

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 22, 2016

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State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **Simple Assault; General Intent**
- **Guilty Pleas; Habeas Corpus**
- **Ineffective Assistance of Counsel**
- **Rule of Lenity; Merger**
- **Replacement of Jurors; Deliberations**
- **Motions to Reveal Confidential Informant**

Simple Assault; General Intent

Patterson v. State, S15G1303 (7/14/16)

Appellant was convicted of aggravated assault and other offenses. The indictment charged that appellant “did commit an act which placed another person, to wit: Nathaniel Lane Silvers, in reasonable apprehension of immediately receiving a violent injury, said assault having been committed with an object which when used offensively against a person, is likely to and actually does result in serious bodily injury, by driving a motor vehicle in the direction of Nathaniel Silvers, striking Mr. Silvers with said vehicle, and pinning him up against a mobile home with said vehicle.” Appellant’s conviction was affirmed by the Court of Appeals. *Patterson v. State*, 332 Ga.App. 221 (2015). The Court granted certiorari to determine whether the Court of Appeals erred in concluding that the crime of simple assault, as set forth in O.C.G.A. § 16-5-20(a)(2), does not require that the defendant have the specific intent to cause the alleged victim of the assault to suffer injury or the apprehension of injury. In a 4-3 decision, the Court held that the Court of Appeals was correct.

The Court stated that it has on multiple occasions noted that the crime of simple assault as set forth in O.C.G.A. § 16-5-20(a)(2), does not require proof of specific intent. Moreover, when squarely faced with a claim that a specific intent to cause apprehension is required when the defendant is alleged to have committed aggravated assault based on the victim’s reasonable apprehension of harm under O.C.G.A. § 16-5-20(a)(2), the Court has squarely stated that all that is required is that the assailant intend to commit the act which in fact places another in reasonable apprehension of injury, not a specific intent to cause such apprehension. Therefore, the Court of Appeals was correct in determining that the State was required to show that appellant intended to drive his van in the direction of Silvers, that Silvers was placed in reasonable apprehension of injury, and that the van was an object that when used offensively against a person, was likely to or actually did result in serious bodily injury. The State was not required to show an intent to injure or that appellant intended to place Silvers in reasonable apprehension of injury.

Guilty Pleas; Habeas Corpus

Lejeune v. McLaughlin, S16A0072 (7/14/16)

Appellant sought habeas relief for a second time before the Supreme Court. In his first appeal, the habeas court rejected his contention that his guilty plea to murder was not knowingly and intelligently entered because he never was adequately advised of his privilege against self-incrimination. The Supreme Court concluded that the habeas court’s findings on which it based its ruling that appellant knew of his right against self-incrimination were not supported by

the record and the court had improperly placed the burden of proof on the warden. It therefore remanded the case for a new evidentiary hearing with appellant bearing the burden of proof. On remand, the habeas court concluded that appellant was sufficiently aware of his right against self-incrimination and that his plea was thus entered knowingly and voluntarily. The Court reversed in a 4-3 decision.

The Court found that on remand the only new evidence relevant to whether appellant was advised of his right against self-incrimination was his testimony that, at the time of his guilty plea, he was not aware of his right against self-incrimination and that, at pre-trial hearings, when his attorneys mentioned his right against self-incrimination, he did not understand what that meant. Both of appellants' attorneys testified on habeas before the remand. The Court found that their testimony certainly did not refute appellant's testimony that he was unaware of his right against self-incrimination, and in fact, tended to support it. In any event, the habeas court did not rely on their testimony to conclude that appellant was aware of his right against self-incrimination.

