

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING OCTOBER 21, 2011

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## THIS WEEK:

- **Prosecutorial Misconduct; Fifth Amendment**
- **Jury Instructions; Mens Rea**
- **Jury Instructions; Due Process**
- **Severance; Illegal Verdicts**
- **First Offender Act; Automatic Discharge**
- **Search & Seizure; Arrest Warrants**
- **Criminal Damage to Property; Hearsay**
- **Similar Transactions; Sexual Offenses**
- **Judicial Notice; Implied Consent Rights**

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### **Prosecutorial Misconduct; Fifth Amendment**

*Demory v. State, A11A1071 (10/7/11)*

Appellant appealed from the denial of his “Plea of Former Jeopardy.” The evidence showed that during his trial for burglary and other charges, appellant took the stand in his own defense. On cross-examination, the prosecutor asked appellant, “Have you ever told the police officer about [another individual] going into the house?” Appellant replied, “I had never been questioned.” His attorney then moved for a mistrial on the ground that the question violated appellant’s Fifth Amendment rights. This was also the second motion for mistrial on the same grounds. The first occurred when the prosecutor asked an investigator if he a chance to meet appellant after appellant’s fingerprints were found at the scene. The Court granted the mistrial and thereafter appellant filed his plea in bar arguing that his retrial should be barred by prosecutorial misconduct.

Where a mistrial is granted at the request of a criminal defendant, retrial is not prohib-

ited on the basis of double jeopardy unless it is established that the State intended to goad the defendant into moving for a mistrial in order for the State to avoid a reversal due to prosecutorial or judicial error, or otherwise to obtain a more favorable chance of a guilty verdict on retrial. The trial court denied appellant’s plea in bar based upon the prosecutor’s testimony that “she was unaware that this particular question under these particular circumstances would be an improper comment on the Defendant’s right to remain silent”; the State’s “diligent efforts” to save the case and oppose the motion for mistrial; and the tenor of the trial up to the point of the question. The Court also noted that the trial court, who was there to observe the trial as it progressed, found the prosecutor’s statement that the trial was going well to be credible. Thus, the record contained evidence to support the trial court’s conclusion that the prosecutor’s question was not intended to goad the defense into seeking a mistrial. The prosecutor consistently opposed the mistrial and requested a curative instruction instead. Since the evidence authorized the trial court to find that the prosecution did not instigate any misconduct either directly or through collusion in order to goad the defendant into moving for a mistrial, double jeopardy did not bar retrial. Accordingly, the trial court’s denial of the plea of former jeopardy was affirmed.

### **Jury Instructions; Mens Rea**

*Wilson v. State, A11A1236 (10/4/11)*

Appellant was convicted of trafficking in marijuana. He contended that the trial court erred in charging the jury that his knowledge of the quantity of marijuana was not an element of the marijuana trafficking offense. The Court disagreed. Citing *Cleveland v. State*, 218

Ga. App. 660, 662-663 (1) (1995), and *Barr v. State*, 302 Ga. App. 60, 61-62 (1) (2010), the Court held that the legislative intent of the drug trafficking statutory scheme is not to require proof of the defendant's subjective knowledge as to the precise weight of the drugs in his possession. Therefore, consistent with the rulings in *Barr* and *Cleveland*, in which the Court stated that a defendant's knowledge of the weight of cocaine was not an element in the offense of cocaine trafficking, the Court concluded that appellant's knowledge of the precise weight of the marijuana in his possession was not required to sustain his marijuana trafficking conviction. Therefore, the trial court did not err in failing to instruct the jury as appellant contended.

