

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING OCTOBER 11, 2013

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## THIS WEEK:

- **Inconsistent Verdicts; Sufficiency of Evidence**
- **Guilty Pleas; Sentencing**
- **Jury Charges**
- **Ineffective Assistance of Counsel; Jury Charges**
- **Void Sentencing; Juveniles**
- **Rule of Sequestration; Motions in Limine**
- **Restrictive Custody; O.C.G.A. § 15-11-63**
- **Statements; Miranda**

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### ***Inconsistent Verdicts; Sufficiency of Evidence***

*Walker v. State, S13A0861 (10/7/13)*

Appellant was found guilty of the felony murder of Evangelina Hernandez-Contreras based on aggravated assault; two counts of homicide by vehicle, one based on reckless driving and one based on the failure to stop and render aid to Hernandez-Contreras after being involved in an automobile accident; failure to stop and render aid to Hernandez-Contreras; aggravated assault of Roberto Contreras; and driving with no proof of insurance. The trial court treated the guilty verdicts on both counts of homicide by vehicle and the failure to stop and render aid count as merged into the felony murder conviction and entered judgment of convictions for felony murder, aggravated assault, and no proof of insurance.

The evidence showed that appellant's vehicle cut-off the vehicle driven by Contreras. When the two vehicles stopped at

a light, Contreras got out of the driver's side, approached appellant's window and began yelling at him. Hernandez-Contreras then got out of the car and pulled her husband back to their car. At this point, appellant put his car in reverse and ran over Hernandez-Contreras. He then drove forward, again driving over Hernandez-Contreras, and then sped away.

The Court noted that six eyewitnesses testified at trial that they saw appellant's car hit and drive over Hernandez-Contreras, dragging her up and down the road. Thus, the main issue at trial was not whether appellant had struck and killed Hernandez-Contreras with his car but rather what his intent was at the time. Covering its bases, the State charged appellant with two crimes that required criminal intent (malice murder and felony murder based on aggravated assault) and a crime that required only criminal negligence (homicide by vehicle based on reckless driving). Unfortunately for the State, the trial court failed to instruct the jury that it could not find appellant guilty of both types of crimes, and the court then accepted the jury's guilty verdicts for both felony murder based on aggravated assault and homicide by vehicle based on reckless driving.

Appellant contended that, under *Jackson v. State*, 276 Ga. 408 (2003), those guilty verdicts were mutually exclusive and must be set aside. The Court agreed. The Court also found that the error in this type of case was in the trial court's improper charge to the jury, because where an indictment contains alternative counts alleging potentially mutually exclusive crimes, the trial court should instruct the jury that a guilty verdict could be returned upon either count but not both. Thus, the Court cautioned, to avoid potentially invalid verdicts, even if proper

charges are not requested by either side, the trial court should give them sua sponte.

The Court then noted that appellant's guilty verdict on Count 3 (homicide by vehicle, in violation of O.C.G.A. § 40-6-393(a), based on the failure to stop and render aid, in violation of O.C.G.A. § 40-6-270(a)) was vacated by the trial court as a matter of law because he was convicted of felony murder based on the same crime. But, because the Court reversed the felony murder conviction, the guilty verdict on Count 3 no longer stood vacated as a matter of law and, if the State does not re-try and convict appellant on the felony murder count or the reckless-driving homicide by vehicle count, it could normally elect on remand to have a conviction and sentence imposed on the Count 3 homicide by vehicle charge. However, appellant argued that the evidence presented at trial did not support his guilty verdict on Count 3, which would bar entry of a conviction on that count. The Court again agreed.

