Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 23, 2011

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THIS WEEK:

Appeals; Habeas Corpus

Brown v. Crawford, S11A1124; S11A1142 (9/12/11)

Two prisoners filed pre-trial habeas corpus actions. In one, the prisoner lost and in the other, the Sheriff lost. In each case, the losing party filed a direct appeal to the Supreme Court. The Court consolidated the cases and asked the parties to address the jurisdiction of the Court.

The Court held that OCGA § 42-12-3 (1) was amended in 1999 to close a loophole that allowed a pre-trial prisoner to file a direct appeal from a denial of a habeas corpus petition but required a post –trial habeas prisoner to seek review through a discretionary review process. Pursuant to this amendment, any appeal of a court's action with respect to a habeas corpus filing by a prisoner must follow the discretionary review process set forth in OCGA § 5-6-35. Although the Court held in several cases after the passage of the 1999 amendment that a petitioner may file a direct appeal from the denial of a pre-trial petition for writ of habeas corpus, these cases failed to acknowledge that the language of the statute was different. "Accordingly, to the extent that they are inconsistent with this opinion, we hereby overrule *Jackson v. Bittick*, 286 Ga. 364-365 (1) (690 SE2d 803) (2010); *Lamb v. Bennett* , 284 Ga. 810, 811 (671 SE2d 506) (2009); *Massey v. St. Lawrence*, 284 Ga. 780 (1) (671 SE2d 834) (2009); *Nguyen v. State*, 282 Ga. 483, 484-485 (1) (651 SE2d 681) (2007); *Bryant v. Vowell*, 282 Ga. 437 (651 SE2d 77) (2007); *Gresham v. Edwards*, 281 Ga. 881 (644 SE2d 122) (2007); *Whitmer v. Conway*, 279 Ga. 99 (610 SE2d 61) (2005); *Tabor v. State*, 279 Ga. 98, 99, fn. 1 (610 SE2d 59) (2005), and any other case which allows a petitioner to file a direct appeal from the denial of a pre-trial petition for writ of habeas corpus."

In the present appeals, appellants each filed an appeal of an order on a pre-trial petition for writ of habeas corpus filed by a prisoner, and thus they were required to file an application for discretionary review. Although the appellant in the second case was the county Sheriff and not a prisoner, the Court noted that in *Ray v. Barber*, 273 Ga. 856 (1) (2001), it held that OCGA § 42-12-8 applies when a non-prisoner files an appeal of an action originally filed by a prisoner. Accordingly, as neither appellant filed an application for discretionary

appeal pursuant to OCGA § 5-6-35, both appeals were dismissed.

Jury Charges; Statements

Rogers v. State, S11A0767 (9/12/11)

Appellant was convicted of malice murder, burglary, possession of a firearm during commission of a felony, and possession of a firearm by a convicted felon. The evidence showed that the victim was shot in his house. He argued that the trial court erred in not giving his request to charge on unlawful act involuntary manslaughter as a lesser included offense of the crime of murder. Under OCGA § 16-5-3 (a), a person commits the offense of involuntary manslaughter in the commission of an unlawful act when he causes the death of another human being without any intention to do so by the commission of an unlawful act other than a felony. Here, appellant contended that he went to the victim's house for the sole purpose of instigating a fist fight, and that the victim was killed unintentionally by an accidental discharge of the victim's gun. Therefore, from appellant's statement, the jury could have concluded that appellant was guilty of involuntary manslaughter as opposed to intentional murder. Moreover, there was some evidence consistent with appellant's statement, and thus, it was error for the trial court to refuse appellant's request to charge the jury on unlawful act involuntary manslaughter. Nevertheless, the Court found, there was overwhelming evidence inconsistent with appellant's version of events, but supportive of the jury's finding him guilty of malice murder and the jury, by finding appellant guilty of malice murder, made a specific finding of an intent to kill. Therefore, the error was harmless.

Appellant also contended that the trial court erred by not excluding inculpatory statements made by him to the police on the ground that they were not knowingly, intelligently, and voluntarily given. In order for the statements to be admitted, they "must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury." OCGA § 24-3-50. Generally, the "hope of benefit" to which the statute refers has been construed as a hope of lighter punishment. The evidence showed that during an in-custody interview, appellant was initially not responding fully to the questions posed, and one of the investigators told appellant "you are not trying to help yourself." Appellant contends that his subsequent inculpatory statements were induced by this statement by the investigator, which appellant took as a promise of a lighter sentence in return for his cooperation. The Court disagreed. Exhortations to tell the truth are not a hope of benefit that renders a confession inadmissible under OCGA § 24-3-50. An interrogator's statement to an arrestee to "help yourself out" is an encouragement to tell the truth and does not constitute an impermissible hope of benefit.

