

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 6, 2017

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THIS WEEK:

- **OCGA § 16-13-41; OCGA § 16-13-42**
- **Out-of-Time Appeals**
- **First Offender Sentencing; Prosecutorial Consent**
- **Verdicts; Jury Polling**
- **Hearsay; Declarations Against Penal Interest**
- **Ineffective Assistance of Counsel; Victim's Good Character**
- **Deliberate Ignorance; Closing Arguments**
- **Jury Charges; Double Jeopardy**

OCGA § 16-13-41; OCGA § 16-13-42

Hourin v. State, S17A0962 (8/28/17)

Appellant, the non-physician owner of a medical clinic, was charged with one count of conspiracy to commit the offense of unauthorized distribution and dispensation of controlled substances in violation of OCGA § 16-13-42. He argued that the trial court erred in denying his general demurrer and motion to dismiss. Specifically, he contended that the indictment should have been dismissed for two reasons: (1) the statutes under which he is charged, OCGA § 16-13-41 and OCGA § 16-13-42, are unconstitutionally vague as to whom they apply; and (2) OCGA § 16-13-41 (h) is unconstitutional because it shifts the burden of proof to the defendant.

The Court noted that the indictment alleges that appellant conspired to commit the offense of unauthorized distribution and dispensation of a controlled substance in violation of OCGA § 16-13-42. As the overt act

committed in furtherance of this alleged conspiracy, the indictment alleges that appellant possessed “13 prescriptions that were issued and signed in blank by Dr. Kelvin White, a practitioner and a person who is subject to the requirements of O.C.G.A. § 16-13-35[,] in violation of O.C.G.A. § 16-13-41(h)[.]” OCGA § 16-13-42 (a) (1) makes it “unlawful for any person ... [w]ho is subject to the requirements of Code Section 16-13-35 to distribute or dispense a controlled substance in violation of Code Section 16-13-41[.]” OCGA § 16-13-41 (h) provides: “It shall be unlawful for any practitioner to issue any prescription document signed in blank. The issuance of such document signed in blank shall be prima-facie evidence of a conspiracy to violate this article. The possession of a prescription document signed in blank by a person other than the person whose signature appears thereon shall be prima-facie evidence of a conspiracy between the possessor and the signer to violate the provisions of this article.”

The Court noted that State did not allege that appellant is either subject to the requirements of OCGA § 16-13-35 or a “practitioner” within the meaning of OCGA § 16-13-41 (h) and in fact appeared to concede at least that he is not the latter.

Appellant argued that the statutes under which he is charged are unconstitutionally vague because they do not put him on notice that they apply to a person who is not a “practitioner.” But, the Court stated, regardless of whether appellant could be convicted of violating OCGA § 16-13-42 (a) (1) or OCGA § 16-13-41 (h), and regardless of whether the statutes are vague as applied to him, appellant's argument fails because it rests on the faulty premise that a defendant cannot be convicted

of conspiring to commit a particular offense if he could not be convicted of committing the underlying offense. Thus, the Court stated, appellant did not contend that *no one* could be convicted of the underlying offense, just that the statute does not clearly criminalize his conduct because he is not a “practitioner.” His argument raises the question of what it means to “conspire” under OCGA § 16-4-8, a term of art with a long tradition of usage in the criminal law and it is well established that a defendant may be said to “conspire” even if he is in a class of persons who could not be convicted of the underlying crime. Thus, even if appellant could not be convicted of violating OCGA § 16-13-42 (a) (1) or OCGA § 16-13-41 (h), he may be prosecuted for conspiring with another to violate those provisions. It therefore does not matter whether the statutes apply directly to someone in appellant's shoes at all, let alone whether they clearly put appellant on notice that they do. Appellant did not contend that the statutes were vague as to the doctor with whom he is charged with conspiring. Accordingly, the Court held, appellant's vagueness argument failed.