The Court stated that O.C.G.A. § 40-6-270(a) requires that the driver of any vehicle involved in an accident resulting in injury to or the death of any person stop at the scene of the accident and render "reasonable assistance" to anyone injured. There was ample evidence presented at trial that appellant violated O.C.G.A. § 40-6-270 by fleeing after hitting Hernandez-Contreras, rather than stopping to assist her. However, at the time appellant ran over Hernandez-Contreras in 2003, a conviction for homicide by vehicle based on a violation of O.C.G.A. § 40-6-270 required proof that appellant's failure to stop and render aid caused the victim's death. The then-applicable version of § 40-6-393(a) said, "Any person who, without malice aforethought, causes the death of another person through the violation of . . . Code Section 40-6-270 . . . commits the offense of homicide by vehicle in the first degree." At trial, Contreras testified that his wife died in his arms at the scene, and the medical examiner testified that Hernandez-Contreras died from the horrific generalized trauma that she had suffered. There was no evidence that Hernandez-Contreras would have survived her injuries if appellant had stopped to assist her. Because there was insufficient evidence for a rational jury to find appellant guilty of homicide by vehicle based on his failure to stop and render aid, the Court set aside the guilty verdict on

Count 3, and appellant could not be re-tried on this count.

## **Guilty Pleas; Sentencing**

*Bell v. State, A13A0897 (10/7/13)*

Appellant pled guilty to malice murder and related crimes. Within the same term of court, he filed a motion to withdraw his guilty plea and later filed a motion to vacate void sentence. The trial court denied both motions.

Appellant contended that the trial court erred in denying his motion to withdraw his guilty plea. Specifically, he alleged that there was not a sufficient factual basis for his plea, he shot the victim in defense of another person, his assertions of fact in support of this justification defense were a claim of innocence, and the trial court failed to resolve the conflict between his waiver of a jury trial and his claim of innocence. The Court stated that when a defendant challenges the validity of a guilty plea, the State has the burden of showing that the plea was made intelligently and voluntarily. The State may meet its burden by showing on the record of the guilty plea hearing that the defendant understood the rights being waived and possible consequences of the plea or by pointing to extrinsic evidence affirmatively showing that the plea was voluntary and knowing. A defendant may withdraw a guilty plea for any reason prior to sentencing, but can withdraw the plea after sentencing only to correct a manifest injustice. Although "manifest injustice," will vary depending on the case, withdrawal is necessary to correct a manifest injustice if, for instance, a defendant is denied effective assistance of counsel, or the guilty plea was entered involuntarily or without an understanding of the nature of the charges.

Here, the Court noted that the State set out a sufficient factual basis for the guilty plea. Furthermore, the colloquy between appellant and the trial court at the plea hearing showed that appellant acknowledged that he understood the charges against him and the rights he was waiving by entering a guilty plea, including the right to a jury trial, the presumption of innocence, the right to require the State to prove guilt beyond a reasonable doubt, the right to subpoena and confront witnesses, the right to testify and present evidence on his own behalf, and the right to the assistance of counsel

during trial. In addition, appellant stated that he had discussed his legal rights with his attorney before signing the waiver of rights form, he understood the charges to which he was pleading guilty, he had discussed the maximum and minimum sentences with his attorney, no one had promised a benefit or threatened him into entering the plea, and he was entering it voluntarily.

Moreover, the Court found, contrary to appellant's contentions, he did not make a claim of innocence at the plea hearing or enter a plea under *North Carolina v. Alford*. Instead, appellant admitted to police and testified twice under oath that he shot the victim, but claimed at the hearing to withdraw his plea that he never intended to kill the victim and pled guilty because he felt that he did not have any other choice. Assuming appellant was correct that he entered an *Alford* plea, the record nevertheless showed that he was aware of the evidence against him, the availability of a justification defense, and the maximum and minimum sentences he could receive if convicted at a trial and that he made a decision to avoid the possibility of life without parole by pleading guilty. The trial court found that appellant made a knowing and intelligent waiver of his rights and there was a sufficient factual basis for the plea. Since the Court concluded that the record supported these factual findings, this case did not involve a manifest injustice necessitating the withdrawal of appellant's guilty plea.

