

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING NOVEMBER 23, 2012

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## THIS WEEK:

- **Similar Transaction; Child Molestation**
- **Voir Dire; Death Penalty**
- **False Evidence; Due Process**
- **Constitutional Right to a Speedy Trial; Right to Direct Appeal**
- **Voir Dire; Batson**
- **Merger; Aggravated Assault**
- **New Trial**
- **Authority to Modify Sentence**
- **Mistrial; Closing Argument**

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### **Similar Transaction; Child Molestation**

*Sandifer v. State, A12A1581, (11/19/12)*

Appellant was convicted on five counts of aggravated child molestation, four counts of child molestation, and two counts of enticing a child for indecent purposes. Appellant argued that the State's introduction of evidence of similar transactions should have been denied because the State's Rule 31.3 notice failed to specify the purpose for which the State sought to use that evidence. The record showed that prior to trial, the State filed a Rule 31.3 Notice announcing its intent to introduce evidence of similar transactions, listing "child molestation" that occurred at the address where appellant had lived with a former girlfriend. The trial court held a hearing at which it received testimony concerning appellant's molestation of three girls at the address for the purpose of admitting the evidence to show appellant's

"bent of mind and course of conduct." The trial court allowed the evidence for those limited purposes. The Court held that the State is not required in its notice of intent to inform the defendant of the purpose for which it seeks to introduce similar transaction evidence. The Court also held that it is better practice for the State to include such information, but Uniform Superior Court Rule 31.3(B) and case law do not require such inclusion.

### **Voir Dire; Death Penalty**

*Ellington v. State, S12P0870 (11/19/12)*

Appellant was convicted of murdering his wife and two sons by blunt force with the "claw end" of a hammer. He was sentenced to death. Appellant argued that in precluding voir dire questioning of prospective jurors as to whether they would automatically impose the death penalty as opposed to another sentence was an abuse of discretion by the trial court. Appellant also argued that it was error to prohibit voir dire that addressed the fact that two of the victims were young children because that fact "was directly relevant to juror bias and ability to serve." The trial court found that appellant had sought to ask questions that required prospective jurors to pre-judge the case.

O.C.G.A. § 15-12-133 proscribes the voir dire rules, specifically that either party has the right to inquire about "any fact or circumstance indicating any inclination, leaning, or bias which the prospective juror might have respecting the subject matter of the action..." In addition, parties are entitled to ask a prospective juror if he or she would automatically impose a particular sentence upon conviction, regardless of the facts and circumstances of the case. *Morgan v. Illinois*, 504 U.S. 719, 735 (1992). However, a party cannot "outline" a case in an attempt to have

jurors commit to a specific outcome based on specific facts of a case.

The Court held that appellant was entitled to ask whether the prospective jurors would automatically vote for a death sentence in any case in which two murder victims were young children, regardless of any other facts or legal instructions. One of the factors the Court stressed was that the State, after objecting to any inquiry about the juror's views as to child victims, prosecuted the case with a focus on the fact that the victims were children and used that fact in advocating for the death penalty. The Court held that the "subject matter of the action" extends beyond crimes charged and their sentences to include "critical facts of the case that experience, reason, and common sense indicate will be so influential" on jurors as to make them unable to consider all of the evidence. The Court also recognized three limitations of this holding, specifically (1) the issue is not whether the prospective juror will consider a specific fact to be very important or worthy of great weight; the problem is with prospective jurors who, if asked about a critical fact involved in a case, admit that they would automatically return a certain verdict, regardless of other facts and regardless of the law; (2) the voir dire questions must be framed properly to reveal the prospective juror's general view on the critical fact and whether that view is so strong as to substantially impair the juror in considering all sentencing options; and (3) decisions as to what facts of a particular criminal cases qualify as "critical" in terms of risking juror partiality can be difficult and context-specific and thus, it would be appropriate for the trial court to elicit proposed questions in this area well before voir dire commences and to rule on the issue pretrial so that it could be considered by the Supreme Court on interim review if the trial court has any doubt about its rulings. In cases not involving the death penalty that present particularly difficult issues in this area, trial court rulings may be appropriate for interlocutory appeal under OCGA § 5-6-34 (b).