Prosecutorial Misconduct; Cross-examination

Collins v. State, S11A0759 (9/12/11)

Appellant was convicted of malice murder, aggravated assault and a firearms offense. The evidence showed that appellant drove his car alongside of another vehicle. He then shot into that vehicle, aiming at the drive, a business partner, but killing the three year old son of the target. Appellant turned himself into the police two days later when he learned that the child had been shot.

On cross examination, the prosecutor questioned appellant about his actions between the shooting and the time he turned himself in, including getting his car detailed. The prosecutor asked, "—you didn't, between that time period, at no point did you drive to the police station, say here is my car, here is my weapon. That guy was shooting at me. I'm sorry a child died, but it was in self-defense." Appellant moved for a mistrial which was denied. He contended that this was reversible error. The Court held that appellant was correct that the question posed by the prosecutor about appellant's failure to talk to police between the time of the shooting and the time appellant turned himself in to authorities was improper. Appellant testified that he turned himself in because he saw on the news that the child had been shot. The prosecutor was free to cross-examine appellant on this rationale for turning himself in, i.e. the revelation about the injured child, and appellant's activities prior to turning himself in i.e., having his car detailed for bullet holes, watching the news story about the shooting, and contacting his lawyer. However, posing a question that inquired of appellant as to why he did not turn himself in two days earlier and as to why he failed to tell the police he acted in self-defense had the effect of suggesting to the fact-finder that if appellant truly acted in self-defense he would have presented himself to police immediately. A prosecutor may not comment on a defendant's pre-arrest silence even if the defendant has not received *Miranda* warnings, or if the defendant takes the witness stand at trial. Nevertheless, the Court held that the error was harmless in light of the overwhelming evidence of guilt.

Ineffective Assistance of Counsel; Habeas Corpus

Hambrick v. Brannen, S11A0799 (9/12/11)

The warden appealed from the grant of Brannen's petition for habeas corpus. The habeas court found that Brannen's counsel at his probation revocation hearing was ineffective for not investigating Brannen's mental health and that had he done so, the results of the revocation would have been different. In so holding, the habeas court relied on *Martin v. Barrett*, 279 Ga. 593 (2005).

The Supreme Court reversed. In *Martin*, trial counsel performed no investigation into the defendant's mental health even though counsel knew, prior to trial, that the defendant had been hospitalized for treatment of mental illness, and such failure to investigate was the result of inattention rather than strategic choice. Here, however, Brannen's counsel's testimony revealed that counsel made a strategic decision not to pursue an insanity defense based upon his prior experience, on Brannen's assurance and the attorney's perception that Brannen understood the revocation proceedings, and on an agreement with the State that it would "dead docket" the new felony charges in exchange for Brannen not contesting the probation revocation. Moreover, Brannen expressed his paramount concern which was his desire to get into a facility where he could get treatment, and Brannen, his parents, and counsel believed that the surest route to such treatment was to admit the allegations in the probation revocation and have mental health treatment be an integral part of Brannen's sentence. Finally, counsel spoke with Brannen, Brannen's parents, and doctors before deciding not to request a psychiatric evaluation of Brannen. "A reasonable strategic choice by counsel, which is made after thorough investigation of the law and the facts relevant to plausible options is virtually unchallengeable,

and therefore, will not support a claim of counsel's ineffectiveness." Consequently, the determination that counsel was guilty of a failure to investigate Brannen's mental health condition, and that such ostensible failure constituted a professional deficiency failed as a matter of fact and law. Moreover, the Court found, Brannen not only failed to show the deficient performance test of *Strickland v. Washington*, but he failed to prove the prejudice prong as well.

Sentencing; Merger

Culpepper v. State, S11A1338 (9/12/11)

Appellant was convicted of malice murder, aggravated assault, and armed robbery. He contended that the aggravated assault and armed robbery convictions merged into the malice murder conviction and the sentences imposed for aggravated assault and armed robbery should have been vacated. The Court agreed and disagreed.

OCGA § 16-1-7(a)(1) prohibits a defendant from being convicted of more than one crime if one crime is included in another. Under the "required evidence" test adopted in *Drinkard v. Walker*, 281 Ga. 211, 215 (2006), "where the same act or transaction constitutes the violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not." The indictment charged appellant with killing the victim with malice aforethought by stabbing her with a knife, and with assaulting her by stabbing her with a deadly weapon, a knife. Malice murder requires proof of a fact —the death of the victim —that aggravated assault does not require; however, aggravated assault as pled did not require proof of a fact not required to be proved in malice murder. Accordingly, the aggravated assault conviction merged into the malice murder conviction and the sentence imposed for aggravated assault was vacated.