Appellant also contended that he had an absolute right to withdraw his guilty plea because his sentence was void. This argument was premised on his contention that the trial court imposed a term of probation that was not allowed by law as part of his sentence for murder. The Court stated that a defendant who knowingly enters into a plea agreement does not waive the right to challenge an illegal and void sentence. Under state law, a person convicted of murder "shall be punished by death, by imprisonment for life without parole, or by imprisonment for life." O.C.G.A. § 16-5-1(d). Georgia law does not permit consideration of probation for murder or any other offense that is punishable by life imprisonment. When a defendant is sentenced in a murder case to life imprisonment plus probation, only the portion of the sentence imposing probation is invalid. The remedy in that situation is to remand to the trial court for

it to resentence the defendant by eliminating the term of probation.

Here, however, the trial court did not impose an invalid sentence. It is the sentence signed by the judge, not his oral declaration, which is the sentence of the court. Although both the prosecutor and the trial court during the plea hearing erroneously told appellant that he would be subject to probation, the written sentence signed by the judge and defendant and filed with the clerk showed that the trial court imposed a sentence of life with parole on the murder count and a five-year concurrent term of imprisonment on the criminal damage to property count. The sentence did not include a term of probation. Because the judgment imposed a term of life imprisonment on the murder count, as provided by law, appellant's sentence was not illegal or void and the trial court properly denied his motion to vacate void sentence.

## **Jury Charges**

*Redding v. State, S13A1233 (10/7/13)*

Appellant was convicted of felony murder, participation in criminal street gang activity, and other crimes arising from a series of gang-related armed robberies. He contended that the trial court erred in giving certain jury instructions. Specifically, the pattern jury instruction for felony murder, which says in part: "A person (also) commits the crime of murder when, in the commission of a felony, that person causes the death of another human being (with or without malice)." Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, § 2.10.20 (parentheticals in original). The commentary on the instruction notes that if the defendant is not also charged with malice murder, the words in parentheses should be omitted. Here, although appellant was not indicted for malice murder, the trial court included the parenthetical words in its jury instruction on felony murder. The court also charged that if the jury found that appellant was "guilty of the offense of murder with malice aforethought," then the jury should find him guilty of "felony murder." Appellant contended that the references to malice and malice aforethought were error, because they served only to confuse the jury.

The Court found that the trial court should not have made those references, but no reversible error occurred. The trial court did

not instruct the jury on "malice murder" or ever use that term; it accurately instructed the jury on the principles of felony murder based on the predicate felony of armed robbery; it explained that the State had the burden to prove every material allegation of the indictment and every essential element of the crimes charged beyond a reasonable doubt; and it provided the jury with the indictment. Any error was therefore cured. Furthermore, if anything, the court's indication that the State had to prove malice aforethought for appellant to be found guilty of felony murder made it harder for the State to make its case, since malice aforethought is not an element of felony murder (although it is not inconsistent with that crime). Instructional errors that could only benefit a defendant are harmless.

The Court also noted that in instructing the jury on the form of its verdict, the trial court discussed the long list of charges against appellant in four groups, organized by the date on which the various offenses were allegedly committed. In discussing each group of charges, the court instructed the jury that if it found appellant guilty beyond a reasonable doubt of the crimes that occurred on that date, it would be authorized to find him guilty as to each such count. After discussing the four groups of charges, the court instructed the jury that if it had a reasonable doubt as to whether appellant was guilty of "some or all of these offenses," it was the jury's duty to acquit and to write "not guilty" for each such count.

