

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 21, 2014

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THIS WEEK:

- **Mutually Exclusive Verdicts; State's Right to Appeal**
- **Murder; Concealing a Death**
- **Miranda; Renewed Contact with Suspect**
- **Statements; Right to Counsel**
- **Grand Jurors; Indictments**
- **Line-ups**
- **Venue**
- **Theft by Receiving; Competent Evidence**
- **Right of Confrontation; 911 Calls**
- **Judicial Comments; O.C.G.A. § 17-8-57**

Mutually Exclusive Verdicts; State's Right to Appeal

State v. Owens, S14A0889 (11/17/14)

Owens was indicted on charges of malice murder, felony murder (aggravated assault), felony murder (cruelty to a child in the first degree), aggravated assault, and cruelty to a child in the first degree. The jury acquitted her of malice murder, found her guilty on all other charges in the indictment, and found her guilty of the lesser included offense of involuntary manslaughter (O.C.G.A. § 16-5-3(a)). The trial court sentenced her to serve ten years on the conviction for involuntary manslaughter. The State appealed, contending that the trial court erred when it failed to sentence Owens on the convictions for felony murder, rather than on her conviction for the lesser included offense of involuntary manslaughter. Owens challenged the State's right to appeal.

The Court stated that a judgment entered on mutually exclusive verdicts is void and the remedy for a judgment entered on convictions

based on mutually exclusive verdicts is to reverse the judgment, set aside the verdicts at issue, and remand for a new trial. Verdicts are mutually exclusive where a guilty verdict on one count logically excludes a finding of guilt on the other.

Verdicts on felony murder and involuntary manslaughter are not mutually exclusive as a matter of law. However, such verdicts are mutually exclusive when the felony murder verdict requires a finding of criminal intent to commit the underlying felony and the involuntary manslaughter verdict requires a finding of criminal negligence (i.e., reckless conduct). Here, Owens was charged on counts of felony murder which required a showing that the underlying felony was committed with intent. When the jury was instructed on felony involuntary manslaughter, it was given the option to choose the underlying predicate of simple battery, which requires criminal intent, or reckless conduct, which requires criminal negligence. The Court found that while none of these instructions were in error, after the verdict form was returned and the jury was dismissed, it was impossible to determine whether the jury found Owens guilty of felony involuntary murder based on simple battery or based on reckless conduct. This lack of specificity created a reasonable possibility that the jury found Owens guilty of felony involuntary manslaughter based on reckless conduct. Thus, the verdict was void.

In so holding, the Court rejected Owens contention that the State had no right to appeal. Because the judgment of conviction entered in this case was void, the State's appeal was authorized by O.C.G.A. § 5-7-1(a)(6) and the Court had jurisdiction to review the case on the merits.

Murder; Concealing a Death

Walker v. State, S14A0674 (11/17/14)

Appellant was convicted of the murder of his girlfriend, Ramona, the murder of Tyler, Ramona's infant son, and concealing the death of Ramona. He contended that the evidence was insufficient to support his convictions. The evidence showed that Ramona's mother shared an apartment with the two victims. She left for an overnight visit out-of-town. When she returned the following evening, she found Tyler lying in his crib, dead. She found Ramona on a sofa in the living room, also dead. The Court agreed that the evidence was insufficient with regard to the murder of Tyler and the concealing of Ramona's death.

First, the Court stated, to prove unlawful concealment, the State had to show that appellant, "by concealing the death of [Ramona], hinder[ed] a discovery of whether or not [she] was unlawfully killed." O.C.G.A. § 16-10-31. That is, the State had to prove that appellant actually concealed the fact of her death, and it had to establish that his doing so delayed or otherwise hindered the discovery that her death was an unlawful one. The Court rejected the State's contention that the element was satisfied by proof that appellant moved the body of Ramona from the floor to the sofa and that he turned off a night light in the apartment before leaving. The Court also rejected the State's argument that evidence of the back door being locked also showed concealment. Finally, the Court rejected the State's argument that appellant killed Tyler to prevent the baby from crying and attracting the neighbors.