## **Jury Instructions; Due Process**

*Fairwell v. State*, A11A1110 (10/4/11)

Appellant was convicted of reckless conduct as a lesser included offense of aggravated assault (Count 1), felony obstruction of an officer (Count 2), felony fleeing or attempting to elude a police officer (Count 3), failure to stop upon striking an unattended vehicle (Count 5), and failure to stop at or return to the scene of an accident (Count 6). She argued that the trial court violated her due process rights by instructing the jury that several of the crimes could be committed in manners other than as specified in the indictment. The Court noted that because defense counsel did not object to any of the instructions, appellant waived her right to raise the issues on appeal. However, the Court would review the instructions under a plain error standard.

A criminal defendant's right to due process may be endangered when an indictment charges the defendant with committing a crime in a specific manner and the trial court's jury instruction defines the crime as an act which may be committed in a manner other than the manner alleged in the indictment. The giving of a jury instruction which deviates from the indictment violates due process where there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed to limit its consideration to the manner specified in the indictment.

Appellant first contended that the trial court erred by instructing the jury that "[a]

person commits the offense of obstruction of an officer when that person knowingly and willfully resists, obstructs, or opposes any law enforcement officer in the lawful discharge of his official duties . . ." when Count 2 of the indictment specifically charged, in pertinent part, that she did "knowingly and willfully obstruct, a law enforcement officer," by striking the officer with a motor vehicle. The Court noted that appellant was correct that the trial court instructed the jury using the pattern charge which applies when a person knowingly and willfully resists, obstructs, or opposes a law enforcement officer, and the indictment only alleged that appellant knowingly and willfully obstructed the officer. But appellant's contention that the words "resist," "oppose," and "obstruct," have different meanings under the felony obstruction statute, OCGA § 16-10-24 (b), as evidenced by the legislature's use of the word "or" instead of "and" in listing them in the statute, had no merit. In fact, the Court held, these words, "obstruct, resist, or oppose," all imply "forcible resistance" in regard to obstructing a police officer. Moreover, OCGA § 16-10-24 (b) requires, among other things, the commission of the offense by either offering to do violence or "doing violence to the person of such officer," and the jury was instructed on the latter. Thus, the Court concluded appellant's contention that the jury could have convicted her for "resisting" by failing to stop, or for "opposing" by driving away lacked merit because, unlike the act alleged in the indictment (striking the officer with a motor vehicle), the acts of failing to stop and driving away, in and of themselves, were not violent acts under the facts of this case, as required under the statute. Moreover, the State did not introduce evidence that appellant did violence to the officer on the date in question other than by striking the officer with a motor vehicle and, as such, no due process violation occurred because there was no reasonable probability that the jury convicted appellant for obstructing the police officer in a manner not specified in the indictment.

Appellant also argued the trial court violated her due process rights by charging the jury that it could find that she committed the offense of fleeing or attempting to elude a police officer by failing to stop when given a visual or audible signal to stop, where the indictment alleged that she failed to stop upon being given only a visual signal to stop, and

the evidence showed both visual and audible signals. The indictment charged that appellant did, "while fleeing a pursuing police officer, after being given a visual signal to bring the vehicle to a stop, in an attempt to escape arrest for Aggravated Assault, strike another vehicle . . ." As indicted, the offense was completed when appellant struck another vehicle. During the period of time relevant to this count namely, between striking the officer (the alleged aggravated assault) and striking the vehicle(s) there was no evidence that appellant was given an audible signal to stop. Because there was no evidence of an audible signal, no due process violation occurred because no reasonable probability exists that appellant committed the offense in a manner not specified in indictment.

Appellant next argued that the trial court improperly instructed the jury that a violation of OCGA § 40-6-271 (a) (Failure to stop upon striking an unattended vehicle) occurs when an individual fails to "immediately" stop, in light of the fact that the indictment did not allege that she failed to "immediately" stop and evidence showed that she stopped later. A trial judge must charge the jury on each crime specified in the indictment or accusation, unless the evidence does not warrant a conviction of such crime. The Court stated that it was true that the trial court charged the jury that a violation of OCGA § 40-6-271 (a) is committed when an individual fails to immediately stop, and the indictment did not allege that she failed to immediately stop. But, OCGA § 40-6-271 (a) does not provide any method of violating the statute (regarding the duty to stop), other than by a failure to stop immediately. The evidence showed that after striking the unattended vehicle, appellant failed to immediately stop. Consequently, the trial court's charge to the jury that the offense is committed by failing to "immediately" stop was not erroneous because it is only in this manner that the statute is violated, regarding the duty to stop.

