

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 3, 2011

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THIS WEEK:

- **Self-Defense; Jury Charges**
- **Brady; Merger**
- **Recidivist; Guilty Plea**
- **Guilty Plea; Our-of-time Appeal**
- **Juror Qualification; Character Evidence**
- **Restitution; Opinion Evidence**
- **Hearsay; Juror Qualification**
- **Venue; Hearsay**

Self-Defense; Jury Charges

Davis v. State, A11A0650 (5/11/11)

Appellant was convicted of voluntary manslaughter as a lesser included offense of felony murder, aggravated assault, possession of a firearm during the commission of a felony and false imprisonment. Appellant argued that the trial court erred by refusing to charge the jury on involuntary manslaughter. The trial court charged the jury on both self-defense and accident. The Court noted that a charge on involuntary manslaughter is not generally allowed where the defendant alleges self-defense, as appellant did regarding the shots he fired after the first shot. Nor, under these facts, did the defense of accident as to the first shot require such a charge. The Court held that it is well established that if the victim's death was truly accidental, a charge on involuntary manslaughter in the commission of a lawful act is not warranted as no crime would have occurred. The Court also stated that a charge on involuntary manslaughter in the commission of an unlawful act other than a felony was

not required, given that the evidence relied upon by appellant established either that the pistol discharged accidentally when the victim wrestled for its control or that appellant intentionally fired the weapon.

Nevertheless, appellant cited *Vick v. State*, 166 Ga. App. 572 (1983), for the proposition that the evidence supported a charge on involuntary manslaughter. However, the Court noted that *Vick* had been overruled. As far back as 1991, the Court held that when the trial court charges the jury on self-defense and accident, its refusal to charge on involuntary manslaughter is not error. *Bangs v. State*, 198 Ga. App. 404, 405-406 (1991). The Court held that *Bangs* overruled all decisions to the contrary.

Brady; Merger

Chandler v. State, A11A0596 (5/17/11)

Appellant was convicted of child molestation and cruelty to children. Appellant argued that he was entitled to a new trial on the grounds of prosecutorial misconduct because the prosecutor withheld a statement made by the victim's mother that the victim had recanted his accusations against appellant and had admitted that he had fabricated the story. At trial, appellant's attorney made a motion for a mistrial arguing that the prosecutor had intentionally withheld that information, prejudicing appellant's defense. The prosecutor denied that the mother had ever told him that the victim had lied; rather, he claimed that she was lying. The court decided to let the jury resolve the inconsistencies in the mother's testimony.

The Court found no evidence in the record that the victim's mother gave the police or the prosecution a written or recorded statement that the victim had told her that he had lied

about the molestation. Therefore, the Court held that appellant failed to meet his burden of showing that the prosecutor suppressed a statement from the victim's mother, and as a result, his *Brady* claim had to fail. Moreover, even if appellant had met this burden, the record showed that the defense already had the information allegedly withheld by the prosecutor and was able to use that information timely in appellant's defense. The Court held that because appellant failed to show any misconduct by the prosecutor, the trial court had not erred in denying his motion for mistrial.

Appellant also argued that the trial court should have merged his convictions for child molestation and cruelty to children because each count is based upon the same act and, therefore, the crimes are included in one another as a matter of fact. However, the Court noted that the Supreme Court of Georgia has adopted the "required evidence" test for determining when one offense is included in another. The Court explained that under the required evidence test, a single act may constitute an offense that violates more than one statute, "and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution and punishment under the other." *Drinkard v. Walker*, 281 Ga. 211, 215 (2006). Here, appellant had been indicted for child molestation, which required him to have committed an "immoral and indecent act, to...a child under 16 years of age" and for cruelty to children, which required him to have "maliciously caus[ed the victim]... cruel mental pain..." Because each statute required at least one element that the other did not, the Court held that the two crimes did not merge.

Recidivist; Guilty Plea

Mikell v. State, A11A0221 (5/17/11)

Appellant was convicted of one count of enticing a child for indecent purposes and three counts of child molestation, and he was sentenced as a recidivist under OCGA § 17-10-7 (c). He argued that his motion to correct a void sentence should have been granted by the trial court. The record showed that the State introduced certified copies of three prior felony convictions reflecting that appellant pled guilty in each case. The trial court then proceeded to sentence appellant

as a recidivist. Appellant asserted that he did not voluntarily enter any of the pleas that were introduced to the court and that he was not represented by counsel as to some of the pleas, therefore the trial court's convictions were void because the law did not allow the court to impose recidivist punishment upon him. The Court found that for at least three of appellant's prior convictions, the State introduced certified copies of the convictions which reflected that appellant had pled guilty thereto and had been represented by counsel. At that point, the burden shifted to appellant to prove that the pleas were not voluntary, and the Court found that appellant did not present any evidence on this point. Accordingly, the Court affirmed the trial court's judgment denying appellant's motion.