Second, the Court found the evidence to be insufficient to prove that the conduct of appellant caused Tyler's death. The Court noted that the State elected not to charge appellant with the malice murder of Tyler or felony murder predicated on a felonious assault upon the baby. Instead, the State specifically charged appellant with a felony murder of Tyler predicated on the murder of Ramona and the unlawful concealment of her death. To authorize a conviction under this particular theory of prosecution, the State had to prove beyond a reasonable doubt that appellant caused the death of Tyler "in the commission of" these specific predicate felonies. But, there was no proof that the murder of Ramona proximately caused Tyler's

death and the Court noted, it had already determined that the evidence was insufficient to prove the concealment charge. Thus, the evidence was legally insufficient to sustain the conviction for the felony murder of Tyler as charged in the indictment.

Miranda; Renewed Contact with Suspect

Mack v. State, S14A1168 (11/17/14)

Appellant was charged with murder and related offenses. He contended that the trial court erred in denying his motion to suppress his confession. The Court granted him an interlocutory appeal and reversed. The evidence showed that on Nov. 1, appellant was taken into custody and questioned after being informed of his *Miranda* rights. Appellant insisted an unidentified third party shot the victim. Appellant told the officers during the course of this interrogation that he was done talking with them. The officers continued to interrogate him, but appellant stuck to his story until 5:10pm when the interview ceased. On Nov. 2, at 10:00am, appellant was brought in to continue the interrogation. He was again read his *Miranda* rights and although he changed his story slightly, he continued to deny being the shooter. This interview was concluded at 11:54am. The last interview occurred ten minutes later when appellant requested to speak to the officer and after being *Mirandized* a third time, admitted to shooting the victim.

The Court found that appellant unambiguously and unequivocally invoked his right to remain silent when he stated during the November 1 interview, "I'm done. I have no more to say. I'm done. Let's ride." Accordingly, any statements appellant made during the November 1 interview after invoking his right to remain silent were improperly obtained and must be suppressed.

The Court found that the admissibility of the statements made during the November 2 interviews was a more complicated issue, as it is clear that an accused's assertion of his right to remain silent effects neither a "permanent immunity from further interrogation" by the police nor a "blanket prohibition" on later statements made voluntarily by the accused. Rather, the admissibility of statements obtained after the person in custody has decided to remain silent depends under *Miranda* on

whether his right to cut off questioning was "scrupulously honored" by law enforcement authorities. Here, the Court found, given the investigators' disregard of appellant's right when initially invoked on November 1 and the relatively short interval between that time and the resumption of questioning the next day, the interview initiated by the police on the morning of November 2 was improper, and all statements made by appellant therein were inadmissible.

Finally, the Court found that the admissibility of the second interview on November 2, in which appellant finally confessed to the murder, turns on whether this interview was "initiated" by appellant. After discussing the law in other jurisdictions, the Court stated as follows: "[W]e now expressly adopt this rule: A suspect will be considered to have 'initiated' renewed contact with law enforcement authorities, so as to permit further interrogation, only if the renewed contact by the suspect was not the product of past police interrogation conducted in violation of the suspect's previously-invoked rights." And applying this new rule here, the Court found that the State failed to satisfy its burden to establish an effective "initiation" by appellant. Accordingly, the Court held, all statements appellant made to police on November 1 and 2 after he invoked his right to remain silent on November 1, were improperly obtained and must be suppressed.

Statements; Right to Counsel

Francis v. State, S14A0877 (11/17/14)

Appellant was convicted of murder and related offenses. He argued that the trial court erred in denying his motion to suppress his custodial statement. The evidence showed that while appellant was being interviewed, counsel for appellant appeared at the sheriff's office and asked the prosecutor if he could speak with appellant. The prosecutor responded that she would not inform appellant of his counsel's presence or interfere with the investigation. The attorney waited with appellant's family and made other law enforcement personnel at the office aware of his presence, but he was never allowed to meet with appellant. Although the agent interviewing appellant testified that he took several breaks and conferred with other individuals at the sheriff's office, he did not recall ever being advised that the attorney was

there or wanted to speak with appellant. After a break in the interrogation, the agent asked appellant if he still wished to speak with him. Appellant said, "I can't afford an attorney, so." To which, the agent responded, "Sir, all I can tell you is you . . . you understand your rights, right?" The interview then continued.

Appellant argued that his attorney's presence at the sheriff's office combined with his equivocal statement that he could not afford an attorney were sufficient to invoke his right to counsel. The Court disagreed. First, the Court found, in order for a suspect to properly invoke his right to counsel during a custodial interrogation, he must articulate his desire to have counsel present sufficiently clearly that a reasonable police officer in the circumstances would understand the statement to be a request for an attorney. Appellant's statement did not rise to this level.