Instead, the Court noted, the habeas court found that when appellant pled guilty, he was aware of the right against self-incrimination, because "he had been through years of preparation for a trial in which the death penalty was being sought, [including] two aborted trials." The habeas court cited *Parke v. Raley*, 506 U.S. 20, 37 (113 S.Ct. 517, 121 L.E.2d 391) (1992), for the proposition that a defendant's prior experience with the criminal justice system is relevant to the question of whether he knowingly waived constitutional rights. But, the Court found, in *Parke*, the prior experience on which the Supreme Court relied was a plea hearing in which the defendant was informed of the constitutional rights that he was waiving by pleading guilty. The *Parke* Court concluded that the state court did not err in inferring that based on the prior plea and other factors, the defendant was aware of his rights when he pled guilty to another crime two years later. Here, however, the record contained no evidence that appellant had a prior experience of being informed that he waives his right against self-incrimination by pleading guilty. Therefore, the Court concluded, under our existing due process test for the constitutional

validity of guilty pleas, appellant's plea was not entered voluntarily and knowingly and is constitutionally invalid.

Ineffective Assistance of Counsel

Fisher v. State, S16A0515 (7/8/16)

Appellant was convicted of malice murder and other crimes in a shooting death. At appellant's trial, the bulk of the evidence against him — including the only testimony directly identifying him as the shooter — came from David Lewis, who claimed that he was not involved in the crimes even though he admitted that he drove appellant and the victim to the crime scene, was present during the shooting, and drove appellant away afterwards.

Appellant contended that he received ineffective assistance of counsel in two respects. First, trial counsel failed to secure the attendance at trial of Clark, who knew Lewis because Lewis was his drug dealer; he also knew the victim and appellant, but he never saw Lewis and appellant together; he spoke to counsel by telephone before the trial and knew that counsel was appellant's attorney; he told Johnson that he saw Lewis flashing a revolver while looking for the victim to collect on a debt two or three days before the shooting; he gave Johnson his contact information but never again heard from Johnson; and he was available and willing to testify at appellant's trial but was not aware that the trial had been scheduled until it was over. Defense counsel's only explanation for his failure to subpoena Clark was that "since Mr. Clark was associated with [appellant], I attempted to have him just to show up on his own free will," although Clark indicated that he was never even notified of the trial date. The Court found that trial counsel was professionally deficient in failing to subpoena Clark or otherwise secure his attendance at trial.

Appellant also contended that defense counsel rendered deficient performance by failing to request an accomplice corroboration instruction pursuant to former O.C.G.A. § 24-4-8, which was in effect at the time of appellant's trial and said that in felony cases the testimony of a single witness whom the jury finds to be an accomplice is not sufficient to prove a fact. Trial counsel testified at the motion for new trial hearing that his failure to request such an instruction was a simple

"oversight," adding, "It certainly was not trial strategy; [it was] something that I overlooked to request of the court." The Court found that given the importance of Lewis's testimony to the State's ability to prove its case against appellant, it would have been entirely unreasonable for trial counsel to make a "strategic decision" to approve the trial court's instruction to the jury that "generally, the testimony of a single witness, if believed, is sufficient to establish a fact," without insisting that the court also instruct the jury that this general rule did *not* apply to Lewis's testimony if the jury found him to be an accomplice. Thus, the Court agreed with appellant that counsel's failure to request an accomplice corroboration instruction also constituted deficient performance under *Strickland*.

The Court then addressed whether appellant was prejudiced by these two instances of deficient performance. The Court found that due to the deficient performance of appellant's trial counsel, the jurors who found him guilty did not have the opportunity to hear Clark testify or to consider the evidence they did hear with the instruction that if they found Lewis to be an accomplice to the shooting, they must treat him unlike the other witnesses and decide whether his identification of appellant was corroborated by other evidence. A jury that heard Clark and was properly instructed might reach the same verdict, but the Court stated, it could not "say that with confidence." Accordingly, the Court concluded that appellant carried his burden to show that his trial counsel's deficient performance resulted in prejudice as defined in *Strickland*. His convictions were therefore reversed, but because the evidence was otherwise sufficient to support his convictions, the State may choose to retry him.