The State argued that wounds not classified by the medical examiner as fatal may serve as an aggravated assault distinct from the aggravated assault that results in the victim's death, and urged the Court to uphold the aggravated assault conviction based on one of the non-fatal stab wounds suffered by the victim. The Court declined to do so. 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, there was no evidence of a "deliberate interval" between infliction of a non-fatal injury and a fatal injury. Accordingly, the aggravated assault merged into the malice murder conviction.

Appellant also contended his armed robbery conviction should be vacated because it merged into the malice murder conviction. Using the "required evidence" test of *Drinkard*, the Court concluded that armed robbery did not merge into malice murder because malice murder has an element that must be proven (death of the victim) that armed robbery does not, and armed robbery has an element (taking of property) that malice murder does not. Thus, appellant's conviction and sentence for armed robbery remained in place.

Conspiracy; Jury Charges

Darville v. State, S11A0993 (9/12/11)

Appellant was convicted of malice murder, conspiracy to violate the Georgia Controlled Substances Act and other related crimes. The evidence showed that appellant and another individual met to purchase marijuana from the victim and another person. During the negotiation, appellant shot the victim and fled with the drugs. Appellant contended that his conviction for conspiracy must be reversed.

The Court agreed. A conspiracy may be shown by proof of an agreement between two or more persons to commit a crime. The existence of the conspiracy agreement may be established by direct proof, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose. The existence of a common design or purpose between two or more persons to commit an unlawful act may be shown by direct or circumstantial evidence. It has been repeatedly held, however, that the mere agreement of one person to buy contraband which another agrees to sell does not establish that the two acted in concert so as to support a finding of a conspiracy. This is because in an illegal drug transaction, the purchaser and the seller are not acting together to commit the same crime and there is no joint design or purpose.

Here, the indictment charged appellant, along with six other co-indictees who were both purchasers and sellers in the drug transaction, with the offense of conspiracy to commit a violation of the Georgia Controlled Substances Act through "the sale, distribution and purchase of marijuana." Included in the indictment was a list of overt acts taken in furtherance of the alleged conspiracy, essentially describing the individual and collective actions of all indictees in furtherance of both the sale and purchase of marijuana. The court subsequently charged the jury it could convict appellant for conspiring to violate the Controlled Substances Act if it determined he conspired with one or more other persons to "purchase, sell or distribute any quantity of marijuana." The court, however, failed to provide any limiting instruction informing jurors that the purchaser and buyer in a drug transaction could not conspire together. Because the language of the indictment could have been read to charge individuals with conspiracy who, under Georgia law, cannot conspire with one another to violate the Georgia Controlled Substances Act and because the court failed to eliminate the possibility for error by instructing jurors they would not be authorized to convict appellant of conspiracy based merely on his participation with the sellers in the drug transaction, the Court stated it was "compelled to reverse his conviction on the conspiracy charge."

Search & Seizure; Self Incrimination

Simpson v. State, S11A0803 (9/12/11)

Appellant was convicted of murder in the stabbing death of his estranged girlfriend. The evidence showed that the victim moved out of appellant's house and moved into a female friend's trailer. Appellant, who was addicted to cocaine, became increasingly aggressive toward the victim. In the days prior to the victim's death, appellant assaulted her, but the victim refused to seek a protective order. On the day of her death, the victim was found in the trailer with 100 stab wounds. When police first located appellant on the night of the murder,

he was considered a person of interest in the case, but not yet a suspect. Appellant, who was high on crack cocaine at the time, agreed to go to the police station for questioning. While there, police told appellant that he was free to go if he agreed to let the police inspect his clothes. Appellant agreed and, upon inspection, police found a blood stain on his pants. At that point, appellant was arrested without a warrant, by an unidentified officer, and his clothes were confiscated for testing. Once seized, appellant's clothes were kept in a brown paper bag which was not sealed and for which no chain of custody was kept. Blood stains on appellant's clothes matched the victim's DNA and DNA found at the scene of the crime was matched to appellant.

