

# Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING DECEMBER 8, 2017

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## THIS WEEK:

- **Text Messages; Juror Misconduct**
- **Habeas; Brady Violations**
- **Rule 404(b) Evidence**
- **Indictments; Electronic Eavesdropping**
- **Defense of Habitation; Jury Charges**
- **Void Sentences; Child Molestation**

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### Text Messages; Juror Misconduct

*Hodges v. State, S17A0711 (11/2/17)*

Appellant was convicted of two counts of felony murder, armed robbery, and two counts of aggravated assault. He first contended that the trial court erred in admitting a compilation of text messages. The record showed that the State sought to introduce the compilation of text messages between appellant's friend, Rozier, and appellant from the night the victim was murdered. Rozier, who was a participant in the text conversation, testified and authenticated the document's contents. The Court stated that evidence may be authenticated by the testimony of a witness with knowledge that a matter is what it is claimed to be. OCGA § 24-9-901 (b) (1). This rule applies to the authentication of text messages retrieved from cell phone records. Accordingly, the trial court did not err by admitting into evidence this authenticated compilation of messages between appellant and the authenticating witness.

Appellant also argued that he was entitled to a new trial because of juror misconduct. One of the jurors testified at the motion for new trial hearing that, during the trial, and while at home, she looked up some words on the dictionary application of an electronic

device. She could not remember the words, but testified that she was trying to understand some things on which the jury was attempting to make a decision. She testified, however, that her dictionary search had no impact upon her "as a juror." No evidence was presented that she shared the result of her dictionary search with other jurors. Thus, the Court found, because there was no evidence presented that the juror's conduct contributed to the conviction such that the verdict is inherently lacking in due process, the juror's conduct was harmless beyond a reasonable doubt. Thus, the Court concluded, the trial court did not err in denying the motion for new trial on this ground.

### Habeas; Brady Violations

*Jones v. Medlin, S17A1291, S17A1292, S17A1293 (11/2/17)*

Appellants Jones, Gardiner and Lucci are three white former soldiers who were found guilty of malice murder in the shooting death of an African-American victim. The murder occurred on January 31, 1992. There was one eyewitness whose name was White.

In 2010, they filed a habeas action asserting that, contrary to *Brady v. Maryland*, exculpatory evidence was not provided to the defense team by the State. Specifically: 1) prior to trial, White made statements to police officers that he could not identify the shooters, contradicting his positive identification of Jones and Gardiner at trial; 2) White was coerced into testifying at trial that he could, in fact, positively identify the men; and, 3) a police report of an incident that took place shortly after the shooting, namely that a man told a patrol officer named Herron that, at 1:00 a.m. on February 1, 1992, in the Yamacraw

Village public housing complex, Caucasian males in a white Chevrolet pick-up truck and a silver Ford Thunderbird, with military style haircuts and semiautomatic weapons, were “threaten[ing] to shoot blacks who hang out on street corners” (the “Yamacraw Report”). It was uncontroverted that at 1:00 a.m. on February 1, 1992, Jones, Gardiner, and Lucci were in police custody.

At the habeas hearing, White testified that he could not identify the shooters and that he was threatened with physical harm to himself and his family if he did not make a positive identification. He also testified that the State threatened him with perjury if he did not testify at trial as he had at a preliminary hearing when he identified Jones and Gardiner. The habeas court, however, rejected his testimony, finding that it lacked credibility. Thus, the Court stated, because the habeas court’s findings were not clearly erroneous, it affirmed the denial of the petition on this *Brady* claim.

As to the Yamacraw Report, the habeas court found that in order to be considered *Brady* material, the Yamacraw Report would have to be admissible evidence. However, the Court stated, this is a misstatement of the appropriate standard. The admissibility of the undisclosed material itself is not a prerequisite to finding a *Brady* violation; the question is whether, had the material been disclosed to the defense, the result of the proceeding would have been different, in reasonable probability. Thus, inadmissible evidence may be material under *Brady* if it could have led to the discovery of material admissible evidence. As to whether the Yamacraw Report is material within the meaning of *Brady*, the question is whether in the absence of the production of the report, the defendants received a fair trial, understood as a trial resulting in a verdict worthy of confidence. A “reasonable probability” of a different result is shown when the government’s evidentiary suppression undermines confidence in the outcome of the trial.

The Court noted that due to the passage of time, the man who provided the information in the Yamacraw Report was not located so as to enable him to testify at the habeas hearing. Thus, the information that he might have given if his existence had been known to the defense at the time of trial - and what further information this might have produced - is unknown. However, even if he had merely testified at trial to a repetition of that which he

had told Herron, the information would have been impactful, given how the case would have proceeded at trial.