Appellant contended that the trial court's failure to mention the not guilty option while discussing each of the four date-based groups of charges unduly emphasized the guilty option. The Court disagreed. An appellate court views the jury charges as a whole to determine whether the jury was fully and fairly instructed on the law of the case. So viewed, the jury in this case was fully and fairly instructed as to its duty in deciding each count of the indictment. After reviewing the four groups of crimes alleged, the court instructed the jury clearly that: "If you do not believe that the defendant is guilty of some or all of these offenses or if you have any reasonable doubt as to the defendant's guilt, then it would be your duty to acquit the defendant, in which event the form of your verdict would be, we, the jury, find the defendant—and you would write in the words "not guilty" as to each such count." This direction was

immediately followed by instructions that the jury had to consider and render a verdict on "each count of the indictment separately," that the State had to prove "every material allegation in each count and every element of the crime charged beyond a reasonable doubt for each count," and that the jury could find appellant "guilty of one count and not guilty of another count" if it so chose. Considering the charges as a whole, the trial court did not unduly emphasize the jury's option to find appellant guilty. Instead, the jury was properly instructed that if it found that the State had not carried its burden of proof as to any count in the indictment, the jury was to find appellant not guilty of that count.

## **Ineffective Assistance of Counsel; Jury Charges**

*Sullivan v. Kemp, S13A1259 (10/7/13)*

Appellant was convicted of aggravated assault with a deadly weapon (his hands). After his conviction was affirmed on appeal, *Sullivan v. State*, 277 Ga.App. 738 (2006), he filed a petition for habeas corpus alleging ineffective assistance of counsel by his appellate counsel. He was granted a certificate of probable cause by the Supreme Court after the habeas court denied his petition for writ of habeas corpus. Appellant contended that his appellate counsel was ineffective for failing to assert error as to the trial court's jury charges. The Court agreed and reversed the denial of his petition for habeas corpus.

The evidence showed that appellant was left alone with the one-year-old victim who died from injuries consistent with shaken baby syndrome. The trial transcript and record showed the trial court charged the jury on the general definition of a crime set forth in O.C.G.A. § 16-2-1(a) by stating that a crime involves "a joint operation of an act, or omission to act, and intention." Appellant was not indicted for any offense involving criminal negligence and neither party requested an instruction for reckless conduct as a lesser included offense of the indictment for aggravated assault with a deadly weapon, for which a finding of criminal negligence would be sufficient to support a conviction. Nevertheless, the trial court went on to instruct that intent or criminal negligence is an essential element of any crime, that intent or criminal negligence may be shown in many

ways, and also instructed on the definition of criminal negligence based upon the language of O.C.G.A. § 16-2-1(b). The trial court then gave instructions on simple assault and aggravated assault with a deadly weapon, tracking the language of O.C.G.A. § 16-5-21(a)(2), but the instruction did not specify that criminal intent to injure, as opposed to criminal negligence, was necessary to convict. Trial counsel reserved objections to the charge. On appeal, appellant's court-appointed counsel, who was not the same lawyer as the appointed counsel who represented appellant at trial, raised only the issue of the sufficiency of evidence to convict. Appellate counsel testified at the habeas proceeding that he has practiced primarily criminal law since being admitted to the bar in 1997 but that appellant's was one of his first appellate cases. He admitted he simply missed the jury charge as a ground for appeal because he was not aware of the line of cases that identified such an instruction as possible error. Appellate counsel acknowledged there was no strategic reason not to raise the issue on appeal.

The Court stated that the threshold issue to examine with respect to whether appellant demonstrated he was denied effective assistance of appellate counsel was to determine whether, as appellant argued, the jury instructions were erroneous and thus provided a ground for appellate reversal of his conviction for aggravated assault. Here, the trial court did not expressly state that criminal negligence could be substituted for criminal intent in the commission of aggravated assault or any other crime charged in the indictment. Instead, the trial court charged the jury on the definition of criminal negligence as part of its general charge on the definition of a crime. By having previously instructed the jury that intent or criminal negligence is an essential element of any crime, the Court found that the jury could have been misled into believing it could convict for aggravated assault even if the evidence showed only criminal negligence, not criminal intent to commit the aggravated assault. Furthermore, "[t]o make matters worse," the prosecutor stated in closing: "This is a criminal negligence case," and also stated that the State had proved criminal negligence concerning the aggravated battery and cruelty to child count, both of which require evidence of malice, not criminal negligence. The prosecutor further stated the defendant

"shook that baby in a criminally negligent manner . . ." In fact, in closing argument the prosecutor acknowledged appellant did not intend to injure the child but that he intended to shake the baby and did so in a criminally negligent manner. It was therefore reasonable to assume that these misstatements in closing argument may have exacerbated the error and created confusion with respect to the intent required for conviction.

