

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JUNE 22, 2012

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## THIS WEEK:

- **Confrontation Right; Crawford**
- **Felony Murder; Inherent Dangerousness**
- **Effective Assistance of Counsel; Habeas Corpus**
- **Appellate Jurisdiction; Habeas Corpus**
- **Justification; Hearsay**
- **Search & Seizure**
- **Jury Charges; Videotape**
- **Child Hearsay Statute**

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### Confrontation Right; Crawford

*Breedlove v. State, S12A0885 (6/18/2012)*

Appellant was convicted of malice murder and possession of a firearm during the commission of a felony in connection with a shooting death. He asserted the trial court erred in admitting statements the victim made to a police investigator on the day she was murdered. Finding no error, the Court affirmed.

Appellant asserted the trial court erred in admitting statements the victim made to an investigator on the day of the murder because they were testimonial in nature. The victim contacted him and asked to speak with him. The victim, the investigator, and the mutual friend met in the parking lot of a church. The victim told the investigator that appellant threatened her and she feared for her life. She added that appellant was becoming more and more angry and aggressive. The investigator suggested that the victim go to the authorities and file a written report. The victim responded that she was afraid to do that because appellant warned her against it. Generally, statements made to a police officer

in response to the officer's questions that are reflective of past events during a time when there is no longer an ongoing emergency are testimonial and inadmissible because they violate the confrontation clause. Here, however, the victim was not reporting a crime to a policeman; she was not attempting to build a case against appellant; she was merely seeking advice from a knowledgeable friend, who happened to be a policeman, as to what she should do in a difficult situation. The victim's statements were not made during the course of an ongoing investigation; they were not made with intent to prove past events pertaining to a subsequent criminal prosecution. Thus, the Court held that the statements were not testimonial in nature.

### Felony Murder; Inherent Dangerousness

*Chance v. State, S12A0684 (6/18/2012)*

Appellant was found guilty of criminal attempt to possess cocaine and possession of a firearm during the commission of a crime, but the jury acquitted him of malice murder and was unable to reach a verdict on felony murder. On retrial, appellant was found guilty of felony murder during the commission of criminal attempt to possess cocaine. The trial court entered judgments of conviction and sentenced him to life imprisonment for felony murder, a concurrent five-year term for the drug offense, and a consecutive five-year term for the weapons offense.

Appellant contended that the evidence was insufficient and that the trial court therefore should have directed a verdict of acquittal on the felony murder count. Construed most strongly in support of the verdicts, the evidence showed that appellant regularly pur-

chased illegal drugs from the victim's cousin on a particular rural dirt road. After the victim's cousin arranged for the victim to make a sale of cocaine to appellant at the same location, appellant arrived there in a pickup truck and stopped next to the victim's vehicle. Appellant fatally shot the victim in the head with a shotgun through appellant's open driver's side window. Although appellant testified that the passenger in his vehicle shot the victim, the passenger gave the opposite testimony, and the victim's DNA was found in bloodstains on the lower left side of appellant's shirt. Appellant eventually surrendered to law enforcement after changing his clothes and concealing the murder weapon in a friend's vehicle.

Appellant argued that the inherent dangerousness required for felony murder is not present in the underlying felony of criminal attempt to possess cocaine, because the victim, and not appellant, was the distributor of the cocaine, and because the shotgun was in appellant's vehicle during hunting season for hunting purposes. The Court noted that "the only limitation on the type of felony that may serve as an underlying felony for a felony murder conviction is that the felony must be inherently dangerous to human life. For a felony to be considered inherently dangerous it must be "dangerous per se" or it must "by its circumstances create a foreseeable risk of death." The Court therefore did not consider the elements of the felony in the abstract, but instead considered the circumstances under which the felony was committed. The Court found that by participating in a felony drug deal as the purchaser, appellant was affirmatively choosing to engage in a dangerous and potentially violent criminal activity. Thus, his criminal attempt to possess cocaine "was dangerous and sufficiently connected to the murder so as to also serve as an underlying felony for the felony murder conviction." However, the Court also found that the appellant was erroneously sentenced on both felony murder and the underlying felony and therefore vacated the separate judgment of conviction and sentence for criminal attempt to possess cocaine.

