

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JULY 7, 2017

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## THIS WEEK:

- **Plea Negotiations; Judicial Intervention**
- **Sentencing; Life with Parole**
- **Procedural Double Jeopardy**
- **Juveniles; Modification of Dispositions**
- **Juveniles; Criminal Street Gang Activity**

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### ***Plea Negotiations; Judicial Intervention***

*State v. Hayes, S16G1723 (6/5/17)*

The Supreme Court granted the State's petition for writ of certiorari in *Hayes v. State*, 337 Ga. App. 280 (2016) after the Court of Appeals reversed Hayes' convictions and sentences on his *Alford* plea to burglary and other offenses, holding that the trial court impermissibly participated in plea discussions in violation of Uniform Superior Court Rule 33.5 (A). The Court of Appeals found that the trial court, by telling Hayes, "if you were sentenced to 20 years you will serve every day of that in prison," and "you are facing 20 years and you would serve every day of it if you are found guilty. And that was the sentence imposed by the court," failed to inform Hayes that part of his sentence could be probated or suspended. It thus concluded that the trial court effectively advised Hayes that it had no intention of probating or suspending any portion of his sentence if he proceeded to trial, stating that he would spend "every day of [the 20-year sentence] in prison," which was an impermissible participation by the trial court in the plea-negotiation process rendering the resulting guilty plea involuntary.

The Court reversed. First, the Court

found, the trial court informed Hayes that *if* he were found guilty and sentenced, he *could be facing up to* 20 years, and, because of his recidivist status, *if* he were sentenced to 20 years he would serve every day. Telling a defendant that he could be sentenced to *up to* 20 years is not the same as telling a defendant that he *would be* sentenced to 20 years. Second, the trial court informed Hayes that *if* he went to trial he would be facing 20 years and would serve every day of it *if* he were found guilty and sentenced to 20 years. The Court found both statements were clearly conditional, and explained the maximum sentence that Hayes could face upon conviction.

Furthermore, the Court found, the disclosure of the possibility of probation or suspension was not required in order to avoid impermissibly indicating an intention to impose a particular sentence. The trial court could permissibly inform Hayes of the maximum sentence he could face. And that distinction is not "hair splitting" as Hayes contended, but an accurate description of the information that the trial court conveyed to Hayes. Uniform Superior Court Rule 33.8 lists in detail the matters as to which a defendant must be informed before the trial court accepts a plea of guilty, and that the trial court must inform a defendant on the record "of the maximum possible sentence on the charge, including that possible from consecutive sentences and enhanced sentences where provided by law." USCR 33.8 (D) (3). However, there is no requirement in recidivist cases sentenced under former OCGA §17-10-7 that the court inform the defendant that the custodial portion of any sentence is non-parolable but that the trial court need not impose the maximum custodial sentence.

Thus, the Court concluded, the record did not show that Hayes was coerced into making a decision or that his plea was involuntary. Rather, he appeared for a calendar call and made unusual assertions and demands, with no basis in law, to the trial court. The trial court responded appropriately and informed Hayes that his trial was imminent, and that it was necessary for him to make a decision whether to go to trial or to enter a plea. Its explanation of the potential maximum sentence was carefully expressed in conditional language, avoiding any positive statement of what sentence might be imposed after a trial or plea. And in informing Hayes of the potential maximum sentence, the trial court was attempting to communicate to Hayes the gravity of the decision he faced as well as the potential consequences of that decision.

## **Sentencing; Life with Parole**

*Walker v. State, A17A0166 (6/11/17)*

In June of 1991, appellant was sentenced to life with parole following his armed robbery conviction. He appealed after the trial court denied his motion to vacate void sentence.

Appellant contended that under OCGA § 17-10-1, his sentence of life with parole is void because it is an indeterminate punishment. Under Georgia law, a sentence is void if the court imposes punishment that the law does not allow. Appellant argued that the trial court erred because it was required to prescribe with specificity the maximum time he was to serve and failed to do so. The Court disagreed.

In support of his argument, appellant focused on the language of OCGA § 17-10-1(a) (1) as it existed on March 6, 1991, which provided in part that “[e]xcept in cases in which life imprisonment or the death penalty must be imposed . . . the judge fixing the sentence shall prescribe a *determinate sentence for a specific number of months or years*. . . .” (emphasis supplied). However, the Court stated, appellant failed to recognize that OCGA § 16-8-41 (b) was also in effect and applicable at the same time and allowed for a sentence of life imprisonment, or a sentence from five to twenty years for armed robbery. Even if the Court were to concede that reading OCGA § 16-8-41 (b) and OCGA § 17-10-1 (a) (1) together, as they existed at the time, created an ambiguity, in resolving any ambiguity the Court must look

to the more specific code section. In addressing the scope of their applicability, OCGA § 17-10-1 (a) (1) is a general sentencing statute while OCGA § 16-8-41 (b) establishes the range of sentences authorized specifically for the crime of armed robbery. Because the specific statute prevails over the general statute, absent any indication of a contrary legislative intent, a sentence of life with parole is a lawful sentence. Accordingly, appellant’s sentence for armed robbery is not void as a matter of law.