Guilty Plea; Out-of-time Appeal

Spencer v. State, A11A0003 (5/19/11)

In 1999, appellant entered into negotiated pleas of guilty on numerous felonies and was sentenced to a total of 40 years to serve. In 2010, he filed motions to withdraw his plea and for an out-of-time appeal. He argued that the trial court should have held a hearing on his motion for an out-of-time appeal because his right to an appeal was frustrated by his trial counsel's ineffective assistance. The Court, citing *Upperman v. State*, 288 Ga. 447, 448 (2011), found that the trial court was not required to hold an evidentiary hearing because appellant was not entitled to a direct appeal from his guilty pleas based on the existing record. Since a defendant has no right to file even a timely notice of appeal from the judgment of conviction entered on a guilty plea, a defendant is not entitled to be informed of a non-existent "right" to appeal. Therefore, the Court held, the merits of the motion to withdraw the plea are not relevant because appellant had no right to a direct appeal from his guilty plea in the first place. If the sentence had been void, meaning if the court had imposed punishment that the law did not allow, appellant would have had a right to withdraw his guilty plea. However, the Court found that appellant's sentence fell within the statutory range and was not void and therefore the trial court properly dismissed the motion to withdraw the plea because it had no jurisdiction to consider it.

Juror Qualification; Character Evidence

Culajay v. State, A11A0014 (5/19/11)

Appellant was convicted of trafficking in methamphetamine and selling methamphetamine. He argued that the trial court erred in denying his challenge to strike a prospective juror for cause and, therefore, he was improperly required to exercise a peremptory strike. He also argued that the trial court erred in allowing testimony that improperly placed his character into evidence.

The record showed that during voir dire there was a prospective juror who indicated that he didn't trust all lawyers and that he himself would not be able to do the defense counsel's job "ethically". When asked if he could set aside his personal feelings, listen to the evidence, and render an impartial verdict, the prospective juror replied that he thought he could do so. Appellant contended that the prospective juror should have been stricken for cause, but the Court found that there was no evidence suggesting that the juror had formed a fixed or definite opinion regarding appellant's guilt or innocence. Georgia law presumes that "potential jurors are impartial, and the burden of proving partiality lies with the party seeking to have the juror disqualified" and provides that "[w]hether to strike a juror for cause lies within the sound discretion of the trial court, and a trial court is not obligated to strike a juror for cause in every instance where the potential juror expresses doubts about his or her impartiality or reservations about his or her ability to set aside personal experiences." The Court held that the trial court did not abuse its discretion in denying appellant's challenge for cause as to this prospective juror.

Appellant also contended that the testimony of the undercover officer who purchased the methamphetamine from him had improperly placed his character into evidence and was therefore prejudicial. The comment to which appellant objected was made during redirect examination of the officer, when the prosecutor asked the officer if appellant looked substantially the same as when he was arrested and the officer replied that he had lost some weight since he had been in jail. Appellant argued that commenting on the fact that appellant was in jail was prejudicial, but the Court found that evidence that an accused has been confined in jail in connection with the case at issue does

not place his character into evidence. The Court held that the trial court did not abuse its discretion in overruling appellant's objection to the undercover officer's testimony.

Restitution; Opinion Evidence

Baghose v. State, A11A0180 (5/17/11)

Appellant was convicted of theft by taking and forgery for writing fraudulent checks on behalf of her employer, ZF Industries. The evidence showed that in 2007, two internal audits, spearheaded by the president of ZF, revealed numerous fraudulent checks. This led to two auditors from the German parent corporation and one from the first audit to conduct an audit in September that traced to appellant hundreds of fraudulent checks totaling over \$650,000. The trial court convicted appellant of the theft count and all but four of the forgery counts on which she was indicted. Following the conviction, the court held a sentencing and restitution hearing during which evidence of ZF's losses were presented. Appellant argued that during the hearing the court admitted evidence that was inadmissible hearsay, and that the court's factual finding on the total damages was inconsistent with the jury's verdict because it included the amounts for which she was acquitted.