Next, appellant argued that OCGA § 16-13-41 (h) is unconstitutional because it relieves the State of its burden to prove the elements of a conspiracy. Specifically, OCGA § 16-13-41 (h) provides that “possession of a prescription document signed in blank by a person other than the person whose signature appears thereon *shall be prima-facie evidence* of a conspiracy between the possessor and the signer to violate the provisions of [Article 2].” (Emphasis supplied) Appellant argued that under this provision the State may obtain a conviction by showing only that he possessed the signed prescription.

The Court noted that in *Mohamed v. State*, 276 Ga. 706, 707-709 (1) (2003), it reversed a defendant's conviction where the jury was instructed with the same language found in the statute at issue here. But, in *State v. Hudson*, 247 Ga. 36, 38 (2) (1981), it held that it was error for a trial court to sustain a plea in bar on the basis that the statute under which the defendant was indicted amounted to impermissible burden-shifting. That statute, used the same statutory language at issue here and in *Mohamed*. The difference being that unlike *Mohamed*, the procedural posture of the case was, like here, that no trial had been had. Thus, the Court stated, the presumption

in the statute in question here might be constitutionally valid or invalid depending on the instructions given to the jurors by the court. If the presumption indicated by the statute could be interpreted by the jury under the court's instructions as a burden shifting presumption or as a conclusive presumption, either interpretation would deprive the defendant of his right to have the state prove every element of the crime with which he is charged beyond a reasonable doubt. Under those circumstances, the instructions would render the presumption unconstitutional. On the other hand, if the instructions made clear to the jury that the presumption raised by the statute was permissive only, and that the duty still devolved upon the state to prove every element of the crime charged beyond a reasonable doubt, the presumption permitted by the statute would be constitutionally permissible. Accordingly, the Court held that on this record and in this procedural posture, the trial court's denial of the general demurrer must be affirmed.

Out-of-Time Appeals

Houston v State, S17A0769 (9/13/17)

In 2008, appellant pled guilty to two murders and numerous other crimes. In 2015, he filed a pro se motion for an out-of-time appeal, challenging the voluntariness of his guilty pleas based on alleged ineffective assistance of his plea counsel, coercion by the trial court, and other errors. The court denied the motion.

Appellant contended that the trial court deprived him of his right to an appeal by misinforming him at the plea hearing that “[i]f you enter this plea, all appeals are off.” The Court noted that although the grounds for an appeal from a guilty plea are limited, a criminal defendant has a right to a direct appeal from a judgment of conviction and sentence entered on a guilty plea, so the trial court's statement that “all appeals are off” if appellant pled guilty was erroneous. However, a defendant is entitled to a direct appeal from a conviction entered on a guilty plea only to the extent that the issues presented on appeal can be resolved by reference to the existing record. Thus, where the claims that a defendant belatedly seeks to raise on appeal require factual development, an out-of-time appeal is unavailable, and his remedy, if any, is in habeas corpus. Moreover, if the claims that a defendant seeks to raise on appeal can be resolved by reference to facts

in the existing record, he must show that the claims would be resolved in his favor or an out-of-time appeal is properly denied. In addition, before being entitled to an out-of-time appeal, a defendant must allege and prove an excuse of constitutional magnitude for failing to file a timely direct appeal, which is usually done by showing that the delay was caused by his trial counsel's ineffective assistance in providing advice about or acting upon an appeal.

And here, the Court found, pretermitted both whether the trial court's overbroad statement that “all appeals are off” was the reason that appellant failed to file a timely appeal from his guilty pleas and whether this allegation was properly raised in the trial court, appellant was not entitled to an out-of-time appeal. Appellant contended that his guilty pleas were invalid on five grounds. But, the Court found, to the extent that his claims can be resolved by reference to the existing record, the record refuted the claims. And to the extent that his claims require more factual development, appellant must look for redress, if any, by way of a petition for habeas corpus rather than an out-of-time appeal. Therefore, the Court concluded, the trial court did not err in denying his motion for an out-of-time appeal.

First Offender Sentencing; Prosecutorial Consent

White v. State, S17A0874 (9/13/17)

In 1992, appellant was convicted of felony murder and cruelty to children. In 2016, she filed a pro se “Petition for Resentencing Under the First Offenders Act” which the trial court denied.