## **Procedural Double Jeopardy**

*Goodwin v. State, A17A0066 (6/5/17)*

Appellant was charged by accusation in the superior court with obtaining a controlled substance by theft (hydrocodone) (Count 1) and misdemeanor theft by taking of tramadol (Count 2). Following a bench trial, she was found guilty of both offenses, and she appealed the judgment of conviction and sentence entered on those verdicts. The Court of Appeals reversed appellant’s conviction on Count 1, because appellant had not waived formal indictment of that offense, a felony, and indictment was required pursuant to OCGA § 17-7-70 (a). Thus, the Court noted, it found that the superior court did not have jurisdiction over that offense. However, the Court affirmed appellant’s conviction on Count 2.

The State subsequently indicted appellant for obtaining a controlled substance by theft (hydrocodone), with the charging language in the indictment being identical to that in Count 1 in the former accusation. Appellant filed a Plea in Bar and Motion to Dismiss the Indictment, which the trial court denied.

The Court found that it was indisputable that the two offenses (the misdemeanor charge of which appellant was convicted, and the felony charge that was improperly accused in her first trial and for which the State subsequently indicted her) arose from the same conduct and were known to the prosecuting officer at the time the previous prosecution was commenced. The offenses were within the jurisdiction of a single court, in that they could both be tried in the superior court of same county. Appellant was placed in jeopardy as to Count 2 (theft by taking of tramadol, a misdemeanor), and her trial resulted in a conviction on that count. Although constitutional jeopardy did not attach to Count 1 (obtaining

a controlled substance by theft (hydrocodone)) in the former prosecution because that offense was not within the jurisdiction of the trial court as a result of the State’s failure to indict it, constitutional jeopardy did attach to the misdemeanor in Count 2, and thus *procedural* double jeopardy prevents a subsequent prosecution of offenses arising from the same transaction. The burden was on the State to properly indict the offense of obtaining a controlled substance by theft (hydrocodone), and to prosecute that charge simultaneously with the offense of theft by taking of tramadol.

The State contended that it did charge appellant with obtaining a controlled substance by theft in the former prosecution and “attempt[ed] to prosecute both offenses in one prosecution.” However, the Court stated, appellant was not properly charged in the superior court. It is not sufficient that appellant was “on notice” of the felony offense, as the State argued. Further, although the State correctly argued that appellant’s conviction on the count in question was not overturned on the basis of insufficient evidence, and thus OCGA § 16-1-8 (d) provides that “a prosecution is not barred within the meaning of” OCGA § 16-1-8, OCGA § 16-1-7 (b) still applies. Accordingly, the Court held, the trial court erred in denying appellant’s plea in bar.

## **Juveniles; Modification of Dispositions**

*In re. D. B., A17A0587 (6/5/17)*

Following a hearing and the entry of an admission with a negotiated disposition, a juvenile court adjudicated D. B. delinquent for carrying a weapon within a designated school safety zone, possessing a handgun as a person under the age of 18 years, and committing criminal trespass. The juvenile court determined that D. B. should be designated as a Class-B felon under OCGA § 15-11-602 for carrying a weapon in a school safety zone and, accordingly, ordered him to serve six months in a youth development campus, committing him to the Department of Juvenile Justice (DJJ) for a total of eighteen months. D. B. filed a motion to vacate what he argued was a void disposition, contending that he did not qualify as a Class-B designated felon. The juvenile court agreed and amended the disposition. The State appealed.

First, the State contended, the court lacked jurisdiction to modify D. B.’s disposi-

tion after he was committed to the custody of the DJJ. The Court noted that under our new Juvenile Code, notwithstanding the fact that a child has been committed to the DJJ's custody, under OCGA § 15-11-602, the juvenile court retains jurisdiction to consider a motion to modify its order when such a motion is filed by either the DJJ or *any party* under OCGA § 15-11-602. That said, OCGA § 15-11-602 (f) further provides that “[a]ll motions filed under this paragraph shall be accompanied by a written recommendation for release, modification, or termination from a child's DJJ counselor or placement supervisor, filed in the court that committed such child to DJJ, and served on the prosecuting attorney for such jurisdiction.” And here, D. B.'s motion was not accompanied by such a recommendation, as required by OCGA § 15-11-602 (f) (2) (B). Moreover, D. B.'s motion also was not based on an allegation of changed circumstances. Instead, D. B.'s motion was made on the assertion that his disposition and resulting commitment to restrictive custody were void.