Nevertheless, even though criminal negligence was not an issue in any crime charged in the indictment, the Court noted that it has long been held that it is not per se erroneous to instruct on criminal negligence as part of the definition of a crime. Here, however, the Court held it was erroneous for the trial court to give instructions regarding the definition of criminal negligence when it did not also specifically instruct that conviction for aggravated assault requires a finding of criminal intent.

Having determined that the trial court erred, the Court then held that appellate counsel provided deficient performance in not raising the issue on direct appeal and that the circumstances of this case demonstrated a reasonable probability existed that the outcome of the appeal would have been different if the issue of the deficient jury charge had been raised. Since both prongs of the *Strickland v. Washington* test for establishing ineffective assistance of counsel were met, the Court reversed the order denying appellant's petition for habeas relief.

### **Void Sentencing; Juveniles** *Moore v. State, S13A0700 (10/7/13)*

In December 2000, at age 17, appellant was indicted for two counts of malice murder and other crimes related to the fatal shootings of two victims. In January 2001, the State gave appellant notice of its intent to seek the death penalty and of the aggravating circumstance supporting the death penalty on which it intended to rely. Appellant was found guilty by a jury of all charges after a bifurcated trial, and rather than proceed to the sentencing phase, he entered into a negotiated plea agreement in which he agreed, inter alia, to waive his rights to appeal and all post-conviction review of his convictions and sentences. In exchange, the State recommended and the trial court imposed a sentence of life imprisonment

without the possibility of parole on the first malice murder count and consecutive sentences on the remaining counts.

Four years after appellant was sentenced, the United States Supreme Court held in *Roper v. Simmons*, 543 U. S. 551, 568 (2005), that the Eighth Amendment to the United States Constitution prohibited the imposition of the death penalty against offenders who were under the age of 18 at the time their crimes were committed. Based on this holding, in 2010 appellant filed a motion to correct void sentence, claiming that at the time he committed the crimes, Georgia's sentencing scheme authorized a sentence of life without parole only where the State could legally seek imposition of the death penalty, and because *Roper* removed the death penalty as a sentencing option in appellant's prosecution due to his age, he became ineligible to receive a sentence of life without parole. After a hearing, the trial court denied the motion, finding both that appellant waived his right to challenge his sentence and even if he had not waived the right, *Roper* did not apply so as to retroactively invalidate his sentence of life without parole.

The State argued that appellant waived his right to challenge his sentence of life without parole. The Court disagreed. A defendant who knowingly enters into a plea agreement and accepts the benefit of that bargain does not waive or "bargain away" the right to challenge an illegal and void sentence.

Finding no waiver, the Court noted that at the time appellant was sentenced in 2001, O.C.G.A. § 17-1-32.1 provided that a defendant who enters a plea after indictment for an offense for which the death penalty or life without parole may be imposed, may be sentenced to life imprisonment, or if the State has filed a notice of intent to seek the death penalty, the judge may sentence the defendant to death or life without parole if the judge finds beyond a reasonable doubt the existence of at least one statutory aggravating circumstance. The same legislative enactment further provided that "[n]o person shall be sentenced to life without parole unless such person could have received the death penalty under the laws of this state as such laws have been interpreted by the United States Supreme Court and the Supreme Court of Georgia." Ga. L. 1993, p. 1654, § 9 (not codified). Thus, the Court found, it was clear

from the language of the statute that in 2001 the State could seek a sentence of life without the possibility of parole only in those cases where the State could, consistent with state and federal laws, impose a sentence of death.

