

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 18, 2014

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THIS WEEK:

- **Similar Transactions; Closing Arguments**
- **Rule of Lenity**
- **Indictments; Accident**
- **Search & Seizure**

Similar Transactions; Closing Arguments

Peoples v. State, S13A1893 (4/10/14)

Appellant was convicted of felony murder, burglary and other crimes. The evidence showed that appellant and three others committed a home invasion in Douglas County. Appellant argued that the trial court erred by admitting evidence of his prior bad act, and that even if this prior act could be admissible as similar transaction evidence, the State failed to give written notice of its intent to use such evidence as required by Uniform Superior Court Rules (USCR) 31.1 and 31.3(A). The Court agreed.

The record showed that at trial, the State sought to introduce evidence related to an armed robbery in Buckhead which occurred 10 days prior to the home invasion and in which appellant had been implicated. The State maintained that it was not seeking to introduce the Buckhead robbery evidence as similar transaction evidence but rather to prove appellant's identity. Specifically, the State sought to link him to the gun that was used in both shootings. Because the State maintained that the evidence was not similar transaction evidence, it did not provide notice of its intention to offer the evidence as required by USCR 31.1 and 31.3(A). The State did, however, provide appellant with the

relevant police reports in pretrial discovery, included the witnesses on the State's witness list, and advised defense counsel that the State might seek to offer the evidence as the trial progressed. The trial court agreed with the State's position, ruling that the evidence was "not a similar transaction, but evidence of the crime charged."

The Court, however, disagreed. Citing Milich's Georgia Rules of Evidence, the Court found that evidence about the Buckhead robbery was extrinsic to the crimes charged; it did not bear directly on appellant's alleged conduct in this case, nor was it intrinsic to, or inextricably intertwined with, the home invasion. Thus, the Buckhead robbery evidence was not part of any transaction that formed the basis for the charges against appellant arising out of the home invasion ten days later. Such evidence is generally inadmissible unless it is properly admitted as a similar transaction.

The Court found that the evidence was admissible as a similar transaction, but because the State failed to give the proper notification and the trial court failed to hold the proper hearing prior to its admission under USCR 31.1 and 31.3(A), the trial court erred in admitting the Buckhead evidence. However, the Court found, not all trial errors require reversal. First, the Court found that the evidence against appellant was overwhelming. Second, the evidence undoubtedly was somewhat damaging to appellant, since it implicated him in another robbery in which a victim was shot with the same gun later used in the home invasion and shootings. But, the Court found, the link was only inferential, based on the presence in appellant's bedroom 12 days later of one of the Buckhead victim's stolen possessions; the gun was never found

and the Buckhead victims were unable to identify appellant in photo lineups or at trial. Moreover, while the Buckhead victim testified that the gunman was left-handed, like appellant, one of the home invasion witnesses identified appellant's codefendant in a photographic lineup as the man who shot him and testified that the shooter was right-handed. Finally, while the prosecutor argued to the trial court that he needed the Buckhead evidence admitted, he did not emphasize the evidence in closing arguments, not mentioning it at all in his initial argument and, in rebuttal closing, listing it as only one of the five different types of evidence that the jury could rely on to convict appellant even if they chose to entirely disbelieve a co-indictee's testimony. Thus, the error was harmless.

