

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JULY 2, 2010

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## THIS WEEK:

- **Juvenile Court; Jurisdiction**
- **Challenge to Traverse Jury**
- **Sentencing; Jurisdiction**
- **Jury Instructions; "Immediate Presence"**
- **Confidential Informants; Bribery**
- **Sufficiency of Evidence; Ineffective Assistance of Counsel**
- **Severance; Evidence**
- **Fatal Variance; Misnomer**
- **Newly Discovered Evidence**

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### *Juvenile Court; Jurisdiction*

*In the Interest of A. P. S., A10A0069*

Appellant was arrested for possession of less than an ounce of marijuana on the day before his 17<sup>th</sup> birthday. He appealed from the order of the juvenile court transferring his case to state court. The Court noted that with certain exceptions not applicable here, the juvenile court has exclusive jurisdiction over delinquency actions concerning "any child"; and a child is defined as any individual who is "[u]nder the age of 17 years." OCGA § 15-11-28 (a) (1) (A); 15-11-2 (2) (A). The issue presented was exactly when does a person attain the age of 17 years for the purposes of this definition. The Juvenile Code provides no guidance on calculating an individual's age, and it does not specify when an individual actually turns seventeen. Citing *Edmonds v. State*, 154 Ga. App. 650 (1980), the Court held that this State follows the common law rule that a person is deemed to have been born on the first

minute of the day of his birth. In accordance with this principle, the common law rule for determining a person's age is that a person reaches a given age at the earliest moment of *the day before* the anniversary of his birth. Thus, the juvenile court did not err in transferring the case for lack of jurisdiction.

In so holding, the Court stated, "We agree that the common law rule is archaic. Since at least as early as 1896, the common law rule has come under strong criticism. ... Nevertheless, we are convinced that the legislature is the proper body for considering these issues. The application of the common law rule in this State occurred at least as early as 1930, it was applied to juvenile court jurisdiction in 1980, and it has remained unchanged by the legislature. The rule is not ambiguous, just archaic."

### *Challenge to Traverse Jury*

*MacBeth v. State, A10A1173*

Appellant was charged with DUI. He filed a motion challenging the traverse jury list on constitutional grounds, arguing that African-Americans were under-represented in the county jury list, and therefore, the list did not represent a fair cross-section of the community. He further requested that the court order the county jury commission to reconstitute the jury list so that it would represent a fair cross-section of the community. The trial court deemed the motion to seek equitable relief in the form of a writ of mandamus and denied it because it lacked jurisdiction to provide equitable relief. On appeal to the Court of Appeals, that Court then transferred it to the Supreme Court. The Supreme Court held that because "the ... case does not involve a mandamus action brought against a public

officer, and instead involves only the denial of a motion in a criminal case, this Court's mandamus jurisdiction is not invoked, and the case therefore must be, and hereby is, returned to the Court of Appeals."

On return the Court of Appeals, the Court held that the Supreme Court's transfer order established the rule of the case, and thus the trial court erred in finding that appellant's challenge to the traverse jury list constituted a petition for a writ of mandamus. The case was therefore remanded to the trial court for a hearing on appellant's motion.

## **Sentencing; Jurisdiction**

*State v. Blue, A10A0082*

In April, 2003, Blue was found guilty of trafficking in cocaine, OCGA § 16-13-31 (a), and the State filed notice of its intent to seek recidivist punishment under OCGA § 17-10-7 (a), (c) and OCGA § 16-13-30 (d), based on six prior convictions including one for selling cocaine. Blue was thereafter sentenced to 30 years to serve without the possibility of parole. While the trial court indicated at the sentencing hearing that it was proceeding under OCGA § 16-13-30 (d), the written sentence reflected that the sentence was "pursuant to OCGA § 17-10-7 (a) and (c)." In 2009, the trial court granted Blue's motion to vacate sentence, finding that it was unclear from the record whether OCGA § 17-10-7 (a) had been improperly applied during sentencing and sentenced him to 30 years under OCGA § 16-13-30 (d) only.