The record showed that the president of ZF testified at the hearing that the second audit cataloged every fraudulent check and that a check list was made showing ZF had total damages of \$653,735.63. Appellant contended that the check list was inadmissible hearsay, citing *Williams v. State*, 247 Ga. App. 783 (2001). The Court found that under *Wilkerson v. State*, 246 Ga. App. 621 (2000), "Opinion evidence as to the value of an item has probative value and may be admitted if a foundation is laid showing that the witness has some knowledge, experience or familiarity with the value of the property or similar property and if the witness gives reasons for the value assessed and has had an opportunity for forming a correct opinion." Here, the President of ZF laid such an appropriate foundation and so she was authorized to testify.

Appellant also contended that the court's finding of fact that ZF had suffered \$653,735.63 in damages was erroneous given that the jury acquitted her on four specific counts of forgery. The four checks corresponding to the four

counts on which the jury acquitted appellant add up to \$6,464.59, and they were included in the auditors' list of fraudulent transactions totaling \$653,735.63. The trial court included the total amount because as a matter of fact, ZF suffered the full amount of damages shown on the check list. But, because of appellant's inability to pay the full amount, the trial court ordered her to pay \$100,000 restitution. The Court found that appellant was charged with different crimes arising out of the same conduct and the trial court was authorized to determine the amount of restitution on the theft count independent of the other counts. The judgment was affirmed.

Hearsay; Juror Qualification

Keating v. State, A11A0343 (5/17/11)

Appellant was indicted on seven charges, including three counts of murder, conspiracy to commit armed robbery, two counts of aggravated assault, and possession of a firearm during the commission of a crime. She was acquitted of all charges except the conspiracy charge and was sentenced to ten years. She contended that the trial court erred by denying her motion in limine seeking to exclude statements made by her co-conspirator and that the trial court improperly restricted questioning during voir dire.

The record showed that during the trial, appellant contended that the co-conspirator's testimony was inadmissible hearsay, that any conspiracy had ended by the time the statements were made, and that, therefore, the statements of her co-conspirator were not admissible under OCGA § 24-3-5. The Court held that hearsay statements made by a conspirator during the course of a conspiracy, including the concealment phase, are admissible against all conspirators and that merely because the defendants were talking about the crimes to third parties does not evidence the end of the concealment of the conspiracy. Moreover, a conspiracy or the concealment phase of it does not end just because one or more participants have been arrested and jailed. Therefore, the Court held that the trial court did not abuse its discretion by allowing the statements made by the co-conspirator into evidence against appellant.

Appellant also contended that because most of the defendants were black and the

victims were of Asian and Latino descent, the trial court should have allowed further questioning during voir dire related to the possible racial bias, prejudice, or leaning of prospective jurors. The record showed that the court did not allow defense counsel to question the jurors regarding possible racial prejudice and bias after their first attempt to do so. Instead, it essentially only allowed one general question on the topic, and the court itself asked most of the jurors that one question. The Court concluded that the State had carried its burden of showing that it was highly probable that any failure to allow the defendants to ask additional questions regarding possible racial prejudice or bias did not contribute to the judgment against appellant. The Court affirmed the trial court's judgment.

Venue; Hearsay

Warren v. State, A11A0616 (5/16/11)

Appellant was convicted of fifty-two counts of first degree forgery, fifty counts of felony theft-by-taking of property exceeding \$500.00 in value, and two counts of misdemeanor theft-by-taking of property not exceeding \$500.00 in value. Appellant argued, among other things, that the State failed to prove venue beyond a reasonable doubt on the first degree forgery counts and the trial court erroneously admitted her credit card statements into evidence under the business records exception to the hearsay rule.

The Court found no merit in appellant's argument that the State failed to prove venue. It held that the State showed that appellant was the business manager for the victim's medical practice located in the city of Athens in Clarke County, and that working in that capacity, appellant filled out and signed checks drawn on the practice's bank account and sent the checks in the mail offering them as payments on her personal credit card debts. This was direct and circumstantial evidence sufficient to prove beyond a reasonable doubt that she uttered the checks from the location of the medical practice where she worked in Clarke County.

The Court found no merit in appellant's other contention, that the foundational testimony provided to admit her credit card statements into evidence under the business records exception to the hearsay rule was inadequate. The Court found that the foundational testimony given by the credit card

company representatives showed that they had sufficient knowledge of the manner in which the merchants and the credit card companies routinely generated these business records and functioned in this context as related businesses. The Court also found no error in the trial court's conclusion that the credit card purchases transmitted by the merchants to the credit card companies were also business records of the credit card companies that were admissible under OCGA § 24-3-14 based on the foundational testimony given by the company representatives.