Appellant also contended that the trial court committed reversible error by allowing the prosecutor to refer to individual jurors by name, and to make an inappropriate demonstration during closing arguments. The Court noted that appellant did not contemporaneously object at trial when the prosecutor first mentioned the names of individual jurors in closing arguments, and he therefore waived appellate review of this issue to that extent. But nevertheless, the Court found, appellant did not establish reversible error. Citing *Atlanta Stove Works, Inc. v. Hollon*, 112 Ga.App. 862 (1965), the Court stated that while trial lawyers have always made arguments with the backgrounds of specific jurors in mind, "we agree that remarks addressed to jurors by name during trial are almost always unnecessary and may put the fairness of the trial at risk; such remarks therefore should be avoided by counsel for all parties, particularly prosecutors in criminal cases, and may be precluded by the trial court in its discretion." However, the mere mention of jurors by name does not mandate reversal. Where, as occurred here, references to individual jurors were made incidentally in the course of illustrating points of law, rather than in an effort to draw the attention of the named jurors or the entire jury to facts not in evidence or to other improper considerations, it was within the trial court's discretion, after sustaining an objection to such comments, to deny a motion for mistrial. Under these circumstances, therefore, the trial court would not have abused its discretion in denying a mistrial, had a contemporaneous objection

and motion for mistrial been made based on the prosecutor's references to jurors by name.

As for the allegedly improper demonstration, the Court found that as the prosecutor began his rebuttal argument, he approached the jury box and said, "Mr. Turner, would you hand me that folder that's down at the bottom right there? There's not a folder down there, is there? Ms. Brown, don't look for a folder." Having heard defense counsel's closing, the prosecutor's point was that questions asked by counsel do not constitute evidence; only the witnesses' answers are evidence. The trial court overruled appellant's objection, saying that the prosecutor "was making a point by illustration." Thus, the Court concluded, appellant failed to show that the trial court abused its discretion by permitting this demonstration of a legal principle.

Rule of Lenity

McNair v. State, A12A0066 (3/25/14)

In *McNair v. State*, 293 Ga. 282 (2013), the Supreme Court remanded the case to the Court of Appeals to determine whether, under the particular facts of the case there exists ambiguity in the statutes defining the crimes of identity fraud (O.C.G.A. § 16-9-121) and financial-transaction-card theft (O.C.G.A. § 16-9-31) such that the trial court was required to apply the rule of lenity when sentencing appellant.

Appellant argued that the General Assembly intended for the financial-transaction-theft statute, and indeed the entirety of Title 16, Chapter 9, Article 3, to govern only those crimes involving the actual physical possession or use of a financial-transaction card. On the other hand, the identity-fraud statute, and the entirety of Title 16, Chapter 9, Article 8, was designed to address those crimes that do not require an actual financial-transaction card, but rather involve the acquisition and possession of identifying information, i.e. the financial-transaction-card numbers, which can be used to fraudulently obtain access to, mostly electronically, another person's credit or assets. Thus, appellant argued, the financial-transaction-card-theft statute addresses a narrower range of conduct, and "for purposes of statutory interpretation, a specific statute will prevail over a general statute, absent any

indication of a contrary legislative intent [as reflected by the plain meaning of the relevant text]." Accordingly, appellant contended, the critical distinction between the two crimes at issue is the fraudulent possession and/or use of the tangible financial-transaction card itself (financial-transaction-card theft), as opposed to the numbers on the card independently of the card (identity fraud), and appellant committed only the former.

The Court found that both the financial-transaction-card-theft statute and the identity-fraud statute criminalize not only the unauthorized use of a financial-transaction card and/or its numbers, but also the fraudulent possession with intent to use the same. Thus, the Court noted, while the distinction made by appellant may be easily drawn after a suspect has unlawfully obtained and physically presented a financial-transaction card to a merchant in order to effectuate a fraudulent purchase, that distinction is less obvious when a suspect is found to be in the unlawful possession of numerous financial-transaction cards from one or more victims with the fraudulent intent to use, but prior to the actual use, of those cards. In such a situation, the Court held that it was "not prepared to categorically say that the General Assembly intended to eliminate all prosecutorial discretion and mandate that the suspect be charged exclusively with financial-transaction-card theft, as opposed to identity fraud."