### **Effective Assistance of Counsel; Habeas Corpus**

*Tompkins v. Hall, S12A0489 (6/18/2012)*

The Court reversed the grant of Robert N. Hall's habeas petition, holding that the

habeas court erred in reaching Hall's ineffective assistance of counsel claims at all, because Hall was procedurally barred from raising the issue due to his fugitive status and failure to raise ineffective assistance of counsel when first practicable. Hall, along with several co-defendants, was convicted for possession of marijuana with intent to distribute and trafficking in cocaine. Hall, who was on bond at the time, was tried in absentia because, after he attended the first few days of his trial, he fled and became a "fugitive from justice."

At trial, Hall was represented by three attorneys. Following the trial, counsel filed a general motion for new trial. Thereafter, Hall replaced trial counsel, and Hall's new attorney, Derek Wright, filed an amended motion for new trial adding a non-specific claim that Hall "had been prejudiced by ineffective assistance of counsel." The State filed a motion to dismiss, which was granted because Hall remained a fugitive from justice. Hall then filed a notice of appeal of the dismissal, again stating as one of the grounds for his appeal the non-specific allegation that Hall "has been prejudiced by ineffective assistance of counsel." A few months later, Hall filed a motion to recuse the trial judge who dismissed his motion for new trial, or, in the alternative, a motion for arrest in judgment. In this motion, Hall argued for the first time that "the State may have misrepresented the availability of witnesses at trial;" "the failure to conduct a motion to suppress was reversible error;" and "the failure to sever the trial was reversible error." Hall listed these only as general errors; however, he did not contend that they were a basis for ineffective assistance of counsel. The motion to recuse was denied, and Wright withdrew as Hall's counsel. Thereafter, Hall retained Linda Sheffield, who based on the prior notice of appeal, filed a brief on Hall's behalf in the Court of Appeals. In this brief, Hall raised specific allegations of ineffective assistance of trial counsel for the first time. Ultimately, the Court of Appeals dismissed Hall's case because he was still a fugitive from justice at the time that the notice of appeal was filed.

Hall then filed a habeas corpus petition in which he contended that, in addition to errors committed by the trial court, he had received ineffective assistance of trial counsel because trial counsel failed to (1) prevent the admission of an unavailable co-defendant's statement in violation of *Crawford v. Washington*, and

(2) pursue pre-trial motions to sever Hall's trial and suppress evidence. The habeas court granted his petition and the State appealed.

The Court found that the habeas court erred by reaching Hall's claims of ineffective assistance at all because they had previously been waived. It is well settled that any claim for ineffective assistance of counsel must be raised at the first practicable moment. Except for a blank claim with absolutely no specificity, Wright did not include in Hall's motion for new trial a claim of ineffective assistance based on either the contentions raised by Sheffield in Hall's habeas petition or the grounds improperly injected sua sponte by the habeas court. In turn, Sheffield, who replaced Hall, did not raise any claim on appeal to the Court of Appeals that Wright, as Hall's first post-conviction attorney, committed ineffective assistance by failing to properly raise specific contentions regarding trial counsel's performance. As a result, for purposes of Hall's habeas action, the only way he could reach acts of his trial counsel would have been a claim that Sheffield, as appellate counsel, committed ineffective assistance by failing to timely raise claims that Wright committed ineffective assistance. No such claim was raised; thus the trial court erred by considering Hall's contentions regarding ineffective assistance of trial counsel. Moreover, even if Hall had properly presented a claim that Sheffield rendered ineffective assistance of appellate counsel, his habeas petition would still have to be denied.

### **Appellate Jurisdiction; Habeas Corpus**

*Crosson v. Conway, S12A0328 (6/18/2012)*

After being indicted for certain theft crimes, appellant, who was acting pro se, filed a pre-trial petition for writ of habeas corpus. The habeas court entered a final order granting a motion to dismiss filed by the Sheriff and denying the habeas petition, but did not inform appellant of the proper appellate procedure for obtaining review of that order. Although appellant did not request any extension of time, she filed a notice of appeal in the habeas court and an application for discretionary review in the Georgia Supreme Court. The Court granted that application to determine the jurisdictional issue of whether the holding in *Hicks v. Scott*, 273 Ga. 358 (2001), prevented an appeal by a pro se prisoner in a post-conviction

habeas case from being dismissed for failure to comply with certain appellate procedural requirements unless he was correctly informed of those requirements, should be extended to pre-trial habeas cases and whether that holding in *Hicks* should be overruled.