Appellant contended that the arresting officer did not have probable cause to arrest him, and therefore, the statements appellant made at the police station and the bloody clothes seized from him should have been suppressed. In evaluating the legality of a warrantless arrest, the only question is whether the arresting officer had probable cause to believe that a criminal offense has been or is being committed. At the heart of a probable cause determination is the question of whether the totality of the circumstances lend themselves to a reasonable ground for belief of guilt. Here, because the arresting officer was unknown, the Court stated that it could not find probable cause unless it could attribute it to any officer that could have made the arrest. The record showed that, on the night of the victim's murder and appellant's arrest, every uniformed officer in the city was briefed on appellant's acts of violence toward the victim in the prior few days, as well as statements made by the female friend in a 911 phone call that blamed appellant for killing the victim, and reports that a person fitting appellant's description was seen angrily banging on the victim's door shortly before the murder. Probable cause exists if the arresting officer has knowledge and reasonably trustworthy information about facts and circumstances sufficient for a prudent person to believe the accused has committed an offense. Because the record showed that every police officer that was on duty that day had actual knowledge of facts sufficient to support a finding of probable cause, the seizure of appellant's bloody clothes after arrest was proper, and it was unnecessary for the trial court to apply the "collective knowledge" test.

Appellant also contended that his right against self-incrimination was violated because he was required to turn over his clothes to the police for inspection. Under the Federal Constitution, the protections of the right against self-incrimination are limited to being compelled to testify as "a witness against himself." This has been interpreted to apply only to evidence of a testimonial or communicative nature, and not a compulsion by the State to produce real or physical evidence. Our State Constitution, however, extends this protection further. Our Courts have held that the right not to produce evidence against oneself included the right not to be compelled in "the doing of an act against [one's] will to incriminate" oneself." *Creamer v. State*, 229 Ga. 511, 517 (3) (1972). Here, appellant did not perform any act against his will to incriminate himself. On the contrary, he surrendered his clothes when asked to do so. Moreover, the police were entitled to seize the clothes, which were in his immediate possession, because he had already been lawfully arrested.

Severance

Glass v. State, S11A1031 (9/12/11)

Appellant was convicted of malice murder, three counts of aggravated assault, and four counts of possession of a firearm during the commission of a crime. The evidence showed that the female victim was fatally shot as she stood on the front porch of a friend's home. The three men with her when she was shot identified appellant as the man who fired 6-8 shots at them and the victim from the front passenger seat of a vehicle owned by one of the co-defendants. There was testimony that appellant was the current boyfriend of a woman who was the former girlfriend of one of the three men with the murder victim, and that appellant and the former boyfriend had exchanged heated words earlier the day the victim was killed as well as the afternoon of the day before the shooting.

Appellant contended that the trial court erred in not granting his motion for severance. When two or more defendants are jointly indicted for a capital felony where the death penalty is waived, defendants may be tried jointly or separately in the discretion of the trial court. The burden is on the defendant requesting the severance to make a clear showing of prejudice and a consequent denial of due process. In exercising its discretion, the court must consider three factors: (1) Whether a joint trial will create confusion of evidence and law; (2) whether there is danger that evidence implicating one defendant will be considered against the other, despite cautionary instructions to the contrary; and (3) whether the co-defendants will press antagonistic defenses.

Appellant argued that the number of defendants (three) and the relationships among the defendants and the victims created confusion that warranted separate trials. The Court stated that merely because three defendants are tried together is not cause for a severance. The familial and personal inter-relationships of the three defendants and one of the victims were not so confusing as to warrant separate trials given that the relationships went to motive for the shootings and would have been admissible had the co-defendants been tried separately.

Appellant also contended that he and the co-defendant who testified had antagonistic defenses. Both appellant and the testifying co-defendant each testified he was not at the scene of the crimes; however the co-defendant implicated appellant by testifying that appellant borrowed the co-defendant's car the afternoon of the shooting and drove off in it with the co-defendant's younger brother. The Court, however, held that antagonism between co-defendants is not enough by itself to require severance and the co-defendant's testimony implicating appellant was not a sufficient reason to grant a severance since the testifying co-defendant was subject to cross-examination by appellant's trial counsel and the testimony would have been admissible had appellant been tried separately. Since appellant failed to show the requisite prejudice from the denial of the motion to sever, the Court could not say the trial court abused its discretion.

Due Process; Right to "Speedy Appeal"

Payne v. State, S11A0818 (9/12/11)

Appellant was convicted of murder in 1995. He contended that the more than 15-year delay between his conviction and this appeal violated his right to due process. "The Court noted that it has recognized that substantial delays experienced during the criminal appellate process implicate due process rights. Whether an appellate delay violates due process depends on a balancing of the length of the delay, the reason for the delay, the defendant's

assertion of his right, and prejudice —which, unlike in the speedy trial context, is not presumed but must be shown.