Furthermore, the Court stated, although White’s subsequent claims about his trial testimony did not constitute *Brady* violations, it must consider the importance of identity testimony on the course of the trial. The State’s case was heavily dependent on White’s testimony and his eyewitness identification of the defendants. His testimony was attacked as unreliable at trial, as was the quality of the police investigation into White’s identification. Moreover, the victim was killed shortly after 10:00 p.m. on January 31, 1992. There was trial testimony from several witnesses that, until 9:15 or 9:30 p.m., appellants were at the rehearsal of Jones’s wedding, which was to take place the next day, and a dinner afterward, which took place in a town that was over a 50-minute drive away from the scene of the murder. No murder weapon was recovered; no firearm was found in the defendants’ car; no casings from an automatic weapon were found there; and the forensic scientist who vacuumed the interior of the car looking for gunshot residue found none. There were also significant racial overtones to the trial. Consequently, the Court concluded, in light of the totality of the circumstances, confidence in the outcome of the trial was undermined by the State’s failure to provide the Yamacraw Report to the defense. Certainly, in the face of the Yamacraw Report, the jury *could* have voted to convict appellants, but the Court had no confidence that it would have done so. Accordingly, the habeas court’s denial of the petitions for writs of habeas corpus were reversed.

## Rule 404(b) Evidence

*Thompson v. State, S17A0935 (11/2/17)*

Appellant was convicted of two counts of malice murder. The evidence showed that appellant and others entered the home of the victims, robbed them, and shot them. He contended that the trial court erred by admitting character evidence alleging that appellant had participated in an attempted armed robbery of an individual named Ward three and a half years after the murders. The trial court held that evidence of appellant’s involvement in the attempted armed robbery of Ward would be admissible to show motive, plan, and lack of mistake under our new Evidence Code at the

time of appellant’s trial.

The Court stated that to be admitted to prove motive, extrinsic evidence must be logically relevant and necessary to prove something other than the accused’s propensity to commit the crime charged. The fact that appellant may have committed a similar type of crime - an armed robbery coordinated with a group of perpetrators - is not enough to show motive for the murders at issue under 404 (b). Nevertheless, the State argued, the murders and the subsequent attempted armed robbery showed that appellant would shoot at people when he was angry. But, the Court noted, the witness to the attempted armed robbery did not testify that appellant used a gun during that crime. And, the evidence here did not indicate that appellant was inside the apartment when the victims were shot. “We are particularly unpersuaded that the presence of a gun at the scene of each crime is sufficient, without more, to show motive when there is no implication that the defendant was the one who used a gun during the crimes.” Therefore, the Court found, there was no apparent reason that the subsequent armed robbery shows evidence of motive rather than propensity. The later act was not connected to the murders, and the only similarities it shared with the murders are the all-too-common elements of guns and an assortment of co-conspirators. Appellant’s participation in a crime that involved a gun, attempted robbery, and co-conspirators was therefore not enough to show motive for the earlier unrelated crime.

Next, the Court addressed whether the extrinsic evidence was properly admitted as evidence of plan or lack of mistake. First, the Court found there was nothing in the record to suggest that the two crimes were part of a common plan. Here, again, the attempted armed robbery showed, if anything, merely a propensity to commit robbery, and not a common scheme or plan to commit robberies in a certain way. Moreover, there was no allegation that appellant accidentally or mistakenly shot the victims or that he accidentally or mistakenly stole their property. Nor do the two crimes share common perpetrators such that the subsequent crime demonstrates that appellant knew during the first crime that one of the other perpetrators would use a gun. Furthermore, the Court noted, the attempted armed robbery occurred three and a half years after the murders at issue and did not involve

the same group of people. Consequently, the attempted armed robbery evidence did little, if anything, to shed any light on whether appellant knew that his alleged co-conspirators intended to rob and murder the victims in this case.

Finally, the State argued that the evidence at issue was properly admitted to show intent. But the Court stated, whether it could have been or not, it wasn't. The trial court did not instruct the jury on intent. And, before the evidence was admitted, appellant specifically objected to any instruction on intent and the State agreed to remove the language. Under these circumstances, the Court declined to consider whether the evidence would have been admissible to show intent, although it should not be read as a suggestion that the answer would be different if the Court did consider intent. Accordingly, the Court concluded that the evidence of appellant's subsequent attempted armed robbery was not properly admitted.

Next, the Court addressed whether the error was harmless. The Court found that although the properly-admitted evidence was sufficient to convict appellant, it could not say that it was so overwhelming, or that the improper character evidence was so marginal, that the jury's verdict was not likely to be impacted. The Court therefore reversed his convictions and remanded for a new trial.