Because appellant was improperly limited in voir dire, the Court reversed his three death sentences and remanded the case to the trial court for resentencing.

## **False Evidence; Due Process**

*Davis v. State, S12A1793 (11/19/12)*

Appellant was convicted of malice murder. He argued that he was denied due process of law because the State used "false evidence" - phone records and testimony from a T-Mobile employee and a detective to determine the immediate location of the caller. At trial, appellant made no objection to any of the testimony, but introduced an affidavit of an expert witness at the hearing on his motion for new trial to allegedly show that based on an outgoing call from a cell phone that the caller was using, one could determine the immediate location of both the caller, and the person called, appellant.

The Court held that appellant waived his argument for purposes of appeal because he did not raise the due process grounds at trial or in the motion for new trial, and the Court will not consider arguments raised for the first time on appeal. Moreover, due process guarantees "fundamental fairness" for a criminal defendant, and in order to declare a denial of it, a court must find that the absence of that fairness fatally infected the trial; the acts complained of must be of such quality as necessarily prevents a fair trial. Appellant was not prevented in any way from challenging the State's evidence that he contends was incorrect, but simply failed to challenge the evidence at all.

## **Constitutional Right to a Speedy Trial; Right to Direct Appeal**

*Sosniak v. State, S12A0799 (11/19/12)*

Appellant filed a direct appeal from an order denying his motion to dismiss his indictment on constitutional speedy trial grounds. O.C.G.A § 5-6-34(a)(1) authorizes direct appeals only from "final judgments [of the trial court], where the case is no longer pending in the court below." Orders related to speedy trial rights are not covered by this section, and the usual remedy for an order that does not terminate the case in the trial court is to seek a certificate of immediate review from the trial court and the file an interlocutory appeal. Therefore, the Court held, appellant's direct appeal must be dismissed for lack of jurisdic-

tion. In so holding, the Court overruled the holdings in *Callaway v. State*, 275 Ga. 332 (2002), and *Boseman v. State*, 263 Ga. 730, n. 1 (1994), explaining that both cases were wrong to allow a defendant the right to bring a direct appeal from a denial of a pre-trial motion for a constitutional speedy trial.

## **Voir Dire; Batson**

*Toomer v. State, S12A0976 (11/19/12)*

Appellant was convicted of malice murder and other crimes. He contended that the trial court erred in rejecting his *Batson* claim that the prosecutor used three peremptory strikes to exclude prospective jurors solely because of their race, violating his right to equal protection of the law. *Batson v. Kentucky*, 476 U.S. 79 (1986). A *Batson* challenge involves three elements: (1) the opponent of a peremptory challenge must make a prima facie showing of racial discrimination; (2) the proponent of the strike must then provide a race-neutral explanation for the strike; and (3) the court must decide whether the opponent of the strike has proven the proponent's discriminatory intent. Appellant argued that the State failed to offer sufficient race-neutral justifications for striking the jurors, and the trial court erred in failing to proceed through the third element of a *Batson* analysis.

At trial, the prosecutor told the court that he struck two of the jurors for "their demeanor," "seeming disinterest," and as to the third, "that I felt that the juror had a pattern of sympathy in responding to [defense counsel's] questions..." Appellant did not dispute that these explanations were facially race-neutral, but that they were inadequate for *Batson's* second element because they were "based entirely upon... demeanor," and demeanor is not "the kind of concrete, tangible, race-neutral, case-related and neutrally applied reason" that is sufficient to overcome a *Batson* challenge. In support thereof, appellant cited *Veasey v. State*, 311 Ga.App. 762, 766, n. 11 (2011).

The Court held that the appellant misstated the law. "Although a striking party's explanation for the exercise of a peremptory strike may be superstitious, silly, or implausible, the striking party's burden is satisfied as long as the articulated reason is race or gender-neutral." The Court specified that the explanation for the strike only needs only to be facially race-neutral, and any statements

to the contrary in *Veasey, Parker v. State*, 219 Ga.App. 361, 364 (1995), *Blair v. State*, 267 Ga. 166, 166 (1996), *Turner v. State*, 267 Ga. 149, 151 (1996) and any other Georgia case are “hereby disapproved.” The Court further emphasized that case-relatedness, specificity, and similar considerations remain relevant to a *Batson* challenge, and that if the proponent of the strike carries its burden by providing a race-neutral explanation for the peremptory strike, the trial court must advance to the third element of the *Batson* analysis and decide whether the opponent of the strike has proven the proponent’s discriminatory intent in light of “all the circumstances that bear upon the issue of racial animosity.” *Snyder v. Louisiana*, 552 U.S. 472, 478 (2008).