As to the length of the delay, the Court found that it was "excessive and unfortunate." As to the reason for the delay, the Court found that the State bore blame for some of the delay, but it was largely attributable to appellant. Not only did he fail to vigorously assert his appellate right for more than five years, but he acknowledged that the delays were primarily his counsel's fault. To the extent appellant's various counsel provided constitutionally effective representation, delays resulting from their decisions and his interaction with them are attributable to him. Also, none of the exceptions to the rule holding appellants accountable for their counsels' actions supported absolving him of the resulting delay. Thus, he did not show a total breakdown in the public defender system or a failure by the trial court to appoint counsel in a timely fashion. His unelaborated statement that "the Public Defender system was revamped" and cost him "additional time and representation" was insufficient to demonstrate a total breakdown, and in any event, some of his appellate attorneys were retained, not appointed. In addition, while a determination that some of his counsel provided some form of ineffective assistance may be implicit in the trial court's granting motions for out-of-time appeal, appellant did not identify which periods of delay were attributable to those errors, nor did he elicit testimony from those appellate counsel to support his ineffectiveness claims. Responsibility for the delay, therefore, was largely appellant's.

As to the assertion of the right, appellant also failed to show that he asserted his appellate rights for much of the more than 15-year delay. Finally, as to the prejudice prong, appellant failed to show actual prejudice to his ability to assert his arguments on appeal so that there was a reasonable probability that, but for the delay, the result of the appeal would have been different. Thus, while the first factor weighed against the State, the remaining three weighed against appellant and therefore, his due process claim was without merit.

Jurors; Judicial Comment

State v. Clements, S11A0628; S11X0699 (9/12/11)

The State appealed from the grant of a motion for new trial and Clements cross-appealed. The State contended that a successor trial court judge erred by granting a new trial after the successor judge found that the presiding judge manifestly abused his discretion for failing to dismiss a juror in this case. The record showed that juror Henderson was among the jurors selected the first day of the trial to serve on the petit jury. After opening statements were presented, court was recessed until the following day with the jurors cautioned not to discuss the case. The following day before any evidence was presented, juror Henderson presented the presiding judge with a letter. The presiding judge read the letter for the record: "Dear Judge, my husband saw the news this morning and came to me and said do not let them put me on this trial for Derrick Clements because I coached him in baseball. He could tell by the look on my face that it was too late. I have literally been sick over this and unsure of what I need to do. I know that I could listen to the trial and be unbiased; however, my husband is in hopes of returning to Manchester High School next year to teach again and I am afraid some people might have hard feelings toward him due to the outcome of this trial. Please tell me what I need to do." The juror was then questioned by both sides and stated that she could be fair and impartial but was concerned that if her husband got a job at the High School next year, there could be "hard feelings." The presiding judge denied the motion for mistrial.

First the Court noted that although the successor judge referenced the impropriety of the juror's conduct in discussing her service on the jury with her husband without analyzing the matter further, the record supported the presiding judge's decision that the irregularity presented here was inconsequential in light of the uncontradicted evidence that juror Henderson and her husband did not discuss the merits of the case but only her selection for the jury. Where a juror's unauthorized contact with another does not involve discussion about the merits of the case, such an irregularity will not necessarily require a new trial. Thus, the Court held, the juror's action in discussing her jury service with her husband, while improper, was not so prejudicial as to have contributed to the conviction and was harmless beyond a reasonable doubt.

With respect to the issue of juror bias, the Court found that the successor judge clearly erred by identifying the "husband's job prospect" as the source of the juror's concern because the transcript established that the juror was unequivocal that her verdict would not have "any impact on [her husband] getting the job." Juror Henderson was not concerned about her husband's prospect of getting the job at Manchester High School should she cast a vote on a verdict one way or another. Rather, her concern stemmed from the possible impact of her jury service on her husband after he got the job at Manchester High School. Specifically, the juror was concerned that, once her husband got the job, "hard feelings" resulting from the verdict might make her husband's job more difficult. Regarding these potential "hard feelings," the successor judge focused only on the juror's concerns about the effect of a verdict of "not guilty" and erred by ignoring the juror's express acknowledgment that any verdict rendered in the case had the potential to make her husband's job more difficult, i.e., that it would "cut both ways." The Court found nothing to support the successor judge's conclusion that the concern expressed by juror Henderson affected in any degree her ability to serve as a fair and impartial juror whose verdict would be based solely upon the evidence and the law as set forth in the trial court's charge. The presiding judge therefore did not abuse his discretion by determining from juror Henderson's answers to his targeted questions that the juror was truthful and sincere as to her assertion that she had no fixed and definite opinion about Clements' guilt or innocence and that she was able to set aside her concern about the impact of any verdict on her husband's future job and decide the case based upon the evidence or the court's charge upon the evidence.