Appellant argued that she was eligible for first offender treatment pursuant to OCGA § 42-8-66. The Court noted that OCGA § 42-8-66 (a) sets forth two categories of individuals who may seek to file a petition in superior court for exoneration of guilt and discharge. Paragraph (a) (2) applies to individuals who were sentenced between March 18, 1968 and October 31, 1982. Paragraph (a) (1) applies to “[a]n individual who qualified for sentencing pursuant to this article but who was not informed of his or her eligibility for first offender treatment.” Appellant argued that she was not so informed and was eligible for first offender treatment at the time of her conviction. However, the Court noted, this paragraph provides further that such an indi-

vidual “may, *with the consent of the prosecuting attorney*, petition the superior court in the county in which he or she was convicted for exoneration of guilt and discharge pursuant to this article.” (Emphasis supplied.)

The State argued that appellant’s petition was invalid on its face and was properly denied without the need for a hearing or findings of fact and conclusions of law, because the prosecuting attorney where appellant was convicted did not consent to the filing of the petition. The Court agreed and further found that appellant made no showing to the contrary. Therefore, the trial court did not err in denying her petition.

Verdicts; Jury Polling

Miller v. State, S17A1101 (9/13/17)

Appellant was convicted of murder and other offenses. He argued that an error in the poll of the jury entitles him to a new trial. The record showed that after the jury returned the verdict, at appellant’s request, the trial court polled the jurors one by one, asking them whether the verdict was theirs in the jury room, whether the verdict was freely and voluntarily made, and whether it was still their verdict. Each of the jurors so polled answered in the affirmative, but the trial court inadvertently failed to poll one of the twelve jurors.

Appellant contended that this failure to poll the juror, without taking any corrective action, requires automatic reversal because the incomplete jury poll indicated that the verdict was not unanimous. However, the Court found, there was no indication at all that the jury failed to reach a unanimous verdict or that any juror’s guilty verdict was improperly obtained. Thus, there were no grounds for reversal. In so holding, the Court distinguished *Benefield v. State*, 278 Ga. 464 (2004) because in *Benefield*, a juror answered “no” when asked during the jury poll if he had voted for the guilty verdict, and this response showed a non-unanimous verdict, which required the trial court sua sponte to send the jury back for further deliberations.

Hearsay; Declarations Against Penal Interest

Roscoe v. State, S17A0718 (9/13/17)

Appellant was convicted of malice murder and other offenses in the shooting death of

Douglas. He argued that the trial court abused its discretion by granting the State’s motion in limine to exclude hearsay testimony allegedly showing that someone other than appellant had murdered Douglas. Specifically, appellant contended that the trial court should have allowed his roommate, Harold Bird, to testify that, while Bird was incarcerated, an inmate named Graves told Bird that Graves and a man named Moore were the ones who actually committed the murder. The Court disagreed.

Generally, the Court stated, hearsay declarations to third persons against the declarant’s penal interest, to the effect that the declarant, and not the accused, was the actual perpetrator of the offense, are not admissible in favor of the accused at his trial. In fact, the Court noted, if such admissions were allowed as evidence upon the trial of the accused, a person could subvert the ends of justice by admitting the crime to others and then absenting himself. However, the hearsay rule may not be applied mechanistically to defeat the ends of justice when the rejected testimony bears persuasive assurances of trustworthiness and is critical to the defense. Such evidence may be admitted in the guilt-innocence phase under exceptional circumstances that show a considerable guaranty of the hearsay declarant’s trustworthiness. The trial court must determine whether the value and reliability of the tendered hearsay evidence outweigh the harm resulting from a violation of the evidentiary rule.

And here, the Court found, during his proffer to the trial court, appellant claimed that Bird would testify that Graves told Bird that he and Moore had committed the murder. However, when Graves was interviewed by police, Graves denied that he had anything to do with Douglas’ murder and he further denied ever making any statement to Bird admitting to the murder. The police also conducted an independent investigation of both Graves and Moore based on Bird’s allegations and found no relevant evidence in the men’s apartments to connect them to Douglas’ murder. Nor did they find any fingerprint evidence to connect the men to the white truck used as the getaway vehicle. Thus, the only evidence directly connecting Graves and Moore to the murder was the uncorroborated hearsay statement of appellant’s roommate that was based on statements that Graves, himself, denied ever making. Accordingly, the Court held, there

was no abuse of discretion by the trial court in excluding this proffered testimony.

