

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 3, 2016

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THIS WEEK:

- **Inconsistent Verdicts; Collateral Estoppel**
- **Sentencing; Life Without Parole**
- **Prior Inconsistent Statements; Rule 404(b)**
- **Jury Instructions; Plain Error**
- **Indictments; Sentencing**

Inconsistent Verdicts; Collateral Estoppel

Giddens v. State, S16A0256 (5/23/16)

Appellant was convicted of five crimes related to the shooting death of Murray. Specifically, he was convicted of felony murder based on the aggravated assault of Murray, felony murder based on criminal street gang activity based on the aggravated assault, criminal street gang activity based on the aggravated assault, criminal street gang activity based on possessing a firearm during the commission of the aggravated assault, and possession of a firearm during the commission of the aggravated assault. However, he was acquitted of predicate aggravated assault by shooting Murray. After the trial court granted him a new trial on instructional errors, he filed a plea in bar based on principles of collateral estoppel derived from the constitutional protection against double jeopardy that bars the State from trying him again, because he was acquitted of the aggravated assault that was the predicate offense for each of the five crimes of which he was found guilty. The trial court denied his plea in bar.

At the outset, the Court noted that the United States Supreme Court recently granted certiorari to decide this very question, which

has divided the lower courts. See *United States v. Bravo-Fernandez*, 790 F3d 41 (1st Cir. 2015), cert. granted, 194 LE2d 585, 2016 WL 1173125 (2016). “Unfortunately, that decision will come down after our two-term deadline for deciding this case, see Ga. Const. of 1983, Art. VI, Sec. IX, Par. II, so we must work through the constitutional question.”

The Court stated that the bedrock of collateral estoppel in criminal cases is that the court must determine, honor, and apply the facts that the jury actually and necessarily decided in the defendant’s favor. So what facts were clearly decided by a jury that said through its verdicts that the defendant both did and did not commit a specific crime? Juries do not provide detailed accounts of their reasoning, and indeed are generally protected from inquiries into it. Thus, determining what facts the jury decided often requires the court to infer from the record those facts a “rational jury” must have decided in order to return the verdicts it reached. In fact, the whole collateral estoppel analysis is premised on the proposition that the jury acted rationally and lawfully. When an acquittal is not contradicted by a conviction, a court can presume that the jury properly followed the trial court’s instructions and reached its verdicts rationally based on the factual determinations necessary to those legal conclusions. Where a jury has spoken through both acquittals and convictions and has said truly inconsistent things, the same obedience and rationality cannot be presumed. The problem is that the same jury reached inconsistent results; once that is established principles of collateral estoppel — which are predicated on the assumption that the jury acted rationally and found certain facts in reaching its verdict — are no longer useful.

Here, the Court concluded, the guilty and not guilty verdicts returned at appellant's original trial showed that the jury decided that he did and he did not commit aggravated assault by shooting Murray. Given these inconsistent and irrational verdicts, appellant cannot rely on the fact that a rational jury would have had to find that he did not commit the aggravated assault in order to acquit him of that charge. He therefore failed to prove that collateral estoppel applies in this case, and the State may retry appellant on the five vacated convictions. In so holding, the Court noted that it joined the majority position of other jurisdictions that have addressed this issue.

Sentencing; Life Without Parole

Hyde v. State, S16A0698 (5/23/16)

Appellant was convicted of malice murder and other offenses on February 1, 2000. Under subsection (c) of Georgia's recidivist statute, O.C.G.A. § 17-10-7, the trial court sentenced appellant as a recidivist to life in prison without the possibility of parole for malice murder. In May 2014, he filed a pro se motion, contending that his sentence of life without the possibility of parole was void because the trial court, when it sentenced him, was not allowed by law to impose that sentence for murder. The trial court denied the motion. The Court reversed.

As the State conceded, when a court imposes a criminal punishment that the law does not allow, the sentence is not just an error, it is void. An attack on a sentence on the ground that it imposed a punishment that the law does not allow may be made at any time by means of a motion to vacate a void sentence. In 2000, appellant was sentenced as a recidivist to life without the possibility of parole under subsection (c) of O.C.G.A. § 17-10-7 for a murder that he committed in 1999. At both of those times, however, O.C.G.A. § 17-10-7(c) did not allow recidivist punishment for capital felonies, of which malice murder is one. Accordingly, appellant's sentence of life without the possibility of parole is void and the trial court erred in denying appellant's motion to vacate. The Court therefore remanded the case to the trial court to impose a lawful sentence.