### **Merger; Aggravated Assault** *Sears v. State, S12A1211 (11/19/12)*

Appellant was convicted of felony murder, aggravated assault, and possession of a knife during the commission of a felony. He was sentenced to imprisonment for life for felony murder, imprisonment for a consecutive term of 20 years for aggravated assault, and imprisonment for a consecutive term of five years for possession of a knife during the commission of a felony. Appellant argued that the trial court erred when it failed to merge the aggravated assault into his conviction for felony murder, and when it imposed a sentence of 20 years of imprisonment on the aggravated assault conviction, to be served consecutive to the sentence of life in prison for the felony murder conviction. The Court agreed. When the only murder conviction is for felony murder and a defendant is convicted of both felony murder and the predicate felony of the felony murder charge, the conviction for the predicate felony merges into the felony murder conviction.

Here, neither the indictment nor the court’s charge to the jury specified that appellant was being tried for two separate aggravated assaults. Nevertheless, the State argued that appellant committed two separate aggravated assaults, one that caused non-fatal injuries and was the basis of the aggravated assault conviction, and one that caused fatal injuries and was the basis for the felony murder conviction. In determining whether there was an aggravated assault independent of the fatal assault, consideration is given to both the order and timing of the assaults. When a victim suffers

multiple wounds inflicted in quick succession, each infliction of injury does not constitute a separate assault. However, a separate judgment of conviction and sentence is authorized if a defendant commits an aggravated assault independent of the act which caused the victim’s death. When a series of stab wounds are separated by a “deliberate interval” and a non-fatal injury is sustained prior to the interval and a fatal injury sustained after the interval, the earlier, non-fatal infliction of injury can serve to support a conviction for aggravated assault.

Here, however, there was no evidence of a “deliberate interval” separating the infliction of any non-fatal wounds and any fatal wounds. Instead, the undisputed evidence was that the wounds were delivered in quick succession. The Court therefore determined that the jury could not have found appellant guilty of one aggravated assault to support the felony murder conviction and of a separate aggravated assault to support an independent aggravated assault conviction.

### **New Trial**

*State v. Harris, S12A1889 (11/19/12)*

The State appealed the grant of a new trial for Harris, who was found guilty of felony murder and related crimes. The record showed that a grand jury returned a 17-count indictment against Harris and four other men. Harris was named in all but four of the counts, which included charges of malice and felony murder, aggravated assault with a deadly weapon, conspiracy, criminal damage to property, and firearms possession. The defendants were all tried together, and the State argued that the crimes were related and part and parcel of the same conspiracy. Harris was convicted and moved to vacate his convictions and for a new trial. By the time of the motions, the presiding judge had retired, and a different judge considered the motion for a new trial and granted him a new trial on general grounds, finding that the verdicts were decidedly and strongly against the weight of the evidence.

O.C.G.A. § 5-5-50 states: “The first grant of a new trial shall not be disturbed by an appellate court unless the appellant shows that the judge abused his discretion in granting it and that the law and facts require the verdict notwithstanding the judgment of the presiding judge.” Generally, the Court stated, the trial court is given a significant amount of defer-

ence to exercise its sound discretion because it was an observer of what transpired at trial. Although it is certainly true that where, as here, the judge who hears the motion for a new trial is not the same judge as the one who presided over the original trial, the discretion of the successor judge is narrower in scope. Nevertheless, the Court is restricted to reversal of the grant of the new trial only if the successor judge abused his or her discretion. Upon review of the record, the Court noted that it appeared that prior to rendering the decision to grant Harris a new trial, the successor judge thoroughly reviewed the case, and presided over a full hearing in the matter. The judge made independent evaluations not only about Harris’s involvement in the crimes but about the culpability of the co-defendants, and concluded, *inter alia*, that Harris got “caught up” in the “neighborhood feud” and was “just a peripheral figure.” Under these circumstances, the Court found no abuse of the successor court’s discretion in granting Harris a new trial on the general grounds.