Ineffective Assistance of Counsel; Victim’s Good Character

Revere v. State, S17A0806 (9/13/17)

Appellant was convicted of the murder of Patterson. The evidence showed that Patterson ran a nonprofit organization that provided assistance to released felons who were attempting to reintegrate into society. Appellant was one of the released felons to whom Patterson was serving as a mentor. Appellant asserted that he killed Patterson in self-defense.

Appellant contended that his trial counsel was ineffective for failing to (a) object or request a mistrial after three of the State’s witnesses improperly placed Patterson’s good character in issue, and (b) introduce evidence of Patterson’s prior felony convictions to rebut or impeach the State’s improper character evidence. The Court disagreed.

As to the first contention, the Court noted that consistent with Federal Rule of Evidence 404 (a) (2), the Rule upon which Georgia’s Rule 404 (a) (2) is based, the State may only introduce evidence of a victim’s good character to rebut evidence of a pertinent character trait of the victim after the defendant has first introduced such evidence at trial. Here, however, the testimony was introduced during the State’s case in chief before appellant offered any testimony or evidence of his own regarding Patterson’s character or alleged actions as the first aggressor. In this regard, the testimony was not introduced in conformity with the mandate of Rule 404 (a) (2) requiring that a defendant first introduce evidence of a pertinent character trait of the victim or evidence that the victim was the first aggressor before the State may introduce evidence to rebut that which was presented by the defendant. Therefore, the testimony presented by the State was simply inadmissible evidence of Patterson’s good character under Rule 404 (a) (2). Accordingly, Appellant’s counsel could have objected to its admission. Nevertheless, the Court found that the evidence was not prejudicial and therefore, appellant was not entitled to a new trial under *Strickland v. Washington*.

Appellant also argued that his trial counsel was ineffective for failing to introduce evidence of Patterson’s alleged prior crimes

from Texas relating to sexual offenses to rebut the good character evidence presented by the State's witnesses. However, the Court noted, to the extent that appellant based his contention on *Chandler v. State*, 261 Ga. 402, 407 (3) (c) 1991), which created an evidentiary exception permitting a defendant claiming justification to introduce evidence of specific acts of violence by the victim against third persons, his arguments failed because the evidentiary rule set forth in *Chandler* does not remain viable under the new Evidence Code. And, the Court added, to the extent that appellant based his argument on the provisions of the new Evidence Code, in particular or on the theory that the State "opened the door" to evidence of Patterson's prior crimes in general, appellant also could not succeed on such claims. Even if any of Patterson's alleged prior crimes involved specific acts of violence, appellant never introduced into evidence at the motion for new trial hearing any of Patterson's alleged prior convictions. Without introducing certified copies of the prior convictions or other acceptable evidence to show Patterson's alleged prior acts of specific violence, appellant could not support his claim that his counsel could have been ineffective for failing to attempt to introduce such evidence at trial.

Deliberate Ignorance; Closing Arguments

Camacho v. State, A17A1253 (8/9/17)

Appellant was convicted of trafficking in methamphetamine. The evidence, very briefly stated, showed that appellant was surveilled picking up a car known to contain a large quantity of methamphetamine from two men who then followed behind appellant in the car in a pick-up truck as it made its way up the interstate. Appellant was then stopped by two GSP officers.

Appellant contended that the trial court erred by charging the jury, over objection, on deliberate ignorance. Specifically, he argued that the charge was not warranted because the evidence pointed to actual knowledge and the charge "misled the jury since it equated knowledge with intent, . . . significantly [lowering] the State's burden of proof." The Court disagreed for two reasons. First, the Court found that the charge did not mislead the jury. The only requirement regarding jury charges is that the charges, as given, were correct statements

of the law and, as a whole, would not mislead a jury of ordinary intelligence. And here, the Court found, the deliberate ignorance charge given by the trial court was a correct statement of law and tracked the language which was approved in *Able v. State*, 312 Ga. App. 252, 261 (3) (b) (2011).