Furthermore, *Roper*, which eliminated the death penalty as a sentencing option available to the state in its prosecution of juvenile offenders, is retroactively applicable as a new rule of substantive law prohibiting a category of punishment for a class of defendants because of their status, and when applied retroactively to the state sentencing scheme in place at the time of appellant's sentencing, it rendered appellant ineligible to receive a sentence of death under § 17-10-32.1. In other words, because authority to seek a death sentence was a prerequisite for imposition of a sentence of life without parole under § 17-10-32.1, and because after proper retroactive application of *Roper* the State could not consistent with federal law seek the death penalty against appellant due to his age, appellant could not legally be sentenced to life without parole under § 17-10-32.1. Accordingly, the Court concluded that appellant's sentence of life imprisonment without the possibility of parole was void as a sentence not allowed by law and the trial court's order denying the motion to correct void sentence must be reversed. Appellant's sentence was therefore vacated and the case remanded to the trial court with direction to enter a legal sentence.

### **Rule of Sequestration; Motions in Limine**

*Smith v. State, A13A1441 (10/3/13)*

Appellant was convicted of DUI (less safe). She argued that the trial court erred in refusing her request to invoke the rule of sequestration before hearing witnesses on her motion in limine to exclude evidence that she refused the officers' request to take a State-administered blood test. The Court agreed and reversed her conviction.

Former O.C.G.A. § 24-9-61 provided that "in all cases either party shall have the right to have the witnesses of the other party examined out of the hearing of each other. The court shall take proper care to effect this object as far as practicable and convenient, but no mere irregularity shall exclude a witness." The purpose of the rule of sequestration is

to ensure that the testimony of a witness who has not yet testified is not influenced by that of another witness. The Court stated that the practice of separating witnesses or, as generally called, "putting under the rule," is of ancient origin and salutary in the proper administration of justice, the object being, of course, to prevent one witness from being taught by another as to the testimony he should give. The mandate of the law is that in all cases either party shall have the right to have the witnesses of the other party examined out of the hearing of each other, and, hence, the rule is applicable and mandatory in an interlocutory hearing.

Exceptions to the rule exist. The trial court may allow an investigative officer to remain in the courtroom to assist the prosecutor in the orderly presentation of evidence. Thus, while application of the rule is mandatory, the trial court has the discretion to grant an exception if it appears that in making the exception to the rule, the fair rights of the opposite party are secured or the impairment of the efficiency of the court avoided by allowing a deputy or other officials, who are witnesses, to remain in the courtroom. The trial court's exercise of its discretion to allow an exception to the rule will not be reversed unless it was abused. Further, when the rule of sequestration is violated, the violation goes to the credibility rather than the admissibility of the witness' testimony. If a witness is present despite the invocation of the rule, any mere irregularity shall not exclude the witness. The particular circumstances of each case shall control, under the discretion of the court.

But here, the Court found, the trial court did not use its discretion to decide that a witness could remain to assist the State or to allow testimony despite an infraction of the rule. It simply held, incorrectly, that the rule of sequestration did not apply until the first witness was called for trial. Under the law's mandate that a party has the right to examine the opposing party's witnesses out of the hearing of each other, the parties are entitled to the benefit of this rule at all stages of the proceedings in the trial of a case, regardless of the purpose of the testimony, and the error in depriving the defendant of this substantial right rendered all subsequent proceedings nugatory, requiring the grant of a new trial. Therefore, the Court found, because the trial court erred in denying appellant's request

to invoke the rule of sequestration, her conviction was reversed and remanded for a new trial.

Appellant also argued that the trial court erred in granting the State's motion in limine to exclude evidence of the blood test she obtained after she was released from custody, which was negative for marijuana. The Court disagreed. While appellant elicited testimony from the officers establishing that some of her manifestations of impairment indicated drugs instead of alcohol and some indicated impairment from either substance, the issue before the fact-finder was only whether she was under the influence of alcohol to the extent she was a less safe driver, not whether she might have also ingested drugs. The blood test she obtained after she was released from jail shed no light on her alcohol impairment, and the trial court did not abuse its discretion in excluding it.