An application for discretionary appeal pursuant to OCGA § 5-6-35 is required to obtain review of an order on a pre-trial habeas petition filed by a prisoner. A failure to meet the statutory deadline for filing a discretionary application, which is 30 days under OCGA § 5-6-35 (d) plus any proper extensions pursuant to OCGA § 5-6-39, is a jurisdictional defect. The failure to comply with the discretionary appeal procedures of OCGA § 5-6-35 is likewise a jurisdictional defect compelling dismissal where, as here, the discretionary application is required by virtue of the Prison Litigation Reform Act. Further, the Court noted that Georgia courts may excuse compliance with a statutory requirement for appeal only where necessary to avoid or remedy a constitutional violation concerning the appeal.

“[A] criminal defendant has a constitutional right to the effective assistance of counsel for his first appeal of right . . . .” However, there is no federal or state constitutional right to appeal from an adverse order in a habeas corpus proceeding in the absence of compliance with appellate jurisdictional requirements, nor is there any constitutional right to counsel in a habeas proceeding or on application to appeal a ruling therein. Thus, compliance with OCGA § 5-6-35 cannot be excused for failure to inform appellant of its requirements, and the holding in *Hicks* therefore cannot be applied in this pre-trial habeas case. Accordingly, the application for discretionary review filed by appellant was subject to dismissal as untimely, and the current appeal, not being authorized, was dismissed.

Moreover, the Court found that *Hicks* must be overruled in its entirety. Whether the petitioner is acting pro se or not, “[t]his Court cannot denigrate the General Assembly’s determination by considering either a timely notice of appeal or a timely application as a mere procedural nicety.” Furthermore, the Court stated, no constitutional right of appeal or to counsel is implicated in this context, and the Court is wholly without any constitutional or other authority to waive compliance with this jurisdictional mandate. Therefore, compliance with OCGA § 9-14-52 (b) cannot be excused

for failure to abide by a judicially imposed rule that the habeas petitioner be informed of that statute’s requirements. Accordingly, the Court overruled *Hicks* and its progeny, including *Thomas v. State*, 284 Ga. 327-328 (1) (2008) and *Capote v. Ray*, 276 Ga. 1, 2 (1) (2002).

## **Justification; Hearsay**

*State v. Hodges*, S11G1820 (6/18/2012)

The Court considered whether the Court of Appeals erred in holding that the defendant should have been allowed to present evidence in support of his justification defense about a previous incident of violence allegedly committed by the victim against third parties where the defendant claimed that he heard of the previous incident but did not witness or have any other evidence supporting the claim. Specifically, Hodges presented a justification defense pursuant to OCGA § 16-3-21(a). He sought to introduce evidence that the victim acted violently toward other people on several occasions, all of which Hodges heard about before he killed the victim. Hodges argued that his testimony about the purported incidents would explain his state of mind and fear for his personal safety when he shot the victim. The trial court refused to allow the testimony because there was no independent evidence about the victim’s alleged acts of violence available to make the requisite showing of admissibility. The Court of Appeals reversed, finding that the testimony was admissible, pursuant to OCGA § 24-3-2, as “original, admissible, competent evidence” of Hodges’s state of mind to explain his conduct, and that its exclusion was harmful error.

The Supreme Court concluded that the holding was in error, and therefore reversed the judgment of the Court of Appeals. The Court noted that there was a theoretical distinction to be made between the offer of evidence of prior violent acts by the victim against third parties to show that the victim was indeed the aggressor in the fatal episode with the defendant and the defendant’s desire to introduce such evidence for the purpose of showing the defendant’s state of mind at the time the defendant killed the victim. But, it is a distinction without a real difference in regard to the ultimate determination to be made by the fact finder in regard to a defendant’s assertion of self-defense, i.e., whether the killing was legally justified.