Second, the Court found that there was some evidence to support a charge on deliberate ignorance. A jury charge on deliberate ignorance or willful blindness is appropriate when the facts support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution. However, a trial court should not instruct a jury regarding deliberate ignorance when the evidence only points to either actual knowledge or no knowledge on the part of the defendant. The deliberate ignorance instruction is based on the alternative to the actual knowledge requirement at common law that if a party has his suspicions aroused but then deliberately omits to make further enquiries, because he wishes to remain in ignorance, he is deemed to have knowledge. Thus, the Court found, under appellant's version of events, there was some evidence that he blatantly ignored evidence of nefarious activity. Appellant believed he was driving the car to a mechanic shop in exchange for \$80 to \$100. He did not question the two men in the pickup truck as to why they needed his assistance when there were two of them, and even though he testified that he did not know the location of the mechanic shop, he made no inquiry as to why the men planned to follow him on the highway. Thus, trial court did not err in giving a charge on deliberate ignorance.

Appellant also contended that the trial court should have rebuked the prosecutor under OCGA § 17-8-75 during closing arguments. Specifically, he contended that the prosecutor improperly inserted into the trial the prosecutor's personal experience: "Those drugs go missing, somebody's going to die in Mexico. Somebody's family is going to die in Mexico. I've prosecuted murderers in this courthouse because of drug debts." Appellant objected to this statement and moved for a mistrial, which the trial court denied.

The Court, however, found no reversible error. Parties enjoy considerable latitude when making closing arguments. Further, in ruling

on a motion for mistrial made in response to an alleged inflammatory statement, the trial court is vested with a broad and sound discretion, and its ruling will not be overturned absent manifest abuse. And here, the Court found, although not artfully worded, the prosecutor's statement insinuated that the jury should convict for the safety of the community or to curb the problem of drug-related violence. Such a plea is not improper and the trial court did not abuse its discretion in denying appellant's motion for a mistrial.

Jury Charges; Double Jeopardy

Cotman v. State, A17A1050, A17A1051 (8/11/17)

Appellants Cotman and Williamson were convicted of conspiring to violate RICO and also, Williamson was convicted of two counts of making false writings and two counts of false swearing. Appellants contended that the trial court erred by instructing the jury that it could convict them if it found that they violated either subsection (a) or subsection (b) of the RICO Act despite the indictment charging the defendants with conspiring or endeavoring to violate subsections (a) and (b), conjunctively. The Court disagreed.

The Court noted that Count 1 of the Indictment charged all of the defendants in considerable detail with violating OCGA § 16-14-4 (c) of the RICO Act by conspiring and endeavoring to engage in racketeering in violation of OCGA § 16-14-4 (a) and by conspiring and endeavoring to engage in racketeering in violation of OCGA § 16-14-4 (b). It is well settled that when a defendant is charged, as here, with the violation of a criminal statute containing disjunctively several ways or methods a crime may be committed, proof of any one of which is sufficient to constitute the crime, the indictment, in order to be good as against a special demurrer, must charge such ways or methods conjunctively if it charges more than one of them. And at trial, it was sufficient for the State to show that it was committed in any one of the separate ways listed in the indictment, even if the indictment uses the conjunctive rather than disjunctive form. Moreover, the trial court also charged the jury that the burden was on the State "to prove every material allegation of the indictment and every essential element of the crime

charged beyond a reasonable doubt." Accordingly, the Court held, the trial court did not err in instructing the jury that the State could prove that the defendants conspired to violate the RICO Act in at least one way of the two ways alleged.