### **Restrictive Custody; O.C.G.A. § 15-11-63**

*In the Interest of D. C., A13A1161 (10/3/13)*

Appellant was adjudicated delinquent based upon a second act of theft by receiving a motor vehicle and the court properly concluded that he committed a designated felony act, as defined by O.C.G.A. § 15-11-63(a)(2)(E). Appellant argued that the court abused its discretion in ordering him to serve 36 months in restrictive custody in the absence of a finding that the victim of that theft suffered any actual physical injuries. The Court disagreed.

Where a child is found to have committed a designated felony act, the order of disposition shall include a finding based on a preponderance of the evidence as to whether the child does or does not require restrictive custody under O.C.G.A. § 15-11-63. To determine whether restrictive custody is warranted, the juvenile court must consider and make written findings about these factors: (1) the needs and best interest of the child; (2) the record and background of the child; (3) the nature and circumstances of the offense, including whether the victim sustained an injury and, if so, whether the child caused the injury; (4) the need to protect the community; and (5) the age and physical condition of the victim. The purpose of these specific findings of fact is to specify

in writing the essential elements involved in the case of a particular juvenile and thereby assist the lower court in its consideration of all of the mandated statutory elements—both those supporting and those mitigating against a particular case disposition. By complying with statutory procedure, the lower court will have the documented benefit of those elements relevant to its balancing process, and an appellate court will have documented assistance in determining whether a breach of discretion may have occurred in a particular case.

The weight to be accorded each factor, and the ultimate decision about whether restrictive custody is warranted, is committed to the sound discretion of the juvenile court. In other words, O.C.G.A. § 15-11-63(b) and (c) does not require that a juvenile court find that there was evidence on each factor that supports restrictive custody. Instead, it requires the court to consider each factor and to document its findings thereon, to then weigh those findings that favor restrictive custody against those that do not, and, finally, to use its broad discretion in deciding whether to order restrictive custody.

Here, the Court found, the juvenile court specifically addressed each of the five factors in O.C.G.A. § 15-11-63(c) during the disposition hearing and then issued an order of disposition that included written findings of fact as to each of those factors, as required by O.C.G.A. § 15-11-63(b). After reviewing the order of the trial court, the Court found that the trial court was authorized to find that the appellant's criminal history, his repeated violations of his probation while living at home, and his frequent use of marijuana demonstrated that restrictive custody was in his best interests, as well as the community's, and outweighed the absence of any physical harm to the victim of the second theft by receiving incident. Accordingly, the Court concluded that the court's findings in this case complied with O.C.G.A. § 15-11-36(b) and (c) and that it did not abuse its discretion in ordering appellant to serve 36 months in restrictive custody.

## **Statements; *Miranda***

*Teasley v. State, S13A1231 (10/7/13)*

Appellant and his two brothers, Chris and Tyrone, were indicted, tried together,

and convicted of malice murder, felony murder and two counts of aggravated assault. At trial, at which Chris did not testify, the court admitted into evidence statements that Chris and appellant had made to the police shortly after the shootings. Each statement was redacted to eliminate any mention of co-defendants. Appellant contended that because Chris's statement was inconsistent with his own statement, the jury could not possibly follow the court's limiting instruction to consider Chris's statement only against Chris, resulting in a violation of appellant's Sixth Amendment right of confrontation under *Bruton v. United States*, 391 U.S. 123 (1968). The Court disagreed.