Finally, appellant argued that the trial court improperly instructed the jury that OCGA § 40-6-270 (a) (failure to stop at or return to the scene of an accident) is committed when a collision occurs resulting in damage to a vehicle driven or attended by a person, in light of the fact that the indictment did not allege the stricken vehicle was damaged. Again the Court stated that while it was true that the

trial court charged the jury that a violation of OCGA § 40-6-270 (a) is committed when a collision resulting in damage to a vehicle occurred and the indictment only alleged that the vehicle was struck, the trial judge must charge the jury on each crime specified in the indictment or accusation, unless the evidence does not warrant a conviction of such crime. OCGA § 40-6-270 (a) does not provide any method of violating the statute (in regard to damage), other than by damage to the stricken vehicle. The evidence showed that after appellant's vehicle struck the attended vehicle, as alleged in the indictment, damage resulted. Consequently, the trial court's charge to the jury that the offense is committed when damage to a vehicle results, was not erroneous because it is only in this manner that the statute is violated, in regard to damage.

### **Severance; Illegal Verdicts**

*Brooks v. State, A11A1366 (10/4/11)*

Appellant appealed challenging the denial of his pre-trial motion to sever. The record showed that appellant and Johnson were jointly indicted for rape, aggravated sodomy, aggravated assault, kidnapping and four counts of possession of a firearm during the commission of a felony. In the same indictment, Johnson was also charged with numerous other offenses. Some of those additional charges related to an alleged car-jacking that occurred two days before the incident that gave rise to the joint charges against Johnson and appellant, while the rest of the charges against only Johnson related to an armed robbery that allegedly occurred after the joint incident. Prior to trial, the trial court granted Johnson's motion to sever the counts of the indictment based on the earlier car-jacking incident. However, the trial court denied appellant's motion to sever his trial from Johnson's trial, rejecting his claim that the jury would be misled and would likely punish him for Johnson's criminal activity.

During her closing argument, the prosecutor asserted that the evidence showed similarities between the incident involving both appellant and Johnson and the subsequent armed robbery involving only Johnson, and she further stated to the jury that "after [the armed robbery victim] encountered *these defendants* there was the chase." (Emphasis supplied.) Thereafter, appellant's counsel noted that the State had improperly attempted in its

closing argument to tie his client to the armed robbery, and the trial court responded: "They can't find him guilty of something he's not charged with." However, the jurors did just that, returning a verdict in which they not only found appellant guilty of the eight offenses for which he and Johnson were jointly indicted, but also found him guilty of the armed robbery, aggravated assault and two firearm counts for which only Johnson had been indicted. After announcing its verdict, the jury was polled and each juror reaffirmed that this was indeed their verdict.

The Court found that appellant made such a clear showing of prejudice based on the fact that the jury found him guilty of crimes for which he was not even on trial. "Indeed, it is hard to imagine a clearer showing of prejudice and consequent denial of due process than jurors unanimously finding a defendant guilty of offenses for which only his co-defendant had been indicted." The joint trial obviously created confusion of evidence and law for the jury, and evidence implicating Johnson was clearly considered against appellant since he was found guilty of Johnson's crimes. Because it was apparent that the joint trial hindered a fair determination of the guilt or innocence of appellant, and since appellant has demonstrated that he was prejudiced by joinder, the Court held that the trial court abused its discretion in overruling appellant's motion to sever.

