

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 24, 2014

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THIS WEEK:

- **Jury Charges**
- **Search & Seizure; Flight**
- **Statute of Limitations**
- **Authentication**

Jury Charges

Faulks v. State, S14A1339 (10/20/14)

The Supreme Court affirmed Michael O. Faulks' convictions for malice murder and a firearms offense. On appeal, Faulks contends that the trial court committed plain error by charging the jury on other forms of aggravated assault besides aggravated assault with a deadly weapon, because aggravated assault with a deadly weapon was the only form of aggravated assault charged in the indictment. While it is true that, where the indictment charges a defendant committed an offense by one method it is reversible error for the court to instruct the jury that the offense could be committed by other statutory methods with no limiting instruction, the defect is cured where the court provides the jury with the indictment and instructs jurors that the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt.

Here, the record reveals that the trial court read the indictment to the jury, provided the jury with the indictment during deliberations, and properly instructed the jury that the burden of proof was on the State to prove every essential element of the crimes as charged in the indictment. Under

such circumstances, Faulks cannot show any reversible error, plain or otherwise. The Court found that there was no reasonable probability that the jury found Faulks guilty of felony murder in a manner that was not charged in the indictment.

Search & Seizure; Flight

State v. Walker, S13G1793 (10/20/14)

The Supreme Court reversed the judgment in *Walker v. State*, 323 Ga.App. 558 (2013), holding that the Court of Appeals erred in reversing the denial of Ernest Walker's motion to suppress evidence of cocaine. Officer Adriance, of the Warner Robbins Police Department, was patrolling an area near an elementary school at 12:12 a.m. on February 23, 2011. He had been advised to be on the lookout for a black male in dark clothing who was a suspect in the attempted theft of a motorcycle. Officer Adriance saw Walker, who was wearing a hooded blue sweatshirt and light-colored pants, on foot on the grounds of the school. Officer Adriance approached Walker, telling him to remove his hands from his pockets; rather than complying, Walker became verbally combative, yelled that he was "just trying to get home," and "took off running through back yards, tossing stuff as he ran." Officer Adriance gave chase and caught Walker; the items Walker discarded included crack cocaine and a pipe for smoking crack cocaine.

The Supreme Court found that the Court of Appeals erred in ruling that the evidence was the product of the officer's illegal second-tier detention, since Walker was not seized when the officer told him to remove his hands from his pockets and Walker fled

instead, discarding crack cocaine and a pipe for smoking crack cocaine. In so holding, the Court noted that a command from a law enforcement officer alone is not sufficient to constitute a seizure for purposes of the Fourth Amendment; rather, under the Fourth Amendment, a seizure occurs “only when the officer, by means of physical force or show of authority, has in some way restrained the liberty of a citizen”. The Court further wrote that as *California v. Hodari D.*, 499 U.S. 621, (1991) also made clear, without submission to that show of authority, there was not a seizure. Walker did not submit to Officer Adriance’s command, and thus he was not seized until Officer Adriance physically seized him. The fact that Officer Adriance pursued Walker when he ran does not alter matters as “being chased is not tantamount to being ‘seized’ in violation of the Fourth Amendment. The Court noted that *Hodari D.*’s holding that there must be submission to an officer’s show of authority in order for there to be a seizure has been recognized in the appellate decisions of this State. See *Gray v. State*, 254 Ga.App. 487 (2002), *Walker v. State*, 228 Ga.App. 509 (1997), and *Hunt v. State*, 205 Ga.App. 490 (1992). Because Walker did not submit to Officer Adriance’s show of authority before abandoning the items at issue, the Court of Appeals erred in reversing the trial court’s denial of Walker’s motion to suppress.

Statute of Limitations

State v. Outen, S14G0390 (10/20/14)

The Supreme Court affirmed the judgment in *State v. Outen*, 324 Ga.App. 457 (2013), holding that the Court of Appeals did not err in ruling that O.C.G.A. § 17-3-3 extending the statute of limitation for six months after a timely-filed indictment is quashed did not give the State six additional months to obtain a second indictment against David Outen after the remittitur was filed following the State’s unsuccessful attempt to appeal the dismissal of the felony vehicular homicide count of Outen’s first indictment. In so holding, the Court noted that the text of the statute clearly states that the 6-month extension of the statute of limitation runs “from the time the first indictment is quashed or the nolle prosequi entered,” and not “from the time the first indictment is quashed or the nolle prosequi entered or, in the event

the State seeks an appeal, from the time the appellate court issues the remittitur.” Here, the trial court dismissed the original felony vehicular homicide count against Outen in September 2009, and the grand jury did not return the second indictment until December 20, 2011, which was four years and almost nine months after Outen allegedly committed the offense.

Authentication

Rodriguez-Nova v. State, S14A0808 (9/22/14)

The appellant was convicted of murder and various other offenses. On appeal, appellant alleges that the trial court erred when it overruled his timely objection to the admission of a recording of his 911 call. He argues that the State failed to properly authenticate the recording, insofar as the Spanish interpreter who assisted the 911 operator during the call did not testify, and the 911 operator herself does not speak Spanish. Appellant further alleges that there was no showing that the interpreter was “unavailable” as an authenticating witness under former O.C.G.A. § 24-4-48. Nevertheless, an audio recording can be authenticated by the testimony of one party to the recorded conversation. In this case, the 911 operator reviewed the recording, identified it as a fair and accurate reproduction of the call with no additions or deletions, recognized her own voice, and identified the voice of the interpreter. The operator’s inability to understand the Spanish portions of the recorded conversation went to the weight to be given her testimony, not the sufficiency of the authentication of the recording. Consequently, the trial court did not abuse its discretion when it admitted the recording of the 911 call.