Second, counsel could not invoke appellant's right to an attorney for him. The rights guaranteed under the Fifth and Sixth Amendments are personal and must be invoked or waived by the individual defendant. Without having consulted appellant, and acting on his own, the attorney here was not empowered to invoke appellant's personal right to counsel. Moreover, events occurring outside of appellant's presence, which were entirely unknown to him, had no bearing on appellant's capacity to waive his rights. Although it likely would have been useful to appellant to know that an attorney retained for him was present at the sheriff's office, police are not required to supply a suspect with a flow of information to help him calibrate his self-interest in deciding whether to speak or stand by his rights. Thus, appellant failed to show that his equivocal statement about not being able to afford an attorney or his attorney's presence at the sheriff's office, either when viewed separately or in combination, invoked his right to counsel. Accordingly, the Court concluded, the trial court did not err in denying appellant's motion to suppress his custodial statement.

Grand Jurors; Indictments

Bigbams v. State, S14A1464, S14A146 (11/17/14)

Appellants were convicted of felony murder and other related offenses. They contended that the indictment was void because an elected official served on the grand

jury that returned it. At the motion for new trial hearing, the parties stipulated that a city council member served on the grand jury that indicted them. O.C.G.A. § 15-12-60(b) says that "[a]ny person who holds an elective office in state or local government or who has held such office within a period of two years preceding the time of service as a grand juror shall not be eligible to serve as a grand juror." And under Georgia law, the incompetency of one grand juror renders an indictment void, no matter how many unexceptionable jurors join with him in finding the bill.

However, the Court stated, to be cognizable, most attacks on an indictment, including a challenge to the composition of the grand jury that returned it, must be brought within ten days of arraignment, unless the trial court extends that deadline. Here, the Court found, appellants did not challenge the indictment on the ground that the grand jury was illegally constituted until they filed amended motions for new trial more than seven years after the statutory deadline for such a claim. And the trial court did not grant an extension of that deadline. Appellants therefore waived their challenge to the indictment based on the composition of the grand jury.

Line-ups

Washington v. State, S14A1327 (11/17/14)

Appellant was convicted of murder and related offenses. He contended that the trial court erred in allowing a witness's defense attorney to testify regarding the manner in which a photo lineup was presented to his client. Specifically, appellant contended that the lawyer bolstered his client's testimony. The Court disagreed.

The Court stated that it is improper to allow one witness to testify regarding the veracity of another. But, the Court found, this did not happen here. Instead, the defense attorney, who was present during the photo lineup, testified that (1) detectives read his client an admonition prior to the lineup; (2) his client was neither pressured nor instructed whom to choose; (3) his client immediately chose appellant; and (4) detectives did not inform his client that they had appellant's DNA. Thus, the Court concluded, contrary to appellant's arguments, the defense attorney's testimony did not directly comment on

the credibility of his client's testimony. As a result, the admission of the defense attorney's testimony was proper.

Venue

Jones v. State, A14A1271 (10/30/14)

Appellant was convicted of aggravated battery-family violence, criminal trespass, fleeing and attempting to elude police officers, reckless driving, failure to stop at a stop sign, failure to maintain a single lane, operating an unregistered vehicle, and having taillights that did not work properly. The evidence showed that appellant assaulted his wife at their home in Athens-Clarke County. He then left the scene in his truck. After officers arrived on the scene, one of the neighbors spotted appellant's vehicle driving back to the residence. The police gave chase. Appellant led them through Jackson and Madison Counties before crashing his truck back in Athens-Clarke County. He was eventually apprehended.

Appellant argued that the State failed to prove that venue was properly laid in Athens-Clarke County where he was tried. The Court stated that venue is a jurisdictional fact and an essential element that the State must prove beyond a reasonable doubt for every crime. The State may use both direct and circumstantial evidence to prove venue. In general, defendants should be tried in the county where the crime occurred. Here, the Court found, one of the responding officers of the Athens-Clarke County Police Department directly testified that the residence where appellant and the victim lived was located in Athens-Clarke County. The officer's testimony was therefore sufficient to establish that venue for the offenses that appellant committed at the house, including the aggravated battery-family violence, occurred in that county.

