

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 27, 2013

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THIS WEEK:

- **Sufficiency of Evidence; Motion For New Trial**
- **Re-Sentencing; Presumption of Vindictiveness**
- **Show-ups; In-Court Identification**
- **Challenges to the Array; State's Right of Cross-Examination**
- **Venue; Dead Bodies**
- **Motions for Mistrial**

Sufficiency of Evidence; Motion For New Trial

State v. Jackson, S13A1213 (9/23/13)

Jackson was convicted of murder and related offenses. The trial court granted his motion for new trial, finding under *Jackson v. Virginia*, 443 U.S. 307 (1979) that the evidence was insufficient to support the verdict. Specifically, the trial court found that “. . .there was no evidence that Jackson directly committed or intentionally helped in the commission of the crimes charged.” The State appealed pursuant to O.C.G.A. § 5-7-1(a)(8) and the Court reversed.

The test for evaluating the sufficiency of the evidence under *Jackson* is whether a rational trier of fact could have found the defendant guilty beyond a reasonable doubt. The evidence is reviewed in the light most favorable to the verdict, giving deference to the jury's determination on the proper weight and credibility to be given the evidence. Here, the Court found, the evidence was sufficient because a rational trier of fact could have found beyond a reasonable doubt that Jackson was a

party to the crimes for which he was charged: Jackson had a dispute with the victim; Jackson had Christmas drive him to where the victim was located with the intent to confront the victim; Jackson brought the gun used to kill the victim and cocked the gun while in the vehicle driven by Christmas; Jackson pistol-whipped the victim; Jackson stood over the victim after Christmas shot him at close range and made a statement indicating his approval of the shooting; and Jackson fled from the scene with Christmas, leaving the victim for dead. A person who does not directly commit a crime may be convicted upon proof that the crime was committed and that person was a party to it. Accordingly, the trial court erred when it determined there was no evidence Jackson “intentionally helped in the commission of the crimes charged” and the grant of the motion for new trial was reversed.

Re-Sentencing; Presumption of Vindictiveness

State v. Hudson, S13G0311 (9/23/13)

The Court granted certiorari in this criminal case to decide on the correct approach for determining whether a new sentence, imposed after the defendant's initial sentence has been vacated, constitutes a harsher sentence and thereby triggers a presumption of vindictiveness under *North Carolina v. Pearce*, 395 U.S. 711 (1969). The record showed that Hudson was convicted on one count of aggravated sexual battery and one count of child molestation. On the aggravated sexual battery count, Hudson was sentenced to life in prison, with 25 years in confinement and the remainder served on probation. On the child molestation count, Hudson was sentenced to 30 years in prison, with 10 years

in confinement and the remainder probated. The sentences were to run concurrently. On appeal, the Court of Appeals, holding that the two convictions should have merged, vacated Hudson's sentences and remanded to the trial court for resentencing. *Hudson v. State*, 309 Ga.App. 580(2) (2011). On remand, the trial court resentenced Hudson on the child molestation count to a term of 30 years, with 25 years to be served in confinement and the remainder probated. Hudson appealed again, contending this sentence was more severe than his initial sentence and was thus presumed to have been motivated by trial court vindictiveness under *Pearce*.

In *Pearce*, the United States Supreme Court held that due process prohibits trial courts from penalizing criminal defendants for undertaking successful post-trial challenges to their convictions or sentences. Specifically, the Court held that vindictiveness against a defendant for having successfully attacked his first conviction must play no part in the sentence he receives after a new trial. Furthermore, due process also requires that a defendant be freed of apprehension of such a retaliatory motivation on the part of the sentencing judge. To prevent such fear of retaliation from deterring defendants in the exercise of their appeal rights, the Supreme Court held that vindictiveness will be presumed whenever a more severe sentence is imposed after a retrial or remand, and that to overcome this presumption, the reasons justifying the increased sentence must "affirmatively appear" and be based on "objective information" in the record regarding "identifiable conduct on the part of the defendant." But, the U. S. Supreme Court has not prescribed a particular method for determining whether a subsequent sentence is in fact more severe than the first. This case presented our Supreme Court with the opportunity to reassess its approach to this issue.