## Indictments; Electronic Eavesdropping

*State v. Cohen, S17A1265 (11/2/17)*

The State appealed from the dismissal of its indictment against two lawyers and their client. The alleged evidence, briefly stated, showed that Brindle worked as a housekeeper and personal assistant to Rogers, who was married. During her employment with Rogers, the two became involved sexually. In June 2012, Brindle hired attorneys Cohen and Butters to represent her on a potential claim of sexual harassment. On June 20, 2012, without Rogers' knowledge or consent to be video recorded, Brindle allegedly used a "spy" camera to secretly record video of Rogers naked in his bathroom and bedroom, as well as video of a sexual encounter between Rogers and herself inside his bedroom. The video recording was delivered to attorney Cohen, and Brindle resigned from her position with Rogers. On or about July 16, 2012, Rogers received a de-

mand letter from attorney Cohen relating to the potential sexual harassment claim that he and Butters were prepared to file on Brindle's behalf.

The State charged Brindle and her attorneys (the "defendants") with conspiracy to commit extortion under OCGA § 16-8-16 (Count 1), conspiracy to commit unlawful surveillance (Count 2), and conducting unlawful surveillance under OCGA § 16-11-62 (Count 3). Brindle was also charged individually with one additional count of conducting unlawful surveillance under OCGA § 16-11-62 (Count 4). The trial court granted the defendants' general demurrers to the indictment. The trial court also held that OCGA § 16-8-16 (a) (3) was unconstitutionally overbroad on its face, and further declared that OCGA §§ 16-11-62 (2) and 16-11-66 (a) were unconstitutionally vague because "persons of ordinary intelligence [could not] be expected to determine what is permitted and prohibited by these [two] statutes." Accordingly, the trial court dismissed all counts of the indictment against all of the defendants.

The State first contended that the trial court erred in granting the general demurrer to Count 1 of the indictment. The Court noted that in order to be found guilty of conspiracy to commit extortion under Count 1, the defendants had to conspire to unlawfully obtain property by "threatening to ... [d]isseminate any information tending to subject [Rogers] to hatred, contempt, or ridicule or to impair his credit or business repute" and commit an overt act to effect the objective of obtaining property from Rogers. OCGA § 16-8-16 (a) (3) and OCGA § 16-4-8. The Court found from the plain language of the indictment that the alleged threat was the demand letter, which threatened to file a lawsuit against Rogers and use the video as evidence in a court of law in the context of possible litigation. The indictment did not allege any threat (express or implied) to release the information to anyone outside of the potential court proceedings if Rogers did not pay Brindle a certain amount of money. But, the Court found, a threat of litigation, by itself, is not unlawful. Therefore, the Court held, mere threats to sue cannot constitute criminal extortion. In fact, the Court stated, if a mere threat of legitimate litigation could serve as a proper basis for a charge of extortion, OCGA § 16-8-16 (a) (3) could be applied in an overbroad and unconstitutional manner that

would run afoul of First Amendment principles protecting the right of individuals to petition the government for a redress of grievances. "We decline to adopt such a broad and potentially unconstitutional construction of the statute." Therefore, the Court upheld the grant of the general demurrer as to Count 1 because the defendants could admit to all the allegations and not be guilty of the offense.

The State also argued that the trial court erred in granting the defendants' general demurrer to Counts 2-4 of the indictment. With respect to these Counts, the Court agreed.

The Court noted that these three Counts, whether based on a conspiracy involving a prior agreement and certain overt acts, or based on direct violations of OCGA § 16-11-62, hinged upon whether the facts alleged would show a potential violation of, or an agreement to violate OCGA § 16-11-62 (2). This statute states in relevant part that "[i]t shall be unlawful for ... [a]ny person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view [except where certain statutory exceptions contained in subsections (2) (A)-(D) apply]."

The defendants contended that they were not legally required to obtain the consent of "all" of the persons being video recorded as required by the plain language of OCGA § 16-11-62 (2). Instead, they claim that they only needed to obtain the consent of one of the parties being recorded (Brindle) to avoid criminal liability in light of Georgia's "one-party-consent rule" contained in OCGA § 16-11-66 (a). The Court disagreed. By its terms, OCGA § 16-11-66 (a) applies to intercepted "communications," such as voices involved in a telephone conversation or an electronic communication to which the intercepting person is a party. The statute does not refer to observational surveillance such as video recording or photographing another person's activities, and it does not apply to nullify the clear statutory requirement of OCGA § 16-11-62 (2) that the consent of *all* parties is needed before a person may use any sort of spying device to photograph or video record the activities of another person in a private place and out of the public view. Therefore, the Court held, "[t]o the extent that the Court of Appeals' decision in *State v. Madison*, 311 Ga. App. 31 (2) (a) (714 SE2d 714) (2011), can be read to support

the conclusion that the one-party consent rule of OCGA § 16-11-66 (a) can apply to video recordings made without the consent of all persons observed in private places and out of the public view, the case is overruled.”