Rule of Lenity; Merger

Gordon v. State, A16A0177 (5/6/16)

Appellant was convicted of VGCSA, aggravated assault and felony obstruction of a police officer. The evidence showed that during a traffic stop, appellant attempted to flee and a struggle ensued. As the officer held appellant's neck, appellant attempted to burn the officer's eye with a lit cigarette. Appellant contended that the rule of lenity required that he can only be sentenced for felony obstruction of an officer (and not aggravated assault) because

the evidence showed that both offenses served as alternative charges for the same conduct. The Court disagreed.

Citing *Gordon v. State*, 334 Ga.App. 633 (2015) (whole court), the Court noted that to decide whether the rule of lenity applies, a court must look to whether there is any ambiguity in the two statutes such that both crimes could be proved with the same evidence. In other words, what is required is a statutory ambiguity such that identical evidence, not merely a single act, results in different punishments. The Court found that a close reading of the indictment and the applicable Code sections showed that the two counts did not address the same criminal conduct, even though the indictment predicated both offenses on the same act of attempting to insert a lit cigarette into the eye of the officer. Under the indictment and the statutory definitions, appellant could commit felony obstruction only if he offered violence against an officer while the officer was in the lawful discharge of his official duties. Moreover, felony obstruction can occur regardless of whether it involved the use of an offensive weapon likely to result in serious bodily injury, unlike aggravated assault. Thus, the Court concluded, the two offenses, as described in the indictment and the Code, were not proved by the same evidence, and the rule of lenity did not apply.

Appellant also contended that the trial court erred by sentencing him for both aggravated assault and felony obstruction because they should have merged as a matter of fact. Again the Court disagreed. To determine if merger is required, the Court must apply the *Drinkard* test: To determine whether there are two offenses or only one, the Court must determine whether each statutory provision requires proof of a fact which the other does not. The Court found that to commit felony obstruction, one must obstruct or resist by offering or doing violence to a law enforcement officer who is engaged in the lawful discharge of his official duties. Having such a law enforcement victim is not an element of aggravated assault. And, although the felony obstruction statute requires offering or using “violence,” regardless of whether a weapon is used, it does not, by its plain terms, require that this violence be the type that likely will or actually does result in serious bodily injury. It is of no moment that the violence offered

in this case – attempting to burn the officer’s eye with a cigarette – also satisfies the elements of aggravated assault. Accordingly, the Court held, the trial court did not err by failing to merge the convictions for aggravated assault and felony obstruction.

In so holding, however, the Court distinguished *Taylor v. State*, 327 Ga.App. 882 (2014), and *Dobbs v. State*, 302 Ga.App. 628 (2010). In those cases, the two offenses merged because the offense of aggravated assault upon a peace officer contained the additional element that the assault was “upon a peace officer while the peace officer is engaged in, or on account of the performance of, his or her official duties,” which was not the case here. Therefore, because the aggravated assault offense at issue in this case did not contain that element, and the obstruction charge *did* contain an element not in the aggravated assault charge, the two did not merge under the *Drinkard* analysis.

Replacement of Jurors; Deliberations

Lamb v. State, A16A0010 (5/6/16)

Appellant was convicted of child molestation. The record showed that jury selection occurred on May 6. Juror 19 disclosed that he had a cardiologist appointment at 3:00 p.m. on May 8 in a town approximately 30 minutes from the courthouse. Despite the disclosure, both parties accepted Juror 19 onto the jury. On the morning of May 8, the case was submitted to the jury, which deliberated for a period of time, then recessed for lunch. During the recess, Juror 19 reminded the court about his 3:00 p.m. appointment. The State requested immediate replacement and the defense objected. The judge ultimately decided to dismiss Juror 19 and replace him with an alternate.