Therefore, the Court stated, the question remained whether, under the particular facts of this case, an ambiguity exists between the financial-transaction-theft statute and the identity-theft statute such that the rule of lenity applies. Significantly, appellant was not accused of taking or using the victim's credit card, but of willfully and fraudulently possessing the credit card number without the victim's authorization and with the fraudulent intent to use that information. These same operative facts satisfy the essential elements of both O.C.G.A. § 16-9-31(a)(1) and O.C.G.A. § 16-9-121(a)(1), neither of which requires proof of any fact that the other does not. Thus, although there are other ways in which either crime could have been committed, appellant's conduct, as charged, subjected him to prosecution and sentencing under both O.C.G.A. § 16-9-31(a)(1) and O.C.G.A. § 16-9-121(a)(1). And because these statutes

provide different grades of punishment for the same criminal acts, appellant was entitled to the rule of lenity. Therefore, the Court reversed appellant's identity-fraud conviction and remanded the case for resentencing under the financial-transaction-card-theft statute, which mandates a lesser punishment.

Indictments; Accident

Durden v. State, A13A2138 (3/26/14)

Appellant was convicted of two counts of aggravated assault and aggravated battery. The evidence showed that appellant swung a sword at the victim and severely cut the victim's arm which she had raised in an attempt to ward off the attack. Appellant contended that the trial court erred by denying his general demurrer to the indictment. He argued that the two aggravated assault counts did not sufficiently allege any crime and thus, he could admit to the acts and not be guilty of a crime. The Court disagreed.

Count One of the indictment charged that appellant "did unlawfully make an assault upon the . . . [victim], with a sword, a deadly weapon in the manner used, by intentionally cutting the . . . [victim] with said sword, in an attempt to commit a violent injury upon said person." Count Two charged that appellant "did unlawfully make an assault upon the . . . [victim], with a sword, a deadly weapon in the manner used, by placing the . . . [victim], in reasonable apprehension of immediately receiving a violent injury, by cutting the . . . [victim] with said sword." The Court found that aggravated assault has two essential elements: 1) that an assault (as defined in O.C.G.A. § 16-5-20) was committed on the victim; and (2) that it was aggravated by (a) an intention to murder, to rape, or to rob, or (b) use of a deadly weapon. Here, the Court found, both aggravated assault counts included the assault element under O.C.G.A. § 16-5-20 and the aggravation element under O.C.G.A. § 16-5-21. In any event, the judge merged these two counts into the aggravated battery count and sentenced appellant only on the count of aggravated battery. By doing so, the trial judge rendered the convictions for aggravated assault void. Therefore, there was no error.

Appellant also argued that the trial court erred in denying his requested charge on accident and in preventing him from

arguing the defense of accident to the jury in his closing argument. First, the Court stated that to establish an evidentiary foundation for an instruction on the affirmative defense of accident, the defendant must admit the doing of the act charged but seek to justify, excuse, or mitigate it. Accordingly, if a defendant does not admit to committing any act which constitutes the offense charged, he is not entitled to a charge on the defense of accident. Here, the Court found, there was no citation to the record establishing that appellant admitted to cutting the victim's arm. Although the victim initially told the police that she had accidentally cut her arm on broken glass, this in no way provided evidentiary support for appellant's contention that the trial court should have charged the jury on the defense of accident. Thus, as appellant failed to establish an evidentiary foundation to authorize a charge on the defense of accident, the trial court did not err in denying his request.

Second, the Court held that the trial court did not err in instructing defense counsel that she could not argue during closing that appellant had committed the act, but that it was an accident. The Court noted that appellant did not testify at trial, and the trial court found that there was no other evidence supporting the affirmative defense. The trial court instructed defense counsel that it was permissible to argue that the State had failed to prove intent, specifically "whether or not the State has met its burden of proving that [appellant] intentionally committed the act." The Court noted that under O.C.G.A. § 17-8-75, trial courts have the duty to interpose and prevent attorneys from introducing facts or make statements about matters that were not placed in evidence. Accordingly, because there was no evidence to support an accident defense, the Court held that the trial court did not abuse its discretion in limiting appellant's closing argument on this ground.