Next, the defendants contended that the indictment did not sufficiently allege that the video recording took place in a private place and outside the public view. Specifically, the defendants contended that the recording could not have taken place in a “private” place because Rogers could not have had any expectation of privacy in a place in which he had allowed Brindle to enter for purposes of carrying on a sexual relationship with her. The Court disagreed.

The Court stated that at the time Brindle secretly video recorded Rogers and another person in Rogers' home in June 2012 a “private place” for purposes of OCGA § 16-11-62 (2) was defined as “a place where one is entitled reasonably to expect to be safe from casual or hostile intrusion or surveillance.” Based on the indictment as written, and based on the plain language of the former version of OCGA § 16-11-60 (3), both Rogers and the other person who was secretly video recorded in the residence in this case would have had a reasonable expectation to be safe from “hostile intrusion or surveillance” in the places where they were video recorded. The Court also noted that the indictment indicates that all video recording activities took place in spaces within the residence that were outside of the public view. Accordingly, for these reasons alone, the Court held that the places involved in this case would meet the statutory definition of “private place[s]” that were “out of public view” under OCGA § 16-11-62 (2) and OCGA § 16-11-60 (3).

The Court also stated that there is nothing in the statute to show that the reasonable expectation to be safe from “hostile intrusion or surveillance” under the statute is coextensive with one's “reasonable expectation of privacy” under the Fourth Amendment to the United States Constitution. Nevertheless, the Court has in the past looked to Fourth Amendment jurisprudence as a guide when interpreting the scope of privacy protected by OCGA § 16-11-62. For Fourth Amendment purposes, one who begins with a reasonable expectation of privacy in a particular area such as his or her residence can lose that expectation of privacy by inviting a guest into that otherwise private

place. However, a person does not lose one's reasonable expectation of privacy simply when he or she invites a family member or someone who is more akin to being a member of the household into a place where one has a reasonable expectation of privacy. And here, the indictment showed that Brindle and Rogers were involved to a point where Brindle may have been the type of household member who could be allowed into Rogers' residence without Rogers or the other members of the household losing their reasonable expectation of privacy in those areas of the home that they intended to remain private. Accordingly, even when using the Fourth Amendment as a guide, the indictment sufficiently alleged that the video recording took place in a “private place.” The fact that the indictment also indicated that these areas were outside of public view is sufficient to satisfy the requirements of OCGA § 16-11-62 (2). Because the indictment alleged facts showing that the defendants could be found guilty of the crimes charged in Counts 2-4 based on a conspiracy to violate, and the actual violation of, OCGA § 16-11-62 (2), the trial court erred in holding otherwise.

Finally, the Court held that the trial court also erred in concluding that OCGA §§ 16-11-62 (2) and 16-11-66 (a) are unconstitutionally vague. A statute is unconstitutionally vague if it fails to give a person of ordinary intelligence notice of the conduct that is prohibited and encourages arbitrary and discriminatory enforcement. Here, the Court held, there is nothing unclear about the requirement in OCGA § 16-11-62 (2) that “all” persons being observed must give their consent to be photographed or video recorded before such persons can be photographed or video recorded in a private place and out of public view. Nor is it unclear that the one-party-consent rule of OCGA § 16-11-66 (a) does not apply to eliminate the requirement for “all” persons to give their consent to be legally photographed or video recorded in a private place and out of the public view consistent with the requirements of OCGA § 16-11-62 (2). People of ordinary intelligence can understand that they can be found guilty of illegal surveillance if they use a device to secretly photograph or video record others in private places and out of the public view without the consent of all persons being photographed or video recorded, and neither OCGA § 16-11-62 (2) nor OCGA § 16-11-66 (a) encourage arbitrary or discriminatory

enforcement of their respective provisions.

Accordingly, the Court upheld the demurrer to Count 1, but reversed the demurrer to Counts 2-4 of the State's Indictment.

## Defense of Habitation; Jury Charges

*Salazar-Balderas v. State, A17A0819 (10/18/17)*

Appellant was convicted of serious injury by vehicle, reckless driving, failure to stop at or return to the scene of an accident, following too closely, and driving without a license. The evidence showed that appellant rear-ended the victim's vehicle. The victim testified that both she and appellant exited their vehicles to inspect the damage, which was minimal. Appellant showed the victim an identification card of some sort and returned with the victim to his car so that he could give her his insurance card. However, instead of producing an insurance card to the victim, appellant got into his vehicle and fled the scene, running the victim over in the process.