Nevertheless, appellants, citing *US v. Gipson*, 553 F2d 453 (5th Cir. 1977), argued that the trial court's challenged instruction constituted error because it allowed the jury to render a non-unanimous verdict as to Count 1. However, the Court found, unlike the instruction at issue in *Gipson*, the trial court in this case did not instruct the jury that it could convict the defendants if some of the jurors found that the defendants conspired to violate subsection (a) of the RICO Act while others found that they conspired to violate subsection (b). Rather, in stark contrast to *Gipson*, the trial court concluded its instructions by directing that "[w]hatever your verdict is, it must be unanimous; that means agreed by all." Moreover, the Court noted, *Gipson* has been questioned in *Shad v. Arizona*, 501 U.S. 624 (111 S.Ct 2491, 115 LE2d 555) (1991) and *Griffin v. US*, 502 U.S. 46 (112 S.Ct 466, 116 LE2d 371) (1991). Therefore, the Court concluded, the contention that the trial court's instruction as to Count 1 constituted error because it allowed the jury to render a non-unanimous verdict was meritless.

Cotman also argued that the trial court erred in denying her plea in bar on grounds of double jeopardy. The record showed that in Count 4 of the original indictment, the State charged Cotman with the offense of influencing a witness, specifically alleging that she "did intimidate [principal] Jimmie Hawkins." Cotman filed a special demurrer, which prompted the State to re-indict her solely on the same charge of influencing Hawkins but with additional details specifying the nature of the intimidation. The State then filed a motion requesting that the trial court enter an order of nolle prosequi as to Count 4 in the original indictment and join the new indictment with the original for trial purposes. But Cotman objected to joinder, demanded a speedy trial on the new indictment, and, at the conclusion of that trial, was acquitted. Cotman then filed a plea in bar of former jeopardy, arguing that the State was precluded from trying her on either the RICO or influencing-a-witness charges in the original indictment. Subsequently, the trial court granted Cotman's plea in bar as to the

influencing-a-witness charge but denied it as to the RICO charge. In *Cotman v. State*, 328 Ga. App. 822, 826 (1), the Court affirmed the trial court's ruling, concluding "that Cotman, having opposed the State's invitation to join the two indictments for a single trial, faces subsequent prosecution because of her own election and thereby waived the protections against subsequent prosecutions afforded by OCGA § 16-1-8 (b)." But in that same opinion, the Court also noted that "Cotman [did] not argue substantive double jeopardy for purposes of the appeal." Thus, in this appeal, Cotman contended that the trial court erred in denying her plea in bar because the subsequent prosecution on the RICO charge was barred by substantive double jeopardy. The Court disagreed.

The Court noted that the test for determining substantive double jeopardy was established in *Blockburger v. US*, 502 U.S. 299 (52 S.Ct. 180, 76 LEd. 306) (1932), under which the Court must look and decide if there were two offenses or only one by determining whether each offense requires proof of a fact which the other does not. Thus, the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial. Thus, if each statute requires proof of an additional fact which the other does not, the offenses are not the same under the *Blockburger* test.

Here, the Court found, racketeering is a special type of compound offense, not simply a more serious grade of forgery, robbery, homicide, or any of the other offenses specified in the RICO Act as predicate offenses. And although influencing a witness can be a predicate offense supporting a RICO charge, it is certainly not a necessary element of such a charge. More importantly, it was not a predicate offense in Cotman's RICO trial. In fact, the Court noted, the amended indictment did not allege that Cotman engaged in influencing a witness, either as a predicate act of the RICO charge or as a separate charge, and the State presented no evidence during the trial pertaining to the charge for which Cotman was acquitted in her first trial—i.e., her alleged attempt to intimidate Principal Hawkins from speaking with the GBI. Furthermore, while Cotman was correct that many of the same witnesses who testified during her first trial also testified during her RICO trial, none of

those witnesses testified regarding the specific meeting with Principal Hawkins that resulted in the influencing-a-witness charge. Moreover, Cotman's focus on such witness overlap in the two trials was misplaced because the *Blockburger* test focuses on the proof necessary to prove the statutory elements of each offense, rather than on the actual evidence to be presented at trial. Accordingly, the Court held, Cotman's prosecution on the RICO charge after she was acquitted on the influencing-a-witness charge was not barred by substantive double jeopardy.