The Court of Appeals held that under *Anthony v. Hopper*, 235 Ga. 336 (1975), it was required to use the "count by count" approach for determining vindictiveness. This approach requires a court to consider each count individually, comparing the initial sentence for each count with the subsequent sentence for that count. If the sentence for any one count increases, the subsequent sentence is deemed more severe and triggers the *Pearce* presumption. It therefore held that the

sentence Hudson received was presumptively prejudicial. Hudson's initial sentence on the child molestation count would have resulted in ten years in prison and twenty years on probation. Hudson was resentenced on the same count for a total of twenty-five years in prison and five years on probation. Accordingly, although the probationary period of Hudson's sentence was less, his prison sentence was increased by 15 years. Thus, the Court of Appeals reversed Hudson's sentence and remanded for resentencing.

Our Supreme Court noted that a majority of other state courts and the federal courts use an alternative "aggregate" approach. Under this aggregate approach, a court must compare the total original sentence to the total sentence after resentencing. If the new sentence is greater than the original sentence, the new sentence is considered more severe. Under the aggregate approach, Hudson's new sentence was not more severe. Hudson's initial sentence on both counts would have resulted in a total of 25 years in prison and probation for the remainder of his life. After the conviction for aggravated sexual battery was merged into the conviction for child molestation, he was resentenced to a total of twenty-five years in prison and five years on probation.

Having considered which of the two approaches to use, the Supreme Court adopted the aggregate approach and overruled *Anthony v. Hopper* to the extent it adopted the count-by-count approach to analyzing a subsequent sentence under *Pearce*. In so holding, the Court found that the evil *Pearce* sought to prevent was sentencing judge vindictiveness, not the mere imposition of an enhanced sentence on retrial or remand and that the aggregate approach is more adept at accommodating the discretion trial courts need in fashioning just and proper sentences.

Show-ups; In-Court Identification

Scandrett v. State, S13A0757 (9/23/13)

Appellant was convicted of malice murder and related offenses. The evidence showed that appellant and another man approached the victim and Reese, looking to buy cocaine. The victim told them they could find some across the street. Appellant's companion went across the street to look for drugs while appellant

stayed put. After about 10 minutes, appellant pulled out a gun and started firing. The victim was killed, but Reese was unharmed.

Appellant argued that the trial court erred by failing to suppress Reese's identification of him during trial, contending that the in-court identification had been tainted by an improperly suggestive pre-trial identification that already had been suppressed. The record showed that, approximately six years after the shooting, Reese was shown a photograph of appellant for an out-of-court identification. The following day Reese was present for appellant's bond hearing and saw him shackled and in jail clothes. At an initial trial, which ended in a mistrial, the improper procedure regarding the out-of-court identification came to light for the first time. Prior to appellant's subsequent trial, Reese's out-of-court identification was suppressed as impermissibly suggestive, but he was allowed to make an in-court identification of appellant.

Before the admission of this in-court identification, a hearing was held at which Reese stated that his identification of appellant was not dependent on the out-of-court show-up. To the contrary, Reese testified that, at the time of the murder, he was in close contact with appellant for as long as ten minutes, that he got a good look at appellant, and that he would never forget the face of the man who shot his friend. Based on this testimony, the trial court found that Reese's in-court identification of appellant had an independent origin from the out-of-court identification. The Court stated that even if a pretrial identification is tainted, an in-court identification is not constitutionally inadmissible if it does not depend upon the prior identification but has an independent origin. Accordingly, the Court held, the trial court did not abuse its discretion in making this finding or in denying appellant's motion to suppress.