Prior Inconsistent Statements; Rule 404(b)

Hood v. State, S16A0064 (5/23/16)

Appellant was convicted of felony murder and other crimes related to the stabbing of Coon. The facts, briefly stated, showed that Coon went to appellant's house to purchase prescription pain pills. When Coon disputed the price for the pills, an argument began. Coon refused to pay appellant, took the pills, and ran toward the front door. Appellant and his wife, Briana, outran Coon to the door, locked it, and began fighting with him. Both appellant and Briana had knives, while Coon was unarmed. After the fight, in which Coon was fatally stabbed, appellant planted brass knuckles near Coon's body and hid the bloodstained pills and Coon's cash upstairs before emergency personnel arrived.

The Court noted that appellant raised two evidentiary issues under the new Evidence Code that the Court had not previously addressed. In the first issue, appellant contended that the trial court erred by refusing to allow him to recall an investigator to testify about a prior inconsistent statement made by Erin Kaiser. Pretrial investigation by appellant's counsel showed that Kaiser, an acquaintance of Coon, had given a statement to an investigator about a prior incident when Coon stole pills from a different prescription pill dealer. At trial, Kaiser was called by appellant and testified that she drove Coon and another person who had money to a pill dealer's home. Coon and the other person then stole pills from the dealer and returned to her car. As they drove away, they were chased by the dealer. On redirect examination, appellant asked Kaiser if she remembered telling the investigator that Coon's accomplice came along to show the dealer that they had money to buy the pills and that once they showed the money, Coon stole the pills and ran out of the house. Kaiser said she did not remember saying that because she was under the influence of drugs when she gave the statement to the investigator. Appellant then asked to recall the investigator to testify to the content of Kaiser's statement. The trial court denied the request, ruling that Kaiser's statement was "collateral."

The Court stated that on the issue of admitting extrinsic evidence of a witness's prior inconsistent statement, O.C.G.A. § 24-6-613(b) substantially adopted the language

of Federal Rule of Evidence 613 (b) as it read in 2011. The failure of a witness to remember making a statement, like the witness's flat denial of the statement, may provide the foundation for calling another witness to prove that the statement was made. However, federal courts including the Eleventh Circuit have also held — as Georgia courts did under our old Evidence Code — that prior inconsistent statements cannot be introduced through extrinsic evidence if they are irrelevant or collateral to the subject matter of the case. Thus, although aspects of Georgia's Evidence Code dealing with prior inconsistent statements used to impeach have changed, the principle that such statements may not be introduced to impeach a witness on collateral matters remains intact.

Nevertheless, the Court noted, this case did not require it to precisely draw the line between collateral and material issues. Even assuming that Kaiser's statement to the investigator regarding exactly how the previous theft of pills transpired, including the detail that Coon and his accomplice showed money to the pill dealer before taking the pills and running away, was not collateral but instead was relevant to whether Coon was attempting to steal oxycodone pills from appellant before he was stabbed to death, the exclusion of that statement was harmless. The additional detail would have added very little to the testimony Kaiser had already given, which established that Coon had been involved in a similar pill theft a month before his encounter with appellant and Briana, and the other evidence of appellant's guilt was strong.

In the second evidentiary issue, appellant argued that the trial court erred when it allowed the State to introduce evidence of other acts by him under O.C.G.A. § 24-4-404(b), in the form of testimony by Werner and Campbell that they each purchased prescription pain pills from appellant on numerous occasions. The evidence was permitted to show the intent of appellant as it related to the possession of drugs with the intent to distribute.

The Court noted that Georgia courts evaluate the admissibility of Rule 404 (b) evidence using a three-part test that requires the party offering the evidence to show that (1) the evidence is relevant to an issue in the case other than the defendant's character, (2) the probative value is not substantially outweighed by undue prejudice, and (3)

there is sufficient proof for a jury to find by a preponderance of the evidence that the defendant committed the other act. Here, there is no dispute that the third part of this test was satisfied by Werner's and Campbell's uncontradicted testimony that appellant had sold each of them prescription pills. As for the first and second parts of the test, the Court stressed that it is important to distinguish between the *relevance* and the *probative* value of the other acts evidence in question; the first part of the test deals with relevance, while the second part deals with probative value.

Because the charged drug crime required the same intent as that involved in his uncharged sales of prescription pills to Werner and Campbell, their testimony about those sales was relevant. But, a defendant can sometimes remove intent as an issue. Here, appellant argued that he withdrew the element of intent because he offered to stipulate that he had committed the crime of possession of a controlled substance with intent to distribute. The State, however, rejected his offer to stipulate, which the State was entitled to do. The State retains broad control over how to present its case, so a defendant cannot always keep out damaging evidence simply by offering to stipulate to the element of a crime that such evidence would tend to prove. An unaccepted offer to stipulate does not eliminate the relevance of other acts evidence, because it does not lift the State's burden of proving every element of the crimes charged.