Search & Seizure

State v. Richards, A13A2010 (3/27/14)

Richards was charged with VGCSA. The trial court granted his motion to suppress and the State appealed. A divided en banc Court reversed and remanded the case for further consideration.

The evidence showed that around noon, an officer observed a pickup truck parked at

a gas station pump located near a university campus and known for high drug traffic, particularly heroin. Richards and another man were just sitting in the truck, so the officer pulled up beside the driver's side and began a conversation with them. Both Richards, the driver, and his passenger stated that they were visiting a friend at the university, but were on their way home. During the conversation, the officer asked Richards and the passenger if either of them used any illegal drugs, and Richards responded that he had used oxycodone in the past and was on probation for drug charges. The officer then asked the men if they would mind showing him their arms. When Richards pulled up his sleeves, the officer saw track marks on his arms that did not appear to be fresh.

Meanwhile, two backup officers arrived in a patrol car and a second unmarked vehicle. One officer was in uniform and the other backup officer wore plain clothing, except for a police vest. After the backup officers arrived, the officer asked Richards if he had any drugs on his person or in the truck. Richards responded that there was a package of syringes in the truck for the passenger's diabetic grandmother. The passenger removed the syringes and gave them to the officer.

The officer then searched Richards' person, with his consent, and found \$250 in Richards' shirt pocket. When the officer asked Richards why he had the money, Richards responded that he was waiting to meet a drug dealer to buy a gram of heroin. Shortly thereafter, one of the backup officers performed a consent search of Richards' truck and found a small black overnight bag in the rear seat of the truck on the driver's side. The bag contained a five milliliter bottle of ketamine, a controlled substance.

The trial court granted the motion to suppress, finding that Richards was subjected to a seizure at the moment the officer asked him to roll up his sleeves to check his arms for needle track-marks. The trial court further found that the mere fact that Richards was stopped at a gas pump at noon in a high drug area and was on probation for drugs did not create the reasonable articulable suspicion necessary to justify the seizure, and that this unlawful seizure tainted Richards' subsequent consent to the search of his person and vehicle.

Citing *State v. Dukes*, 279 Ga.App. 247 (2006), the Court found that the conversation

between the officer and Richards was a first-tier encounter. Thus, the Court stated, in order for the officer's request to see Richards's arms to have been considered a seizure or second-tier encounter, the officer must have appeared to be asserting some authority, such as giving an order or a command. But here, the officer was not threatening nor did he use a show of force, and he did not touch Richards or employ language that would have made Richards believe he was compelled to comply with the request to roll up his sleeves. Instead, the evidence showed that the officer was simply engaged in a conversation with Richards and the other occupant at the time he asked the men to roll up their sleeves. There was no evidence that the men had been detained at this point. In fact, the record showed that the men were still in their vehicle during this time. A request to search made during the course of a first-tier encounter does not escalate the contact to a second-tier detention.

In so holding, the Court also noted that blocking a defendant's path or exit can also escalate a first-tier encounter into a second-tier detention. Here, however, the evidence was undisputed that the officer pulled alongside Richards's vehicle and was not blocking his exit. Furthermore, there was no evidence as to when the backup officers arrived or where they parked, and the trial court made no such finding. Rather, the trial court clearly based its ruling on the erroneous belief that the officer's mere request to see Richards' arms constituted a seizure. But, the Court emphasized, "This is not the law."

Nevertheless, the Court noted that the question of whether the arrival of the backup officers had any effect on Richards' subsequent consent to the search of his person and vehicle was not addressed by the trial court. In a consent search, the burden is on the State to demonstrate that the consent was voluntarily given, and not the result of duress or coercion, express or implied. Whether an individual's consent is, in fact, voluntary, is to be determined from the totality of all the circumstances under which consent was given. Accordingly, the case was remanded to the trial court to address the issue of whether the presence of the additional officers had any effect on Richards' subsequent consent to the search of his person and vehicle.