The State appealed, contending that the 2003 sentence was valid under OCGA § 16-13-30 (d), and thus, the trial court did not have jurisdiction to modify the sentence beyond the statutory period provided for in OCGA § 17-10-1 (f). The Court agreed and reversed. Once the statutory period provided for in OCGA § 17-10-1(f) expires, a trial court may only modify a void sentence. A sentence is void if the court imposes a punishment that the law does not allow. To support a motion for sentence modification filed outside the statutory time period, therefore, a defendant must demonstrate that the sentence imposes a punishment not allowed by law. The Court held that regardless of what the trial court noted in the written sentence, Blue was not sentenced under OCGA § 17-10-7 (a) because if he had been, a sentence of 40 years was

required since that was the longest period of time prescribed for a second or subsequent offense. Therefore, Blue's sentence of 30 years without parole was a sentence the law allows, and hence, not illegal or void. In so holding, the Court also found that Blue's reliance upon *Papadoupalos v. State*, 249 Ga. App. 300, 301 (1) (2001) is misplaced because it was decided in 2001 before the Supreme Court clarified the law regarding void sentences in *Jones v. State*, 278 Ga. 669 (2004).

## **Jury Instructions; "Immediate Presence"**

*Sweet v. State, A10A0376*

Appellant was convicted of robbery by sudden snatching. He contended that the trial court erred in its definition of "immediate presence" because it omitted the element of the victim's distance. The record showed that the trial court gave the following charge on immediate presence: "Immediate presence stretches very far. It is not that the taking must necessarily be from the contact of the body, but if it is from under the personal protection of a person. A person may be deemed to protect all things belonging to the individual, within a distance, over which the influence of the personal presence extends. Immediate presence includes a taking, even out of the physical presence of a victim, if what was taken was under his or her control or responsibility."

The Court held that in Georgia, jury instructions must be read and considered as a whole in determining whether the charge contained error. Here, in addition to the quoted charge on "immediate presence," the trial court instructed the jury that if the victim "becomes conscious, even in the taking, that her property is being taken away from her and this knowledge is obtained before the taking is complete, the offense of robbery is committed." Thus, "[t]he State must prove that the person was conscious of something being taken from her." The trial judge further charged the jury on the lesser included offense of theft by taking, noting the difference between the two charges. Therefore, the charge, when considered as a whole, correctly instructed the jury on the essential elements of robbery by snatching as opposed to theft by taking, and the jury was not likely to be misled under the circumstances of this case.

## **Confidential Informants; Bribery**

*Moreland v. State, A10A0047*

Appellant was convicted of four counts of selling cocaine. He argued that his conviction was illegal because the State violated Georgia's bribery statute, OCGA § 16-10-2 (a) (1), when it promised two informants that they would not be prosecuted on unrelated charges in exchange for their participation in controlled buys of cocaine from him and compensated one of those informants for his participation in the buys. OCGA § 16-10-2 (a) (1) provides that "[a] person commits the offense of bribery when . . . he or she gives or offers to give to any person acting for or on behalf of the state or any political subdivision thereof, or of any agency of either, any benefit, reward, or consideration to which he or she is not entitled with the purpose of influencing him or her in the performance of any act related to the functions of his or her office or employment." The Court held that even assuming, without deciding, that the legislature intended OCGA § 16-10-2 (a) (1) to apply to police officers and prosecutors, paying confidential informants is a long-established practice and cannot constitute a violation of the bribery statute even if the parties contemplated testimony by the paid informant. Here, the evidence established that the two informants were offered leniency, and one was paid cash, in exchange for their assistance in drug investigations by the police, only a portion of which involved the controlled buys with appellant. Although the parties may have contemplated the two informants would testify upon the completion of the investigation, there was no evidence that they were paid in exchange for their testimony. Moreover, the record contained no evidence that the State made payments or promised benefits in exchange for testimony with the purpose of influencing either informant in the performance of such testimony as required under the bribery statute. Thus, the Court held, no violation of the statute occurred.

## **Sufficiency of Evidence; Ineffective Assistance of Counsel**

*Ward v. State, A10A0184*

Appellant was convicted of multiple counts of armed robbery, aggravated assault,

false imprisonment, possession of a firearm during the commission of a felony, and burglary. He contended that the evidence was insufficient and that he received ineffective assistance of counsel. The evidence showed that he and his girlfriend, Neighbors, entered a home and robbed the people there at gunpoint. Neighbors testified but none of the victims testified, although they were specifically identified by name in the indictment.