Further explaining its reasoning, the Court cited *Harris v. State*, 279 Ga. 304 (2005). In that case the defendant asserted that he previously had been shot, and that the effect of the shooting on his state of mind was important to his claims of justification and self-defense in his killing of the victim. The Court determined that Harris’s complaint was unavailing inasmuch as a defendant is not permitted to support a justification defense with an explanation that he or she had been the victim of an earlier attack. The Court explained the rationale: the evidence was simply not relevant to the critical question in the defense of justification that was, “whether the circumstances surrounding the commission of the crimes on trial would have excited the fears of an objective reasonable person to the point where the defendant’s actions were justified.” However, that is not to say that evidence of violent acts committed by the victim against either the defendant or against third parties is not relevant to the inquiry, but that evidence may be introduced by a criminal defendant claiming justification. And, that is so because the key showing must be that the victim was the aggressor in the fatal encounter. The trial court correctly refused to allow Hodges to testify about the unsupported alleged violent incident involving the victim and third parties. Hence, the judgment of the Court of Appeals cannot stand.

## **Search & Seizure**

*Blakely v. State*, A12A00625 (6/14/2012)

Appellant was found guilty of possession of cocaine and two counts of obstruction. In a single enumeration of error, appellant argued that the trial court erred by denying his motion to suppress because the officer lacked a reasonable suspicion that appellant had committed a crime when the officer effected the traffic stop. The Court disagreed.

Here, it was undisputed that appellant did not commit any traffic offense. He did, however, make an immediate, sudden turn into a driveway, reverse course, and drive away from the police checkpoint at the same time that the police officer noticed his headlights. Although appellant testified that he did not see the police lights at the checkpoint and was merely turning around to retrieve his wallet, which he left at home, the Court noted that it was required to “accept the trial court’s find-

ings on disputed facts and witness credibility unless they were clearly erroneous.” Under these circumstances, where there was some evidence that appellant attempted to avoid the roadblock, thereby causing a reasonable suspicion in the officer, the trial court did not err by denying the motion to suppress and the subsequent motion for new trial.

## **Jury Charges; Videotape**

*Alatise v. State, S12A0024 (6/18/2012)*

Appellant was convicted for felony murder and aggravated assault. He contended that the trial court made a number of evidentiary errors. The Court affirmed

Appellant maintained that the trial court erred by denying his motion for a mistrial after the jurors watched a portion of his videotaped statement which they were not supposed to view. The record showed that, in the jury room without supervision, the jurors watched a video of a police interview with appellant and his accomplice. By doing so, the jurors were able to see, in addition to the material that they had seen at trial, approximately a minute’s worth of additional video at the end of the videotape. During this minute, the accomplice and appellant scanned the room to find the cameras, spoke briefly about one of the similar transactions, a prior armed robbery attempt, and appellant asked the accomplice what he had done with the “what-cha-ma-call-it?” After this error was discovered, the jurors were questioned by the trial court. Initially, 11 out of 12 jurors did not realize that they had seen any new material, but, upon further questioning, they realized that they had. In any event, all jurors stated that they could disregard the extraneous information without problem. Thereafter, the trial court gave a curative instruction, and the jury continued its deliberation.

The Court found this situation to be analogous to one in which a witness for the State voluntarily and unexpectedly testifies to a prejudicial matter. Where a witness for the State in a criminal case voluntarily injects into the trial improper and prejudicial matter, on motion for a mistrial based thereon, whether mistrial must be granted as the only corrective measure or whether the prejudicial effect can be corrected by withdrawing testimony from the consideration of the jury under proper instructions, is a matter ordinarily in the discretion of the trial court. The trial court’s rul-

ing will not be disturbed on appeal absent an abuse of discretion, which does not exist if the curative instructions given can serve to prevent the alleged harmful testimony from having any prejudicial impact and/or the jury indicates that it can follow the instructions and will not consider any improper prejudicial statements or testimony. Here, the Court found, the jury clearly indicated that it could and would follow the trial court’s curative instruction. Thus, the Court held, there was no error.

## **Child Hearsay Statute**

*Bunn v. State, S11G0682 (6/18/2012)*

The Georgia Supreme Court granted certiorari to consider whether the Court of Appeals improperly limited the Supreme Court’s holding in Division 3 of *Woodard v. State*, 269 Ga. 317 (1998). *Woodard* struck down, as a violation of the equal protection of the law, a 1995 amendment to the Child Hearsay Statute, OCGA § 24-3-16, that expanded the scope of the hearsay exception to allow the admission of out-of-court statements by all children under age 14 who witnessed sexual contact or physical abuse, as opposed to only children who were themselves the victims of such abuse. Having carefully re-examined *Woodard*’s Division 3, the Court concluded that its reasoning could not be sustained. Thus the Court overruled Division 3 and affirmed the Court of Appeals’ judgment.