With respect to the offenses relating to or arising out of the police chase, the Court noted that the responding officers testified that appellant drove away from his house that was located in Athens-Clarke County after the police spotted him, drove through Madison and Jackson Counties, and then drove back into Athens-Clarke County before crashing into a tree. But when a crime is committed in transit or in more than one county, Georgia law provides special methods for establishing venue. For example, a crime committed on or immediately adjacent to a boundary line

between two counties is considered committed in either county. Moreover, in any case where it cannot be determined in what county a crime was committed, it shall be considered to have been committed in any county in which the evidence shows beyond a reasonable doubt that it might have been committed. Furthermore, venue for a crime involving a vehicle may lie in any county through which the vehicle traveled. Accordingly, the Court held, because there was testimony that appellant's vehicle traveled in Athens-Clarke County during the course of the police chase, there was sufficient evidence for the jury to find that venue was proper in that county.

Theft by Receiving; Competent Evidence

Reeves v. State, A14A1009 (11/4/14)

Appellant was convicted of burglary, theft by receiving (felony), theft by receiving (misdemeanor) and obstruction. The evidence showed that appellant was caught after burglarizing one victim's apartment. A subsequent investigation led to law enforcement finding him in possession of other victims' property.

Appellant contended that the evidence was insufficient to support his conviction for the misdemeanor theft by receiving. The Court agreed. A police officer testified that he was able to determine that property found at the apartment of appellant's girlfriend was that which had been previously reported stolen by a victim, but that victim did not testify at trial. Thus, the Court found, there being no competent evidence to show that the property had been stolen—only that it had been reported stolen—appellant's conviction on this count could not stand.

Right of Confrontation; 911 Calls

Owens v. State, A14A0980 (11/3/14)

Appellant was convicted of felony obstruction, possession of a knife during the commission of a felony, and disorderly conduct. The evidence showed that the victim called 911 following a domestic incident with appellant. The victim stayed on the line with 911 and described what was happening as he left the house to get away from appellant. When told that officers were 10 minutes away,

the call was disconnected. But the victim immediately called back and stayed on the line until he saw the officers arrive.

Appellant argued that the trial court violated his constitutional right to confront the witnesses against him when it admitted the 911 calls into evidence even though neither the victim nor the operators were available to testify at trial. The Court found, however, that because the record supported the trial court's determination that the primary purpose common to both of the victim's 911 calls was to seek assistance in the course of a situation involving immediate danger to him, and because the trial court properly redacted those portions of the calls arguably involving the victim's narration of past events and his assessment of appellant's character, the court did not err when it concluded that the 911 calls were non-testimonial.

Having determined that the calls were non-testimonial, the Court then looked at whether the calls fell under an exception to the rule against hearsay. The Court found that the 911 calls were admissible under the present-sense impression exception to the rule against hearsay. Thus, the trial court did not err in admitting the two calls.

Judicial Comments; O.C.G.A. § 17-8-57

Rouse v. State, S14A1165 (11/17/14)

Appellant was convicted of felony murder and robbery. The record reflected that during its preliminary instructions to the venire, the trial court commented as follows: "This process this morning is what[] we call voir dire. Voir dire just simply means to speak the truth. This means that you will be hearing about a case, which is a murder case, that happened in Muscogee County, and you'll be asked questions about this case." Appellant contended the trial court violated O.C.G.A. § 17-8-57 by opining that venue was proper in Muscogee County.

A divided Supreme Court (4-3) agreed. The court's statement that jurors would be hearing a case that happened in Muscogee County clearly and unambiguously suggested that venue in Muscogee County had been established or was not in dispute in this case. Venue is a jurisdictional element that must be proved by the State beyond a reasonable doubt in every criminal case, and the determination

of whether venue has been established is an issue soundly within the province of the jury. Thus, the Court found, when, as in this case, a trial judge makes a statement to jurors, however inadvertent or unintentional, informing them that a crime occurred in a particular county, i.e., a particular venue, the making of the statement violates § 17-8-57 because it could be construed as a comment regarding a required element of the State's case. That the critical element about which the comment is made is a jurisdictional element of the State's case makes no difference for purposes of § 17-8-57; a comment made by a trial court affirmatively establishing a disputed element the State has the burden of proving at trial is error, and the Court cannot surmise whether it may have caused actual prejudice to the defendant. According, because the language of the statute is mandatory that any violation of § 17-8-57 requires a new trial, the Court reversed appellant's convictions.