A defendant's Sixth Amendment right to be confronted with the witnesses against him is violated when co-defendants are tried jointly and the testimonial statement of a co-defendant who does not testify at trial is used to implicate the other co-defendant in the crime. However, it is well-settled that if a co-defendant's statement does not refer to the existence of the defendant and is accompanied by jury instructions limiting its use to the case against the co-defendant giving the statement, the defendant's confrontation right is not violated even though, in light of the other evidence at trial, the jury might infer from the contents of the co-defendant's statement that the defendant was involved in the crimes. The Court found that Chris's statement did not mention appellant or implicate him by itself, and the trial court gave a proper limiting instruction. Thus, even though Chris's statement was inconsistent to some extent with appellant's statement and the jury might have been able to infer from other evidence that appellant was involved in the crimes, the admission of Chris's statement did not violate appellant's right of confrontation.

Appellant also argued that the prosecutor's comment during his opening statement that Chris and appellant gave separate statements that did not match improperly asked the jury to consider Chris's statement directly against appellant, undoing the effect of the trial court's later limiting instruction. However, the Court noted, appellant did not make a contemporaneous objection on the ground that the prosecutor was improperly linking the brothers' statements, and therefore, he was procedurally barred from raising this complaint on appeal. And, the Court stated,

in any event, any error in the prosecutor's opening statement was harmless beyond a reasonable doubt.

Appellant also contended that the trial court erred in admitting his statement into evidence, asserting that he was in police custody at the time he made it but was not advised of his constitutional rights as required by *Miranda v. Arizona*. The Court stated that a person is considered to be in custody and *Miranda* warnings are required when a person is (1) formally arrested or (2) restrained to the degree associated with a formal arrest. Unless a reasonable person in the suspect's situation would perceive that he was in custody, *Miranda* warnings are not necessary. Because it was undisputed that appellant was not formally arrested at the time he spoke to the police, the question was whether a reasonable person in his situation would have perceived that he was in police custody.

Here, the evidence showed that a detective learned that appellant and his brother, Chris, were on the way to the police station and drove there to meet with them. When he arrived, the brothers were sitting in the lobby, with no officers standing around them. After introducing himself, the detective interviewed Chris for five to ten minutes, then appellant for the same amount of time. He conducted the interviews in an unlocked room in which the police interviewed victims and witnesses as well as suspects. The detective testified that the brothers were not in custody and were never told that they could not leave. He added that appellant willingly talked to him and never asked for an attorney or to leave. The detective was unaware of his Lieutenant's directive to two other officers to take the brothers into custody, and it was not communicated to appellant or Chris. The detective decided to arrest the brothers only after the interviews were completed and he had consulted with an assistant district attorney. Under these circumstances, the Court found, the trial court did not err in concluding that a reasonable person in appellant's situation would not have perceived that he was in police custody. Accordingly, based on the evidence presented at trial, the court correctly denied appellant's motion to suppress his statement to the police.

Nevertheless, appellant contended, the evidence presented after trial showed that he actually was in custody when he made his statement. At the hearing on his motion

for new trial, appellant called the Lieutenant as a witness. The Lieutenant testified that shortly after the crimes, he got a call from dispatch that appellant and Chris were on the way to the police station to turn themselves in. He then asked two officers, whom he did not name, to go to the station and take the brothers into custody. He did not know whether the officers did so or, if they did, what time they arrived at the station or what happened once they arrived. Appellant also called an officer to testify. The officer said that he went to the police station at someone's request to meet appellant and Chris, but he did not say whether he was directed to take the brothers into custody or whether he did so. He added that he did not remember much, but he recalled that the brothers "showed up" and the detective then talked to them. Appellant also testified and stated that one of the officers told the brothers they could not leave until the detective arrived and refused to let appellant go outside to the car to charge his cell phone. Appellant said that he did not believe that he was free to leave before he was interviewed by the detective.

The Court stated that appellant cannot rely on evidence presented *after* trial to show that the trial court erred in admitting his statement *at* trial—a decision the court had to make based on the evidence it had at that time. The evidence appellant offered after trial was relevant only to his claim that his trial counsel was ineffective in not presenting that evidence at trial. And, the Court found, appellant's counsel was not ineffective in failing to present this evidence.