The Court also found additional error arising from a defective verdict form. At the time it published its verdict, the jury confirmed that it had found appellant guilty on counts with which he was not charged. At this point, and even though appellant did not object, the trial court had a responsibility to intervene. It is the duty of the trial court not only to tell the jury what the law is, but to insist that they apply it and either render a verdict on some issue submitted or else make a mistrial. A trial court has a duty to insist on a legal verdict, that is, a verdict responsive to the issues as framed by the indictment or accusation and the evidence, and specified in the trial court's charge to the jury. When a jury returns an illegal verdict, the trial court should return the jury for further deliberations with direction to return a verdict within the range of the instructions originally given to it. Because the trial court did not so intervene before the dismissal of the jury, the Court held that a new trial was authorized.

### **First Offender Act; Automatic Discharge**

*Ailara v. State, A11A1371(10/4/11)*

Appellant pled guilty to the offense of child molestation and was sentenced under the First Offender Act, OCGA § 42-8-60 et seq., to serve eleven years on probation. Upon conclusion of his probationary period, he filed a petition for discharge without court adjudication of guilt. Finding that appellant had twice violated the terms of his probation, the trial court denied his petition. Appellant contended that the trial court erred by refusing to discharge him. The Court agreed and reversed.

During the term of his first offender probation, appellant was accused of violating the terms of his probation on two separate occasions, with one such occasion resulting in the revocation of his probation for a period of eighteen months. "Upon violation by the defendant of the terms of probation, . . . the court may enter an adjudication of guilt and proceed as otherwise provided by law." OCGA § 42-8-60 (b). Nevertheless, depending on the severity of the crime committed and all the facts and circumstances of the case, OCGA § 42-8-60 (b) gives the trial court discretion to determine if it is appropriate to revoke first offender status, enter an adjudication of guilt, and resentence on the underlying offense. Here, despite his two violations of the conditions of probation, the trial court utilized its discretion to continue appellant's first offender probation and never revoked his first offender status, entered an adjudication of guilt, or resented him for his underlying crime of child molestation. A first-offender probationer is automatically discharged upon the successful completion of the terms of the sentence without the necessity of any subsequent certification of that successful completion in the records of the trial court. Accordingly, upon fulfillment of appellant's probationary period, he was entitled to discharge under the First Offender Act.

In so holding, the Court rejected the State's argument that appeal should be dismissed because the discharge was automatic. The Court held that contrary to the State's argument, the appeal was not moot. Notwithstanding the automatic nature of appellant's discharge, the Court held that the trial court's order denying his discharge "speaks for itself." As long as the clerk of the trial court

has not entered on the criminal docket and all other records of the court pertaining thereto a specified notice of the defendant's discharge and the legal effect thereof, appellant would benefit from reversal of the trial court's erroneous order. Therefore, the Court reversed and remanded the case with directions to the trial court to vacate its order denying appellant's discharge from first offender probation.

## **Search & Seizure; Arrest Warrants**

*Goodman v. State, A11A0836 (10/4/11)*

Appellant was convicted of two counts of misdemeanor criminal trespass. The evidence showed that he was twice found at a particular apartment complex after previously being banned from the complex by the apartment manager. He contended that the arrest warrants were invalid and insufficient and therefore his convictions should be reversed. Pretermitting whether the arrest warrants were valid, the Court held that a new trial was not required because the sanction for an unconstitutional arrest is the exclusion of the evidence obtained as a result of that arrest. The sanction is not the suppression of the prosecution. Since appellant failed to identify any evidence obtained as a result of his arrest under these warrants, his contention was wholly without merit.

## **Criminal Damage to Property; Hearsay**

*In the Interest of A. C. R-M, A11A1198 (10/4/11)*

Appellant was adjudicated delinquent for committing the act of criminal damage to property in the second degree pursuant to OCGA § 16-7-23 (a) (1). Appellant argued that there was insufficient evidence to establish that the value of the damage exceeded \$500. Appellant was accused of damaging at least 8-10 homes. The evidence showed that appellant shot at least one window out in a mobile home park in which he lived. The property manager and a maintenance worker inspected the damage to each of the approximately eight to ten mobile homes that sustained damage, which included approximately twenty to thirty broken windows total. The owner then obtained an estimate from a window installer, which indicated that each replacement window would cost \$56. According to the property owner, the damage to the property totaled \$2,041.