Although the decision to grant a new trial is addressed to the sound discretion of the judge who saw the witnesses and heard the testimony, the scope of discretion is not as extensive when it is exercised by a judge who did not preside at the trial and heard no pertinent live testimony at the hearing on the motion for new trial. While the presiding judge in this case was uniquely positioned to observe a juror's demeanor and thereby to evaluate his or her capacity to render an impartial verdict, the successor judge here stood in no better position than an appellate court in reviewing a cold record in regard to determining whether the presiding judge abused his discretion in refusing to remove a juror. Given the factual

errors by the successor judge regarding the finding about the husband's "job prospect" and the juror's explicit acknowledgment that her concerns applied to any verdict she might return, in addition to the presiding judge's express findings as to the juror's truthfulness and sincerity regarding her impartiality and fairness, the Court found that the successor judge erred by granting Clements a new trial on the basis of juror bias.

In his cross appeal, Clements contended that the trial court committed reversible error when, during its orientation statements to the jury about the judicial system and the manner in which the trial would be presented, it explained that the attorneys would submit "requests to charge, that is theories of law that they think are applicable to the trial of this case. The Court will consider those and discuss with the lawyers what charges will be given, but what charge of the law is to be given rests solely on the shoulders of the Court and if the Court makes a mistake, not intentionally, but Courts make mistakes, there is a higher court to look over what I have done on the record and make a decision as to whether or not I made a glaring mistake or a crucial mistake or a mistake on purpose.[sic]." The Court noted that in *Gibson v. State*, 288 Ga. 617, 618 (2) (2011), it recently reversed a conviction in which the trial court, in response to a jury inquiry about certain trial exhibits, informed the jury that it could not give the jury the exhibits because, if the court did so, "we would have to try the case all over again" and that "it would be reversible error" for the court to give the jurors those exhibits. In *Gibson*, the quoted language regarding potential error "could have intimated to the jury that the requested exhibits were harmful to the defendant and that the trial court believed the defendant was guilty." Unlike *Gibson*, however, the trial court's statements here were in the context of juror orientation at the start of the trial when no evidence had been adduced and opening statement had not yet been held. Thus, the Court found this case to be more comparable to *Bearden v. State*, 159 Ga. App. 892 (3) (1981), in which it was held that not every reference to the appellate courts during trial is reversible error. The references here to the curative powers of the appellate courts must be considered in the context of juror orientation of the judicial system and how it functions. Where, as here, this form of orientation occurred before any evidence was introduced, did not convey or intimate any opinion of the trial judge, nor lessen the sense of responsibility of the jurors, such abstract references to the appellate courts did not to require reversal.

Impeachment Evidence

McNeal v. State, S11A1076 (9/12/11)

Appellant was convicted of malice murder, felony murder, armed robbery, and other related offenses. He argued that the trial court erred by allowing the prosecutor to read McNeal's entire criminal history into evidence. The Court disagreed. When appellant testified at trial, his trial counsel asked him "whether [he had] had any encounters with the law." Appellant responded that he had, in connection with a prior felony conviction for possession of marijuana. He further stated that the marijuana conviction was the only prior felony conviction on his criminal record. During a break between appellant's direct and cross-examination, the prosecutor argued to the court that his response to the "encounters" question was a lie because it implied that the marijuana conviction was his only past encounter with the police. In this regard, the prosecutor pointed to a 20-plus page arrest record from the Georgia Crime Information Center detailing, among other things, prior Georgia arrests for fleeing and attempting to elude police, aggravated assault, and giving a false name, as well as an arrest in Massachusetts for aggravated assault and attempting to elude police. The trial court allowed this evidence for impeachment purposes, over objection, despite the fact that fleeing the police is a misdemeanor offense, appellant had been acquitted of the Georgia aggravated assault charge, and the Massachusetts charges had been dismissed.

Appellant argued he never "opened the door" to having the prosecution introduce his criminal history at trial under OCGA § 24-9-84.1. However, the Court found, § 24-9-84.1 refers only to the general rule that allows criminal convictions for felonies and *crimen falsi* offenses to be used to impeach a testifying defendant. At trial, the entire basis of the court's ruling in admitting this evidence was the assertion by the prosecutor that appellant had lied on the stand and that the prosecutor had the right to disprove that lie. This, the Court found, falls squarely within the purview of OCGA § 24-9-82. In allowing the State to introduce appellant's criminal history into evidence, the trial court ruled that a reasonable jury might have interpreted his testimony as implying that the marijuana conviction was his only prior "encounter with the law." As such its admission was a discretionary one which the Court refused to disturb on appeal. Rather, all admitted evidence was appropriate under OCGA § 24-9-82.

