked at The People's Bank or had previously worked with Ellington, the murder victim, at the bank. The Court disagreed.

Appellant argued that the jurors were per se disqualified as a matter of law under the reasoning of *Kirkland v. State*, 274 Ga. 778 (2002) (shareholder of a corporation disqualified as jurors where the corporation was a party at interest as the victim of the charged offense) and *Lowman v. State*, 197 Ga.App. 556 (1990) (members of an electric membership corporation were disqualified from serving as jurors in a criminal trial in which the corporation was the victim of the crime charged, because the members had the ability to receive revenues and assets of the corporation).But, the Court found, these cases were distinguishable because unlike the individuals in those cases who had ownership interests in the victim corporations, there was no evidence that the jurors who banked at The Peoples Bank had similar rights or interests.

Appellant also argued that the challenged jurors were disqualified due to the nature of their banking relationship with The Peoples Bank, a community bank that the bank president testified actively cultivates life-long relationships with its customers. But, the Court stated, a juror's knowledge of, or non-familial relationship with, a party is not a per se disqualification. Instead, a juror's knowledge of, or non-familial relationship with, a witness, attorney, or party provides a basis for disqualification only if it is shown that it has resulted in the juror having a fixed opinion of the accused's guilt or innocence or a bias for or against the accused. And here, the Court found, appellant failed to make such a showing.

Next, appellant argued that trial counsel was deficient for failing to challenge two other prospective jurors, M. F. and B. C., who had worked with Ellington at The Peoples Bank. Specifically, appellant contended that they were per se disqualified due to their relationships with The Peoples Bank or with Ellington. But, the Court reiterated, it has rejected a bright-line rule excluding from jury duty those who have a close, but non-familial, relationship with a party. As an extension of this principle, it has also rejected the creation of a per se rule requiring the exclusion of jurors who have an employment relationship with a party to the lawsuit, and have expressly disapproved statements that could be read as advocating such a per se rule. Both M. F. and B. C. said they could remain impartial and fair and presumed appellant's innocence, and appellant offered no reason to discredit those responses. As a result, these prospective jurors' relationships with Ellington or the bank afforded no basis to excuse them for cause.

Finally, the Court found, appellant's reliance on *Kirkland* did not alter its rejection of a per se rule for exclusion of jurors with an employment relationship with a party. Stockholders are disqualified because they stand to gain or lose by the fortunes of the corporation, because theirs is an equity interest. But mere employees, like B.C. and M. F., had no such interest. They were not subject to per se disqualification, and appellant offered no other basis why they should be disqualified. Therefore, the Court held, appellant's challenges for cause were without merit, and trial counsel was not deficient for failing to make meritless motions to strike these prospective jurors for cause.