The Court found that the property owner based his \$2,041 damage calculation on other people's observations of the damage and a window installer's estimate of the cost to replace each window, but there was no evidence that the repairs occurred. Thus, the estimate was inadmissible hearsay. Furthermore, the property owner's estimate was for the cumulative damage done to the property, and there was no evidence admitted at trial regarding the number of windows that would have to be replaced in the homes that appellant himself damaged. This was clearly insufficient to establish the value of the damages to be in excess of \$500. Thus, the juvenile court erred by finding that appellant committed criminal damage to property in the second degree. Nevertheless, because the juvenile court did not err by finding that appellant did shoot a pellet gun towards at least one mobile home, the evidence was sufficient to support an adjudication of delinquency for committing an act which would support a conviction for the offense of criminal trespass to property as a lesser included offense of criminal damage to property in the second degree. Accordingly, the Court remand the case with directions that an adjudication of delinquency and a disposition thereof be entered for committing an act which would have supported a conviction for the offense of criminal trespass to property were appellant an adult. The Court found that this result does not violate appellant's due process right to be notified of the charges against him since a defendant is on notice of all lesser crimes which are included in the crime charged as a matter of law.

## **Similar Transactions; Sexual Offenses**

*Butler v. State, A11A1301 (10/6/11)*

Appellant appealed from the trial court's grant of the State's motion to admit similar transaction evidence, contending that the independent offenses were not sufficiently similar to the crimes charged. Appellant was indicted for aggravated sexual battery, aggravated child molestation, and child molestation, for acts committed against his four-year old.

The evidence of the independent offenses showed that in January 2005, approximately four years before the crimes charged, appellant communicated in an internet chat room with a police officer posing as a 14-year-old girl.

When the officer sent a message to appellant that the child was "looking for sex," the two arranged to meet. Two days after the initial communication, appellant arrived at a park, as arranged, to meet the fourteen-year-old child. An undercover police officer posed as the child. Appellant did not touch the undercover officer. As he and the officer began to walk away, officers apprehended him. Appellant was indicted for and pled guilty to two counts of violation of the Computer Pornography and Child Exploitation Act.

The State has the burden of making three affirmative showings in order to have similar transactions admitted into evidence. The first of these affirmative showings is that the State seeks to introduce evidence of the independent offense or act, not to raise an improper inference as to the accused's character, but for some appropriate purpose which has been deemed to be an exception to the general rule of inadmissibility. The second is that there is sufficient evidence to establish that the accused committed the independent offense or act. The third is that there is a sufficient connection or similarity between the independent offense or act and the crime charged so that proof of the former tends to prove the latter.

Appellant only argued that the independent crimes were not sufficiently connected or similar to the offenses for which he was presently accused. The Court disagreed. Appellant was convicted of violating the Computer Pornography and Child Exploitation Act (OCGA § 16-12-100.2 (d) (1)), by using an online computer messaging service to entice another person believed to be a child to commit child molestation. He was also convicted of violating the Act (OCGA § 16-12-100.2 (e) (1)) for having contact with someone he believed to be a child, via an online computer messaging service, which contact involved explicit descriptions of sexual conduct intended to arouse the sexual desire of the accused. The Court held that contrary to appellant's assertions that these independent offenses were not similar because they did not involve a "real" child, there was criminal liability even where there was no child, if the required mens rea exists.