Appellant first argued that the armed robbery counts must be reversed because the State did not present any evidence to show what had been taken from whom and none of the victims testified. The Court held that the identity of the person alleged to have been robbed is not an essential element of the crime and need not be proved by direct evidence because robbery is a crime against possession, and is not affected by concepts of ownership. Thus, it does not matter exactly whose property was taken so long as it was taken from a person or the immediate presence of another. The general rule that allegations and proof must correspond is based upon the requirements (1) that the accused is definitely informed of the charges against him so he can present his defense and not be surprised by the evidence at trial, and (2) that he is protected against another prosecution for the same offense. The Court held that this rule was not violated here because there was evidence that items were taken from at least three men by use of a gun. “[I]f property is taken from the immediate presence or the actual or constructive possession of more than one victim, the defendant may be charged with the robbery of each victim.”

Appellant contended that the evidence of the aggravated assaults was insufficient because there was no evidence that a gun was specifically pointed at any of them and because the victim that was stabbed and shot at was not identified in the evidence. The Court disagreed. Although the person stabbed and shot at was not identified in the evidence, there was evidence that appellant stabbed and shot at the same person and that Raul Cuevas was the “main victim.” Raul Cuevas was the only person listed as a victim of these crimes in the indictment. There was evidence that appellant and Neighbors pointed a gun at the men in the house, and an officer testified to their names.

Similarly, the Court also rejected appellant’s contention that his convictions

for false imprisonment must be reversed for the same reason—that there was no evidence identifying who he falsely imprisoned. Neighbors’ testimony showed that she kept all the men at gunpoint while appellant searched the house. The evidence showed that there were four men in the house and an officer testified as to their names.

Finally, appellant contended that his trial counsel was ineffective for failing to object to damaging evidence. The Court agreed and reversed. Although the Court went into detail about the damaging evidence, the Court also stated as follows: “In summary, trial counsel was ineffective by not properly objecting to evidence that Ward was a drug trafficker who always carried a gun, that he was a dangerous man, that he was the shooter in the similar transaction, and that his other girlfriend, Ammons, knew where the gun was located after the second crime. Trial counsel was also ineffective in allowing testimony by a detective bolstering Neighbors’s honesty regarding implicating Ward in the crime at issue. In this case, there is not overwhelming evidence of Ward’s participation in the crime. And given the serious nature of the information improperly allowed to go to the jury, we conclude that Ward has met his burden of showing a reasonable probability that the result of his trial would have been different if the harmful information had not been allowed.”

### **Severance; Evidence**

*Bryant v. State, A10A0970*

Appellant was convicted of one count of rape, one count of false imprisonment, three counts of aggravated assault, and nine counts of burglary. The evidence showed that in one of the burglaries, appellant was surprised by a teenaged girl who came home unexpectedly. The charges of rape, false imprisonment and aggravated assault were related to her. Appellant contended that the trial court erred in denying his motion to sever the charges of rape, false imprisonment, aggravated assault, and the burglary charge related thereto from his trial on the remaining burglary charges. The Court held that generally, if the evidence of one crime would be admissible as a similar transaction in the trial of the other crime, or where the similarity of the offenses manifests a pattern, the trial court does not abuse its discretion in denying the motion for sever-

ance. Additionally, if the modus operandi of the perpetrator is so strikingly alike, that the totality of the facts unerringly demonstrate and designate the defendant as the common perpetrator, the offenses may be joined subject to the right of the defendant to severance in the interests of justice. Under such circumstances, a defendant is entitled to severance only if, in view of the number of offenses charged and the complexity of the evidence to be offered, the jury would be unable to distinguish the evidence and apply the law intelligently as to each offense. Here, the Court found, the charges showed a recurring pattern of conduct suggesting a common scheme or modus operandi: Each incident involved a daytime break-in to a residence in or next to a particular subdivision; in each case the perpetrator accessed the home through a back window; the perpetrator always took the same kinds of items; all of the burglaries occurred within an eight-month period, and seven of the nine occurred within a single, four-month period; and the aggravated assault, false imprisonment, and rape occurred during one of these burglaries, when the homeowner’s daughter interrupted the burglary. Thus, the Court determined, because the burglaries were so similar as to evidence a common plan or scheme and revealed an identical modus operandi, evidence of the other burglaries would have been admissible at the trial on the charges of rape, false imprisonment, aggravated assault, and the burglary charge related thereto. Accordingly, the trial court did not abuse its discretion in denying the motion for severance.