The evidence showed that appellant moved in with his step-sister sometime in 2005, becoming the primary after-school care provider for his two nieces, who were ages seven and nine at the time of trial. On January 20, 2006, the girls told their mother that appellant had put his hand down their pants; they later said that appellant also licked their private parts and touched his penis to their vaginal areas. The mother contacted law enforcement and the children were separately interviewed by a forensic therapist at a child advocacy center. The interviews were video recorded. At trial in May 2006, each girl testified about what appellant had done to her and what she saw appellant do to her sister, and appellant cross-examined the children. The girls’ mother and the forensic therapist also testified against appellant, and the recording of the children’s forensic interviews was played for the jury. Like the children’s in-court testimony, this evidence included not only each girl’s out-of-

court statements about sexual contact appellant had with her, but also sexual contact she saw appellant have with her sister. Appellant testified in his own defense, denying any wrongdoing. The jury convicted appellant of two counts each of cruelty to children in the first degree, aggravated child molestation, and child molestation.

The Court of Appeals affirmed, rejecting appellant’s claim that his trial counsel was ineffective in failing to make a hearsay objection when the forensic therapist testified about what each child said she saw him do to the other child and when the unredacted recording of the children’s interviews was played for the jury. The Court held that Division 3 of *Woodard* was “inapplicable here, because both girls were victims” and not only witnesses to the other’s molestation.” Thus, the Court of Appeals concluded that the children’s out-of-court statements about sexual conduct that happened to each other in their presence were admissible under OCGA § 24-3-16 and not subject to proper objection, thereby defeating appellant’s ineffective assistance of counsel claim. The Court granted certiorari.

In 1994, the Court held, as a matter of statutory interpretation, that the Child Hearsay Statute did not apply to out-of-court statements by a child under age 14 describing physical abuse he saw the defendant inflict on two other young children. The original § 24-3-16 admitted only statements “by a child under the age of 14 years describing any act of sexual contact or physical abuse performed with or on the child by another.” The next year the General Assembly amended § 24-3-16 so the hearsay exception was no longer limited to out-of-court statements by the child who was the victim of the defendant’s sexual contact or physical abuse — or to statements about sexual contact or physical abuse committed against children.

In Division 3 of *Woodard*, the Court considered the constitutionality of the 1995 amendment. *Woodard* sexually molested a 5-year-old child in front of her 6-year-old friend, and both children testified at trial. An investigator testified that the victim’s young friend told him during an interview that she saw *Woodard* put his hand in the victim’s pants, and a video recording of that interview was played for the jury. *Woodard* was convicted of one count of child molestation. The Court reversed *Woodard*’s conviction, holding

in Division 3 that the 1995 amendment was unconstitutional because it deprived Woodard of equal protection. Specifically, the Woodard Court found that there was no rational basis for differentiating between the evidence potentially admissible at the trial of a defendant who committed his child molestation crime in front of another child and the evidence admissible against a defendant who committed the same crime in the presence of someone older than 14.

The present case required the Court to re-examine the reasoning underlying that holding to decide if the Court of Appeals improperly limited it. In deciding an equal protection challenge, the level of scrutiny applied by the court depends on the nature of the distinction drawn by the legislation at issue. If neither a suspect class nor a fundamental right is implicated, the most lenient level of judicial review—"rational basis"—applies. Rational basis review involves a two-prong evaluation of the challenged statute. "Initially, the claimant must establish that he is similarly situated to members of the class who are treated differently from him. Next, the claimant must establish that there is no rational basis for such different treatment." Because no suspect class or fundamental right was implicated by the statute, the Court correctly identified rational basis review as the test for evaluating the equal protection claim. In applying rational basis review to the facts of *Woodard*, the Court stated that the reasoning simply did not hold up.

First, the State has a legitimate interest in shielding child witnesses from enduring the rigors of a courtroom. The Court also recognized that simply witnessing a violent crime can cause a child "cruel and excessive mental pain," even when the child exhibits "no overt manifestations of trauma," because such trauma may be suppressed or delayed. Moreover, there is nothing irrational about creating disparate classes of criminal defendants based on the young age of the witnesses to their crimes. Since there was a rational basis for the 1994 amendment to § 24-3-16, the Court determined that Division 3 of *Woodard* was wrongly decided and overruled it.