Appellant, conceding that the independent offenses and the crimes charged both allege crimes that are sexual in nature with minors, nevertheless contended that the elements of the two offenses were not sufficiently similar such that proof of the former tends to

prove the latter. But, the Court found, the computer pornography and child exploitation offenses and the crimes charged (child molestation, aggravated child molestation, and aggravated sexual battery) do have a logical connection to each other; the independent offenses involve a lascivious motivation or bent of mind, which would be proper in determining appellant's motivation or bent of mind to commit the crimes charged. The independent and the charged incidents both involve sexual contact with females under the age of consent. The absence of touching in the independent offenses did not bar admission of the similar transaction evidence to show appellant's lustful disposition toward female children. In considering the similarities rather than the differences between the independent offenses and the crimes charged, the Court concluded that the trial court did not err in ruling that the independent offenses were admissible.

### **Judicial Notice; Implied Consent Rights**

*Tunali v. State, A11A1158 (10/4/11)*

Appellant appealed from the denial of his motion to suppress. The evidence showed that appellant was driving on an interstate highway in a pickup truck, which displayed a hazardous materials placard. An officer from the Department of Public Safety ("DPS") stationed at a commercial vehicle weighing and inspection station observed him drive past the station without stopping. The DPS officer subsequently gave chase and stopped appellant's vehicle. Thereafter, the officer noticed the smell of alcohol on appellant's breath and administered an alco-sensor test which yielded a positive result for the presence of alcohol.

Appellant argued that the trial court erred by ruling that the initial traffic stop was justified by a reasonable articulable suspicion of criminal activity because the DPS rules are not subject to judicial notice and the State failed to introduce the DPS rules giving rise to the suspected violation justifying the traffic stop. The Court found that appellant correctly pointed out that the DPS rules relied upon by the officer and the State had not been made a part of the record, and historically, certain rules were not subject to judicial notice because they were not promulgated pursuant to the Georgia Administrative Procedure Act ("APA"). Thus, appellant's argument was that the State failed

to meet its burden because it did not show the basis for the officer's traffic stop. However, the Court determined, the Georgia Public Service Commission has formally adopted motor carrier safety regulations issued by the Federal Motor Carrier Safety Administration, as codified in the Rules and Regulations of the State of Georgia, which are the official compilation made by the Georgia Secretary of State under the APA. Under these rules, certain officers of DPS, such as the officer in this case, are authorized to stop commercial vehicles to conduct safety inspections under Georgia's regulations. Since the traffic stop in this case occurred after the formal adoption of the federal rules, the Court took judicial notice of the rules as adopted. In light of the authority of the officer to stop and inspect commercial vehicles, and in light of the evidence that appellant drove a truck displaying a hazardous material placard as he failed to stop at an established interstate vehicle inspection station, the Court found no error in the trial court's conclusion that the State met its burden to demonstrate the officer's authority to conduct the traffic stop.

Appellant also argued that the breath test administered by the officer was inadmissible because the officer did not read him the implied consent warning. The record showed that the breath test administered was an alco-sensor test designed to test for the presence of alcohol. That result, the presence of alcohol, was the only evidence tendered at the hearing, and no blood alcohol concentration was at issue. OCGA § 40-5-153 (c) applies to commercial drivers and requires that an implied consent warning be given to drivers of commercial vehicles when an officer administers a test to determine the person's "alcohol concentration or the presence of other drugs." The Court held that when analyzing the admissibility of testing of non-commercial drivers under OCGA § 40-6-392, which is explicitly referenced in OCGA § 40-5-153 (a), the implied consent warning requirement does not apply to alco-sensor tests, which merely detect the presence, not concentration, of alcohol. This is consistent with the plain meaning of the phrase "alcohol concentration or the presence of other drugs." Had the legislature intended to require the implied consent warning for tests detecting only the presence and not concentration of alcohol, it could have used the phrase "presence of alcohol," as it expressly did for drugs. Therefore, the officer was not required to give

the implied consent warning under OCGA § 40-5-153, and appellant's contention was deemed meritless.