Appellant argued that the trial court erred in replacing Juror 19 during deliberations. The Court, citing O.C.G.A. § 15-12-172, stated that a trial court may remove a juror when it is convinced that the removed juror’s ability to perform his duties is impaired. Here, the Court found, the medical issue in this case was not a surprise. Appellant knew during voir dire about Juror 19’s upcoming appointment, but nevertheless accepted him on the jury panel. When the juror reminded the court that he needed to leave for his appointment

on May 8, the trial court thoroughly reviewed the options for handling the situation and determined that replacing him would be best. In reaching this determination, the trial court noted that it did not want Juror 19 to deliberate with the appointment weighing on his mind. Ultimately, the trial court concluded that the impending medical appointment prevented Juror 19 from performing his duties on May 8. Although it considered delaying deliberations until the following day, the court elected not to do so because the case was fresh on jurors’ minds that afternoon. Therefore, the Court concluded, given these circumstances, as well as appellant’s original decision to accept Juror 19 onto the jury panel despite his medical conflict, the trial court did not abuse its discretion in replacing the juror.

Motions to Reveal Confidential Informant

McGhee v. State, A16A0388 (5/18/16)

Appellant was convicted of possession of cocaine with the intent to distribute, criminal attempt to commit the sale of cocaine, and use of a communication facility in facilitating a commission of a felony criminal act. The evidence showed that a confidential informant (CI) contacted a law-enforcement officer and told the officer that the CI could order cocaine from a man named Marco, which is appellant’s nickname. The officer instructed the CI to make a call ordering two ounces of cocaine, and the officer overheard the call by speaker phone. The CI was then transported by law enforcement to the agreed upon location for the drug transaction. Again on speaker phone and in the presence of law enforcement, the CI called appellant and asked him to walk to a nearby gas station. The CI identified appellant to law enforcement as the person to whom he was speaking on the phone. Appellant was detained after he entered the gas station, briefly went into the restroom, and emerged. Law enforcement located a quantity of cocaine dropped by appellant on the gas-station floor. A larger quantity of cocaine was located in the trash can of the gas station bathroom.

Appellant argued that the trial court erred in refusing to require the State to reveal the identity of the CI. The Court stated that in determining whether a defendant is entitled to disclosure of the identity of a CI, the trial court must conduct a two-step hearing, first

considering evidence to determine (a) that the CI is an alleged informer-witness or informer-participant whose testimony appears to be material to the defense on the issue of guilt or punishment; (b) that the testimony for the prosecution and the defense is or will be in conflict; and (c) that the CI was the only available witness who could amplify or contradict the testimony of these witnesses. If this threshold is met, the trial court must then hold an in-camera hearing of the CI's testimony, after which the court should weigh the materiality of the informer's identity to the defense against the State's privilege not to disclose his name under *Roviaro v. United States*, 353 U. S. 53, 59 (1) (77 S.Ct. 623, 1 L.E.2d 639) (1957).

First, the Court agreed with appellant that the trial court erred in determining that the CI was a mere tipster when he was charged with the use of a communication facility (a cell phone) in facilitating the commission of a felony (criminal attempt to commit sale of cocaine) and with the criminal attempt to commit sale of cocaine. Both of these crimes involved the CI's participation because the CI was the individual who placed the calls to appellant to purportedly attempt a purchase of cocaine. And because the State chose to prosecute appellant for crimes that directly involved the CI's participation, this case was distinguishable from *Little v. State*, 280 Ga.App. 60 (2006), upon which the State relied and in which the CI was no more than a tipster when the defendant was only charged with and convicted of trafficking in methamphetamine.

Nevertheless, the Court found, appellant failed to establish the other threshold requirements that would have required the court to conduct an in-camera hearing of the CI's testimony. Namely, appellant did not present any conflicting evidence in his defense, including evidence of what he claimed during the motion hearing would be a defense of entrapment. In short, because appellant gave no indication of how the testimony of the CI would benefit his defense, and because appellant presented no evidence of entrapment, the trial court did not err in denying his motion to reveal the CI's identity.