Nevertheless, the second part of the Rule 404 (b) test — the part that looks to the probative value of evidence determined to be relevant — requires analysis of the other acts evidence under O.C.G.A. § 24-4-403, which mirrors Federal Rule of Evidence 403 and is interpreted accordingly. Under Rule 403, relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence. Rule 403 is an extraordinary remedy which should be used only sparingly. The “major function” of Rule 403 is to exclude matter of scant or cumulative probative force, dragged in by the heels for the sake of its prejudicial effect.

And here, the Court found, the probative value of appellant's drug transactions with Werner and Campbell was extremely low. First,

appellant offered to stipulate *unconditionally* that he committed the entire charged crime of possessing oxycodone with intent to distribute. Second, defense counsel stated in his opening and closing statement that appellant was intending to sell prescription pills to Coon. Third, Werner's and Campbell's testimony filled no narrative holes. Werner and Campbell did not complete the picture of what happened on the night Coon died; their testimony expanded the picture to depict appellant as a frequent and degenerate drug dealer. Accordingly, the Court found, with regard to the two drug buyers' testimony, there was virtually nothing on the probative value side of the Rule 403 balance, and something not insubstantial on the prejudice side.

However, the Court further found that the error in allowing this evidence to be admitted was clearly harmless because the evidence that appellant committed the crimes for which he was convicted was strong, making it highly unlikely that the jury convicted him based on his other drug dealing activities.

Jury Instructions; Plain Error

Stanbury v. State, S16A0321 (5/23/16)

Appellant was convicted of murder and possession of a firearm during the commission of a felony. He contended that the trial court committed plain error by not providing a jury charge on the necessity of corroborating accomplice testimony. The record showed that appellant was indicted with McKenzie for the charged offenses and began the trial as co-defendants. However, during trial McKenzie accepted a plea offer from the State and testified against appellant.

The Court stated that a review of the jury instructions shows that the jury was told only that particular facts could be established based on the testimony of a single witness, which would necessarily include accomplice testimony. Therefore, in essence, the jury received an instruction that it could believe the facts as described by McKenzie without corroboration—in direct contradiction to former O.C.G.A. § 24-4-8. As McKenzie was the only witness to affirmatively establish appellant's participation in the commission of these crimes, under the specific facts of this case, the trial court committed plain error in omitting the accomplice corroboration charge. The Court therefore reversed his convictions.

Indictments; Sentencing

Hunt v. State, A15A2064 (3/29/16)

Appellant was convicted of 16 counts of criminal conduct relating to a long history of child molestation against one victim. The record showed that following the investigation, the State charged him with sixteen crimes, including two counts of rape, nine counts of child molestation, four counts of aggravated child molestation, and one count of cruelty to a child in the first degree. In six matching pairs of counts (Count 1 and 2, 3 and 4, 5 and 6, 7 and 8, 9 and 10, and 14 and 15), appellant was charged with committing identical crimes against the victim “on and between the 6th day of August, 2005, and the 1st day of March, 2007, the exact date being unknown to the Grand Jury,” with the only difference between the two counts in each pair being that the second count specified that the second occurrence of the same crime occurred on an “occasion different” or “on a different date” than the first occurrence. The jury returned a verdict against appellant on all 16 counts, and the trial court sentenced him on each count. The sentences on each count within each of the six pairs of matching crimes were to run concurrently with each other.

Appellant argued that he was improperly convicted on both counts in each of the six matching pairs of counts because the trial court was not authorized to sentence him on both of each matching counts. The Court agreed. Where two charges are indistinguishable because all of the averments, including date (which was not made an essential element), victim, and description of defendant's conduct constituting the offense were identical, only one sentence may be imposed. Here, the Court found, in each of the six matching pairs of counts, appellant was charged with committing one of these crimes against the victim within a certain range of dates, “the exact date being unknown to the Grand Jury,” with the only difference between the two counts in each pair being that the second count specified that the second occurrence of the same crime occurred on an “occasion different” or “on a different date” than the first occurrence. The State did not allege in these counts, nor could they, that the separate events within the same date range were somehow material averments of the complaint. Accordingly, appellant could be

sentenced on only one of the counts in each of the matching pairs of counts. Therefore, appellant's sentence was vacated and the case remanded for re-sentencing.