### **Authority to Modify Sentence**

*McClendon v. State, A12A1040 (11/20/12)*

Appellant argued that the trial court lacked subject matter jurisdiction over the modification of his punishment and erred in granting the State’s “Motion to Hold as Void a Nullity the Orders of the Sentencing Review Panel Dated January 18, 2002.”

The record showed that in 1996, appellant was convicted of voluntary manslaughter and given the maximum sentence of 20 years to serve in confinement. In 2001, he was granted an out-of-time application for review from the Sentence Review Panel. In 2002, his sentence was reduced by the Panel to “20 years, serve 15.” Appellant was released from prison in 2010, after serving 15 years, and apparently ordered to report to the State Probation Department.

The State filed a “Petition for Modification / Revocation of Probation,” alleging that Appellant had violated his probation, and after a hearing, the trial court entered an order which revoked the “balance” of appellant’s 20 year sentence. Appellant then filed a motion to void the order revoking his probation pursuant to OCGA § 17-9-4, arguing that, pursuant to the Sentence Review Panel’s modification order, he was not on probation. Subsequently,

the State filed a “Motion to Hold as Void and a Nullity the Orders of the Sentencing Review Panel Dated January 18, 2002.” After a hearing, the trial court denied appellant’s motion, granted the State’s motion, and entered an order voiding the Review Panel’s order upon finding that the panel had lacked authority to modify appellant’s sentence and that his original sentence of twenty years in confinement was valid. The trial court found that the Review Panel lacked subject matter jurisdiction over appellant’s application in 2002 because it was not filed within the 30-day filing limitation provision in former OCGA § 17-10-6 (a), and that there was no evidence in the record that appellant had been granted an extension of time to file the application. The trial court also held that the Review Panel did not have authority to “modify a straight prison time sentence as to make it a split sentence.”

The Court held that while the Review Panel did not have the authority to modify a sentence to include probation where the initial sentence did not provide for probation, it was authorized to reduce the overall sentence from twenty years to fifteen. The Court also held that because appellant’s sentence was longer than twelve years and subject to a sentence review under O.C.G.A. § 17-10-6(a), and the evidence in the record showed that his application for an out-of-time review was granted, the trial court’s re-invested subject matter jurisdiction over the questioning of the sentence was improper. The trial court’s order reinstating appellant’s 20-year sentence and voiding the order of the Panel was therefore reversed. The Court directed the trial court to reinstate the Panel’s sentence of 15 years to serve in confinement. Consequently, appellant’s sentence was fully served when he was released on September 25, 2010.

## ***Mistrial; Closing Argument***

*McCabe v. State, A12A0861 (11/21/12)*

Appellant was charged with DUI. At trial, the court granted the State’s motion for a mistrial on the basis of defense counsel’s introduction of inadmissible evidence in closing argument. Appellant thereafter filed a plea in bar arguing that the grant of the mistrial was

improper and therefore, her retrial should be barred on the basis of double jeopardy.

If the trial court declares a mistrial over the defendant’s objection or without her consent, the defendant may be retried, but only if there was a “manifest necessity” for the mistrial. The record showed that after both sides rested, the State moved for a mistrial based on documentary evidence introduced by the defense that was not relevant to the operation of an Intoxilyzer 5000 machine because it concerned the machine after appellant’s test. The State asserted that introduction of these documents had tainted the jury’s perspective by suggesting that there were problems with the machine when appellant was tested. Outside the presence of the jury, the trial court allowed the inspection certificates (which concerned the machine prior to appellant’s test) but ruled that subsequent documentation of tests taken after appellant’s test were inadmissible. During closing arguments, defense counsel repeatedly made allusions to the fact that the machine was not functioning properly and referred to the documents that had been deemed inadmissible, suggesting that the State had been improperly concealing evidence. The State objected, and outside of the presence of the jury, again moved for a mistrial. The trial court granted the mistrial, finding that the defense counsel’s comments were “immensely prejudicial” and that there was no curative instruction available to the court. Based on this record, the Court found, there was indeed a manifest necessity for the trial court to grant a mistrial. Therefore, the trial court properly denied the appellant’s plea in bar on the basis of double jeopardy.