Search & Seizure

Oglesby v. State A11A1037 (9/8/11)

Appellant was convicted of trafficking in methamphetamine. He contended that the trial court erred in denying his motion to suppress. The evidence showed an officer was patrolling in a residential area when he observed appellant emerge from behind a vacant private residence. The officer was aware that the residence had been vacant for a while, stolen vehicles had been parked at the residence on prior occasions, and a murder had occurred at a location directly behind the residence. The officer was also aware of prior reports of vandalism and thefts of appliances and copper from other vacant residences in the area. The officer made contact with appellant, suspecting that he may have been engaging in criminal activity at the residence. Appellant appeared to be very nervous, but he agreed to approach the officer's patrol car and answer the officer's questions. In response to the officer's inquiry, Appellant informed the officer that he was coming from a nearby store, where he had purportedly purchased water, ice cream, and a sports nutrition drink, but none of the described items were in his possession. During the conversation, the officer asked appellant whether he had any weapons in his possession. He responded that he did have a weapon and began to reach inside his back pocket. The officer stopped appellant from reaching into the pocket, and obtained appellant's consent to a pat-down search of his person. During the pat-down search, the officer located a knife in his back pocket. As the officer continued the pat-down search, he felt an object in appellant's front pocket. The officer obtained his consent to remove the object and discovered that it was approximately 45 grams of methamphetamine.

The Court agreed with the trial court's determination that this was a first-tier encounter in which appellant engaged in a consensual

conversation with the officer. There was no evidence that appellant made any attempt to leave or that the officer physically prevented him from doing so. Likewise, there was no evidence that the officer threatened, commanded, or forced appellant to approach and speak with him. Based upon these circumstances, no seizure occurred and the officer was authorized to ask appellant a few questions during the consensual encounter without triggering Fourth Amendment scrutiny.

Appellant nevertheless argued that the encounter was a second tier one, based on responses to defense counsel's leading cross-examination questions, indicating that the officer "detained" him to ask some questions and that he was not free to leave because the officer was going to conduct an investigation. The Court held that when analyzing whether a person has been unconstitutionally seized, a court is not bound by the investigating officer's subjective belief. Rather, the touchstone of any Fourth Amendment analysis is a determination of whether an officer's conduct is reasonable based upon all of the objective facts. Moreover, the pertinent inquiry is based upon the objective facts known to the officer at the time of the encounter, not his post-hoc characterizations or opinions concerning those facts given at the suppression hearing. The officer's testimony describing the encounter and his exchange with appellant provided objective facts which illustrated that the encounter was consensual, non-coercive, and of a nature that would not lead a reasonable person to believe that he was not free to leave. And the Court stated, in any event, there was evidence to support a finding that the officer had a reasonable articulable suspicion which justified appellant's detention.

Guilty Pleas; Reduction of Sentence

Grady v. State, A11A1086 (9/8/11)

Appellant appealed from the denial of his "Motion for Modification and Reduction of Sentence" pursuant to OCGA § 17-10-1(f). The record showed that appellant plead guilty on February 23, 2010, to charges of conspiracy to distribute a controlled substance; trafficking in cocaine; three counts of sale of controlled substance ; and two counts of use of a communication facility in the commission of a felony. On March 26, 2010, he was sentenced as a recidivist under OCGA § 17-10-7 (c) to an aggregate term of 30 years, to serve 20 years of incarceration and the balance on probation, along with a fine in the amount of $300,000 and surcharges. On September 28, 2010, approximately six months after the entry of his sentence, appellant filed a pro se "Motion for Modification and Reduction of Sentence." Grady's motion was purportedly filed pursuant to OCGA § 17-10-1(f), which provides in part, as follows: "Within one year of the date upon which the sentence is imposed, or within 120 days after receipt by the sentencing court of the remittitur upon affirmance of the judgment after direct appeal, whichever is later, the court imposing the sentence has the jurisdiction, power, and authority to correct or reduce the sentence and to suspend or probate all or any part of the sentence imposed."

Since appellant's motion was filed within one year of when his sentence was imposed, it was timely filed based upon the time limitation set forth in the statute. However, the Court noted that his enumerations of error revealed that he was not seeking to challenge his sentence, but rather, the conviction on which the sentence was based. Notwithstanding his contentions, the authority granted to trial courts by OCGA § 17-10-1(f) to modify sentences does not, on its face, include the power to vacate the conviction on which the sentence was based. Regardless of how appellant characterized his motion, he was in essence seeking to withdraw his guilty plea and to vacate the underlying conviction. However, he failed to file a timely motion to withdraw his guilty plea in the trial court. Since he failed to file a timely motion to withdraw his guilty plea, his only available means to challenge the judgment of conviction is through habeas corpus proceedings. Therefore, the trial court did not err in denying his motion.