Appellant argued that the trial court erred when it failed to instruct the jury on defense of habitation. The Court agreed. Initially, the Court noted, appellant's request failed to comply with U.S.C.R. 10.3 because it was made orally. This alone would have provided a basis for refusing to give the charge. However, the court did not refuse to give the charge on this basis. Rather, the trial court was directed to the requested pattern charge, reviewed it, and discussed it with the parties before deciding not to give it because it did not find the instruction was warranted under the circumstances of the case. Therefore, the Court found, it was able to review the merits of the issue.

The Court noted that unlike the defense of justification, the habitation defense, in recognition of the sanctity of a person in his home or motor vehicle or place of business, allows the use of deadly force in certain situations even if the occupant does not fear death or great bodily injury. Thus, the analysis does not turn on whether appellant was in any immediate fear of death or great injury or whether such fear was reasonable under the circumstances of this case. Nor does appellant's claimed ignorance of having run over the victim bar the availability of the habitation defense here. Rather, the issue turns on whether there was slight evidence that appellant used force to prevent or terminate a violent or tumultuous

ous entry into his vehicle that he reasonably believed was for the purpose of assaulting or offering personal violence against him.

Here, the Court found, appellant testified that when he returned to his vehicle to obtain his insurance and other paperwork, the victim reached through his window and began grabbing his shoulder while accusing him of not having insurance. Appellant testified that he became nervous and frightened, and that his nine year-old son, who was also in the vehicle, began to cry. Appellant's testimony indicated that he intended to use the force that resulted in victim's injury - that is, driving his vehicle away from her - to escape her reaching through his open vehicle window and grabbing him while she was verbally accosting him. Thus, the Court found, the victim's actions provided the slight evidence needed for the jury to decide whether appellant used the force resulting in injury to escape a violent or tumultuous entry into his vehicle that he reasonably believed was for the purpose of assaulting or offering personal violence against him. Therefore, the Court stated that it was "constrained to hold that the trial court's failure to give the charge was harmful error demanding reversal of the conviction."

## Void Sentences; Child Molestation

*Hood v. State, A17A1147 (10/19/17)*

In 2011, appellant pled guilty to one count of child molestation and one count of statutory rape. On the same date, the trial court sentenced him to 20 years (10 to serve, with the remainder on probation) on Count 5, statutory rape, and to 15 years of probation on Count 1, child molestation, to run consecutively to Count 5. Thereafter, appellant filed a motion to correct void sentence contending that the statutory rape charge should have merged into the child molestation charge and that the trial court "failed to split each count of [his] sentences in violation of OCGA § 17-1-6.2." The trial court denied the motion.

The Court noted that a trial court has no jurisdiction to modify a sentence after the term of court ends or 60 days pass. Where a sentence is void, however, the court may resentence the defendant at any time. A sentence is void if the court imposes punishment that the law does not allow. A direct appeal lies from the denial of a petition attacking a sentence based

upon the contention that it is void. However, a direct appeal does not lie from the denial of such motion unless it raises a colorable claim that the sentence is, in fact, void.

Appellant contended in the trial court, and contended on appeal, that his sentence is void because it does not comply with the requirements of OCGA § 17-10-6.2. The Court agreed. Under the version of OCGA § 17-10-6.2 which existed when appellant committed the child molestation, the trial court was required to impose a sentence that included at least the mandatory minimum of five years to serve in prison plus at least one year of probation, or to issue a written order setting forth its reasons for imposing a sentence below the statutory minimum. Appellant was sentenced only to probation on the child molestation count of which he was convicted, and the record contained no written findings by the trial court to support this deviation from the mandatory minimum term of imprisonment. Thus, appellant raised a colorable claim that his sentence is void in his motion to vacate void sentence and therefore, the Court vacated in part the order denying appellant's motion.

Appellant also contended that his sentence was void because the court did not merge his rape conviction into his child molestation conviction. However, the Court stated, a motion to vacate a conviction is not an appropriate remedy in a criminal case. Instead, such a challenge - including a merger claim - may be considered only in a traditionally recognized proceeding to challenge a criminal conviction: a direct appeal of the conviction; an extraordinary motion for new trial; a motion in arrest of judgment; or a petition for habeas corpus. Thus, appellant was not entitled to file a direct appeal from the denial of the motion to vacate void sentence as to the merger claim.