Challenges to the Array; State's Right of Cross-Examination

Johnson v. State, S13A1169 (9/23/13)

Appellant was convicted of felony murder and possession of a firearm by a convicted felon. He contended that the trial court erred in denying his motion to challenge the array

of the traverse jury on the ground that the clerk of court exempted or deferred service for a number of jurors without requiring them to produce written documentation. The Court found that the record was devoid of a ruling by the trial court upon appellant's motion to challenge the array. However, even if the trial court denied the motion, the Court found no reversible error because, unlike *Yates v. State*, 274 Ga. 312 (2001), upon which appellant relied, a written order authorizing the clerk to excuse potential jurors was in place and jurors who proffered medical excuses were not excused by the clerk indiscriminately. On the contrary, the Court found, the clerk did not grant a potential juror's request without making an inquiry into the nature of the juror's problem; and not all jurors were excused or deferred. Moreover, there was absolutely no evidence that the excusals or deferrals in this case were allowed in such a manner as to alter, deliberately or inadvertently, the representative nature of the jury lists. Thus, the Court did not find such disregard of the essential and substantial provisions of the statute as would vitiate the arrays.

Appellant contended the trial court erred in permitting the prosecutor to cross-examine him as to his plea of not guilty to the count charging possession of a firearm by a convicted felon. The record showed that during cross-examination, appellant admitted he was a convicted felon and that he was in possession of a firearm on the day in question. In view of appellant's admissions, the prosecutor asked appellant why he entered a plea of not guilty to the charge of possession of a firearm by a convicted felon. Appellant objected to the prosecutor's question on the ground that he had "the right to plead not guilty to any charges." The prosecutor responded that he was simply asking appellant about the factual basis for his plea. No immediate ruling was made by the trial court. The prosecutor then asked appellant if he was claiming self defense when he first put the shotgun in the bed of his pickup truck (approximately 40 minutes before the shooting). Defense counsel objected again, asserting appellant was not charged with possessing a firearm at that point in time. Thereupon, the prosecutor, defense counsel and the trial court discussed whether the possession of a firearm charge concerned only the time of the shooting or whether it pertained to the earlier time. At the conclusion

of that discussion, the trial court stated: "Count 2 [felony murder] has commission of the offense of possession of a firearm by a convicted felon. A felon did cause the death and then, of course, the last count is just possession of a firearm by a convicted felon, so I'm going to overrule your objection." The Court stated that it could discern no error; the State has right to conduct a thorough and sifting cross-examination.

Venue; Dead Bodies

Walton v. State, S13A0830 (9/23/13)

Appellant was convicted in Harris County of murder, kidnapping with bodily injury and theft by taking. The evidence showed that appellant's brother worked with the victim at a mobile home dealership in Opelika, Alabama. The victim was the main witness against appellant's brother, charged with the theft of a trailer from the dealership. A few weeks before trial, the victim went missing. The victim's coworkers saw him leave the dealership in his truck with a man whom, they believed, was a customer. The coworkers helped investigators create a composite sketch of the customer, and investigators later received a tip identifying appellant as the customer depicted in the sketch, and added that the victim had been put into a well. The case went cold, however, when investigators could not find the well.

Three years later, appellant's girlfriend came forward and stated that appellant admitted to her that he helped to kill a man from Opelika who had worked with his brother and had tried "to send [his] brother to prison." Appellant also told her, she said, that they had tied up the man, taped his mouth, beat him, and thrown him headfirst into a well off Highway 315, somewhere in Harris or Talbot County. Investigators subsequently found the victim in a well off Highway 315 in Harris County. By then, his body was badly decomposed, but forensic examiners were able to conclude that he most likely died of blunt force trauma to the back of his head. He was still alive, the forensic examiners found, when he was thrown into the well, and he survived there for some time, but eventually succumbed to his fatal injury. His truck was found buried in Talbot County.

Appellant contended that the State failed to prove that venue lay in Harris County. The Court noted that a criminal case must be tried

in the county where the crime was committed, and a murder is "considered as having been committed in the county in which the cause of death was inflicted." O.C.G.A. § 17-2-2(c). If it cannot be determined in which county the cause of death was inflicted, it is considered that it was inflicted in the county in which the death occurred. And if a dead body is discovered in this state, and it cannot be readily determined in what county the cause of death was inflicted, it shall be considered that the cause of death was inflicted in the county in which the dead body was discovered. Here, the Court found, there was no clear evidence that the fatal injury was inflicted anywhere other than Harris County, where the victim was found, and where he died. Accordingly, the State sufficiently proved venue as to the murder.