The Court noted that in the context of juvenile-court proceedings, it is true that an adjudication of delinquency is not a conviction of a crime, that the juvenile court cannot find anyone guilty of a crime, and that the commitment of a juvenile to any authorized facility is not commitment for conviction of a crime, but is instead only for rehabilitation or treatment. But, when a juvenile makes a cognizable claim that his or her disposition was void, in order to comport with fundamental fairness and due process of law, the juvenile court retains jurisdiction to consider and correct same. Thus, the Court found, while the juvenile court may have improperly modified the disposition, the Court rejected the State's argument that a juvenile court *never* has jurisdiction to modify a disposition on motion of a party after a juvenile has been committed to the Department's custody.

Second, the State argued that the juvenile court erred by determining that it should modify D. B.'s disposition when, contrary to the juvenile court's conclusion after considering D. B.'s motion, carrying a weapon in a school zone qualifies as a Class-B designated felony. The Court agreed.

The Court noted that the juvenile court accepted D. B.'s argument that his disposition for a Class-B designated felony was void because OCGA § 16-11-131, in addition to de-

fining “firearm” as including “any handgun,” serves to criminalize the possession of firearms by convicted felons. And because D. B. “had no adjudications, ... was not [on] probation, ... was not under an informal adjustment, and ... was not under an abeyance,” he argued that the definition of “firearm” in OCGA § 16-11-131 does not apply to the facts of his case and, therefore, his act of possessing a handgun in a school safety zone did not qualify as a Class-B designated felony.

But, the Court found, it was clear from the plain language of the relevant statutes that, for purposes of the Juvenile Code, the General Assembly has included within the category of Class-B designated felonies the act of carrying or possessing a firearm in a school safety zone and has further directed that “firearm” includes “handguns” by making specific reference to the definition of “firearm” in OCGA § 16-11-131. That this Section of the Criminal Code goes on to criminalize specific conduct related to its separate definition of “firearm” is of no consequence given the plain language employed by the General Assembly in OCGA § 15-11-2 (13) (N) (i) (I). Accordingly, the Court held, the juvenile court erred by modifying D. B.'s disposition after determining that it was void because his conduct did not qualify as a Class-B designated felony.

## **Juveniles; Criminal Street Gang Activity**

*In re W. B., A17A0441 (6/5/17)*

In February 2016, the State filed a delinquency petition alleging that appellant had committed burglary in the first degree, and it subsequently amended that petition to allege that appellant had engaged both in the burglary and in criminal gang activity on January 19. Appellant's case was heard together with the delinquency cases of his two juvenile co-defendants, J. W. and M. J. At the outset of the hearing, counsel for each of the three defendants announced that his or her client was admitting to the burglary charge but was contesting the charge of criminal gang activity. The State thereafter declined to present any evidence regarding the burglary or the police investigation of that crime and presented the testimony of three witnesses regarding appellant's participation of criminal street gang activity. Specifically, the witnesses showed that appellant was a member of a street gang called

the Winston Road Squad. The trial court found appellant delinquent.

Appellant contended that the evidence was insufficient to show that he participated in criminal street gang activity. The Court agreed. To sustain appellant's conviction under OCGA § 16-15-4 (a), the State was required to prove something more than the mere commission of a crime by gang members. Instead, the State had to prove the existence of a nexus between the burglary and an intent to further street gang activity. This requirement is satisfied by evidence that the gang received the proceeds from or otherwise benefited from the commission of a particular crime. Evidence showing that a crime was done in retaliation for some act or insult committed against the gang or its members will also serve to show that the crime furthered the gang's interests. Additionally, Georgia courts have previously held that evidence showing that the crime was committed in a highly visible manner so as to allow witnesses and victims to discover that a particular gang committed the crime, or evidence that the purpose of the crime was to establish, reinforce, or enhance the gang's reputation satisfies the nexus requirement. This requirement is also satisfied where the State shows that gang members referenced a particular incident on social media so as to establish that the gang was responsible for a specific crime, either for the purpose of enhancing the gang's reputation or intimidating others. And evidence, including social media posts, that a specific gang member perpetrated the crimes so as to promote himself within the gang hierarchy would also suffice to prove the required nexus.

Here, however, the Court found that the State presented no evidence from which the juvenile court could conclude that appellant committed the burglary to further the interests of the Winston Road Squad. Although the State presented evidence showing that appellant and his co-defendants had posted pictures and other items on Facebook which indicated they held membership in a gang, there was no evidence showing that either appellant, his codefendants, or other members of the Winston Road Squad had posted anything about the burglary on Facebook. Thus, the social media evidence gave no indication that appellant or his co-defendants had committed the burglary in an effort to promote themselves within the gang or to otherwise enhance the

gang's reputation. Nor did the State present any evidence showing that the victims of the burglary or any witnesses were aware that the crime was committed by members of the Winston Road Squad. Additionally, there was no evidence that the items stolen by the juveniles during the burglary were for anything other than their personal use. Accordingly, there was no evidence that the Winston Road Squad had benefitted from the burglary, either financially or otherwise. Accordingly, given that the State failed to prove that appellant committed the burglary to further the interests of the gang known as the Winston Road Squad, the Court reversed the juvenile court's finding that appellant engaged in criminal street gang activity.