Appellant contended that the trial court erred in admitting a nurse’s testimony at trial. The indictment alleged that appellant committed aggravated assault against the rape victim by forcing her into unknown objects of furniture. At trial, however, the victim testified that while she remembered coming into contact with something after being pushed back down a flight of stairs, she could not specifically recall if she came into contact with furniture. The trial court thereafter allowed the emergency room nurse who performed the rape exam of the victim to testify, over defense counsel’s objections, that her notes showed that the “perpetrator pulled her through the house and pushed her into the furniture.” The nurse further testified that the victim’s injuries were consistent with having been pushed into furniture. The Court held that the testimony

was properly admitted under OCGA § 24-3-4, which provides that “[s]tatements made for purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment shall be admissible in evidence.” Because the victim’s statement to the nurse was given to explain both the nature and origin of some of her injuries, the statement was pertinent to the diagnosis and treatment of the victim, and, therefore, was admissible.

### **Fatal Variance; Misnomer**

*Hester v. State, A10A1220*

Appellant was convicted of aggravated assault, carrying a concealed weapon, and four counts of armed robbery. She contended that the evidence did not support her conviction on the armed robbery of the victim identified as “Joseph Robert Coon.” The indictment alleged the victim as “Joseph Robert Coon” but at trial, the victim identified himself as “Joseph Kuhn.” The Court held that while the record did not conclusively establish whether Coon or Kuhn is the correct spelling of the armed robbery victim’s last name, it was patently obvious from the testimony that the two were the same person. Moreover, defense counsel’s cross-examination of the victim revealed that she was aware of this person’s identity as one of the robbery victims and that she was prepared to cross-examine him on his prior statements. Appellant also filed no demurrer or motion in arrest of judgment contending that the indictment was void, nor did she interpose any objection to the victim testifying. Thus, the Court held, whether the misnomer constituted a defect in the indictment was not preserved for appellate review. Furthermore, even if the alleged error had been preserved, the misnomer of the victim in the indictment is not a fatal error. “A variance between the victim’s name as alleged in the indictment and as proven at trial is not fatal if the two names in fact refer to the same individual, such as where a mere misnomer is involved.” Thus, because there is no basis for contending that “Joseph Kuhn’s” testimony could not be considered as evidence in support of the armed robbery of “Joseph Coon,” this argument was without merit.

### **Newly Discovered Evidence**

*Callaway v. State, A10A1327*

Appellant was convicted of possession of methamphetamine with intent to distribute. The evidence showed that officers stopped his vehicle for a traffic violation. Whitehead was his passenger. During the course of the stop, methamphetamine was discovered and a subsequent search revealed a bag that contained methamphetamine that one officer, who originally saw it in the vehicle by Whitehead’s feet, later found under the vehicle. Whitehead testified at trial against appellant. She stated that she did not have a deal with the State. She also testified that appellant would bring her money while she was incarcerated and put it into her inmate account.

Appellant filed an extraordinary motion for new trial claiming that Whitehead’s former boyfriend would testify that 1) Whitehead told him she did have a deal with the State; 2) Whitehead knew that he (the boyfriend) was the source of the money that appellant brought to her; and 3) he was with Whitehead when she was arrested on drug charges in another county and that in that case she had attempted to hide the drugs by kicking the bag that contained them underneath her vehicle.

The Court held that the following factors must each be proved by appellant to succeed on a motion for new trial alleging newly discovered evidence: (1) the evidence has come to his knowledge since the trial; (2) it was not owing to the want of due diligence that he did not acquire it sooner; (3) it is so material that it would probably produce a different verdict; (4) it is not cumulative only; (5) the affidavit of the witness himself should be procured or its absence accounted for; and (6) a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness. The Court held that even if it were to consider everything the boyfriend would testify to as true, appellant’s contention lacked merit because the “newly discovered evidence” did nothing more than to impeach the credibility of Whitehead. A new trial is not authorized where the only effect of the alleged newly discovered evidence would be to impeach the credibility of a witness. This is true even though the witness whose credibility would be impeached gave the only testimony on some vital point in the case. Moreover, as to the testimony concerning the money, ap-

pellant must also have known of the source of the money. Thus, such testimony was “merely newly available, rather than newly discovered, evidence.” Accordingly, the trial court did not abuse its discretion in denying appellant’s extraordinary motion for new trial.