As to the kidnapping and theft, the Court noted that venue may be proven by circumstantial evidence, and it generally is a question for the jury. Here, there was evidence that the victim drove his truck from the dealership in Alabama, that no blood or tissue was found in his truck, that he was last seen alive in Harris County, where he was thrown into the well, and that appellant was seen driving the truck in Talbot County, where he hired someone to bury it. And there was no evidence that the victim appeared to be in distress when he drove away from the dealership in Alabama. From this evidence, the Court found that a rational jury might reasonably have inferred that the victim drove from Alabama into Georgia of his own volition, that he was abducted by appellant in Harris County, and that appellant subsequently drove the truck along Highway 315 from Harris County into Talbot County. Accordingly, the Court concluded that venue was sufficiently proven as to kidnapping and theft as well.

Motions for Mistrial

Jordan v. State, S13A0964 (9/23/13)

Appellant was convicted of felony murder, armed robbery, and other crimes. He contended that the trial court erred in denying his two motions for mistrial. The record showed that the first motion for mistrial was made after the lead investigator testified on re-direct examination that early in his interrogation, appellant "was playing

games back and forth, didn't want to give us the full truth even though we knew so much of the truth" and that appellant kept giving them "the run-around." Appellant argued this testimony went to the ultimate issue in the case, which he contended was whether he was being truthful about his innocence, and therefore, it was inadmissible opinion evidence.

The Court noted that ordinarily, a witness may not express his opinion as to an ultimate fact, because to do so would invade the province of the jury. Here, however, even assuming this ground for objection had been preserved for review, the investigator's testimony did not constitute an impermissible opinion regarding the ultimate issue. The ultimate issue in the case was whether appellant was guilty of the crimes charged. The investigator was not asked for and did not give his opinion about whether appellant committed the crimes. Instead, the challenged testimony described the circumstances of the custodial interview and explained why, based on the investigator's own observations, the interview lasted several hours. The fact that appellant initially denied any involvement in the crimes and was not forthcoming in his statements to police, made evident by his subsequent admissions, was relevant to the issue of his guilt or innocence and was properly presented to the jury for its consideration. Furthermore, the Court found, the trial court gave a curative instruction reminding jurors they were the ultimate judges of all facts and it was their duty to determine the credibility of all witnesses. Thus, given the nature of the investigator's statements, the context in which they were made, and the curative instruction given by the trial court, the trial court did not err in denying the motion for mistrial on this ground.

Moreover, the Court stated that it could not agree with appellant's claim that the investigator's testimony improperly interjected his character in issue. The State offered the investigator's testimony on re-direct in response to a defense implication that appellant had been subjected to an overly burdensome interrogation. It was therefore material to explain the circumstances of the interrogation and it was not rendered inadmissible merely because it may have incidentally placed appellant's character in issue. Accordingly, the trial court did not

abuse its discretion in admitting the testimony or denying the motion for mistrial.

The Court noted that appellant's second motion for mistrial was made during the State's closing argument when, after reviewing the evidence presented to the jury, the prosecutor commented that appellant's actions demonstrate he intended to commit armed robbery and "the State believes the evidence has proven beyond a reasonable doubt that [the] armed robbery. . . ." Appellant interrupted the prosecutor and moved for a mistrial on the ground that the comment improperly conveyed the prosecutor's personal belief that appellant was guilty of armed robbery. The trial court disagreed and denied the motion for mistrial. The court nevertheless instructed the prosecutor to back up and restate what he believed the evidence had established. The prosecutor did so, after reminding jurors that they were the "sole deciders of the facts."

The Court stated that although Georgia law makes clear that a prosecutor may not state to the jury his or her personal belief in a defendant's guilt, O.C.G.A. § 17-8-75, and the statement to which appellant objected definitely implied such a belief based on the prosecutor's evaluation of the evidence, there was no abuse of discretion in the trial court's denial of the motion for mistrial. Any improper impression was removed from jurors' minds when the trial court instructed the prosecutor to restate his argument based on what the evidence established and the prosecutor, through his own comments to the jury, reminded jurors they were the ones who were to decide appellant's guilt or innocence and that argument of counsel is not evidence. Because corrective measures were undertaken, the Court concluded no reversible error resulted from the State's comment and a mistrial was not demanded.