Double Jeopardy; Prosecutorial Misconduct

Williams v. State, A11A1446 (9/8/11)

Appellant appealed from the denial of his plea in bar based on double jeopardy. The record showed that appellant was on trial for DUI and other offenses. During closing arguments, the prosecutor incorrectly asserted that appellant "had some margaritas at 2:00[,]" which misstated the evidence that had been presented at trial. Appellant did not interpose a timely objection when the misstatement was made. Rather, his counsel did not discover the misstatement until after the jury had retired for deliberations, at which time he reviewed the videotape of the traffic stop to determine what statements were made concerning appellant's alcohol consumption. When defense counsel raised the issue, the prosecutor acknowledged his mistake and moved for a mistrial. Defense counsel initially opposed the mistrial motion, contending that a mistrial was not necessary and further stating that he knew that "the prosecution didn't make th[e] error to goad [the defense] into moving to mistrial[.]" The trial court denied the State's motion for a mistrial, but considered alternative curative actions. As a form of curative action, defense counsel proposed that the videotape evidence be replayed for the jury. The trial court, however, declined to replay the videotape in the absence of the jury's request. Defense counsel then announced that he was joining in the State's motion for a mistrial, in light of the trial court's denial of his request to replay the videotape to the jury. In the absence of any further suggestions for resolving the issue, the trial court granted the joint motion for a mistrial.

The Court found that the record supported the trial court's finding that the prosecutor's mistake was unintentional and was not intended to goad defense counsel into moving for a mistrial. The record reflected that the prosecutor's mistake was neither blatant, deliberate, nor made in bad faith. No objection was raised at the time that the mistake was made. And when appellant's counsel later discovered and raised the issue, he likewise expressed a belief that the prosecutor's misstatement was "unintentional" and that "the prosecution didn't make th[e] error to goad [the defense] into moving to mistrial[.]" Moreover, the prosecution had already built its case against the defendant and had no reason to abort the first trial by forcing a mistrial. Regardless of the type of alcoholic beverage that appellant had consumed, the evidence was sufficient to support the charged offenses. Under these circumstances, the prosecutor's mistaken argument appeared to have been made in a zealous attempt to obtain a conviction, rather than to force a mistrial. Since the evidence supported the trial court's findings that the prosecutor's mistake did not rise to the level of intentional prosecutorial misconduct and

was not intended to subvert double jeopardy protections, the Court affirmed the denial of appellant's plea in bar.

DUI; Jury Charges

Wagner v. State, A11A0895 (9/7/11)

Appellant was convicted of DUI (less safe) and DUI-Child Endangerment. Appellant contended that the trial court improperly instructed the jury about the inference that could be drawn from his refusal to submit to a State-administered breath test. The trial court instructed the jury: "I charge you that in any criminal trial, the refusal of the defendant to permit a chemical analysis to be made of his blood, breath, urine or other bodily substances at the time of his arrest shall be admissible as evidence against him. I further charge you that the refusal itself may be considered as positive evidence, creating an inference that the test would show the presence of alcohol or other prohibited substances *which impair his driving*; however, such an inference may be rebutted."

The Court stated that in *Baird v. State*, 260 Ga. App. 661, 662-664 (1) (2003), it disapproved of this jury instruction. The Court concluded that the inclusion of the phrase "which impaired his driving" improperly authorized the jury to infer not only that the test would have shown the presence of alcohol in the defendant's body, but also that the alcohol impaired his driving. The jury instruction, therefore, invaded the province of the jury and shifted the burden of proof to the defendant, forcing him to present evidence to rebut the inference.

The State did not dispute that the challenged jury instruction was erroneous but argued that appellant waived any challenge to the charge by failing to specifically object after the trial court gave it. However, the Court held, a substantial error in the jury charge affecting the burden of proof constitutes plain error and is not waived on appeal. And the instruction disapproved in *Baird* and charged to the jury here substantially affected the State's burden of proof by shifting it to appellant, requiring him to rebut the inference that he was an impaired driver because he refused to submit to the breath test. Consequently, the Court concluded that the giving of the challenged jury instruction constituted plain error and was not waived by appellant's failure to raise a specific objection in the trial court.

DUI; Implied Consent

Avery v. State, A11A1340 (9/7/11)

Appellant was convicted of DUI and failure to maintain lane. He contended that the probate court and the superior court erred in denying his motion to suppress the results of the Intoxilyzer 5000 test because he was not given his requested additional test. The evidence showed that after the officer stopped appellant, he was asked to perform some field sobriety tests. Appellant then successfully recited his ABC's, although the officer said there were some pauses in between letters that to him indicated some confusion. Appellant also successfully performed a counting test, although he performed the test one time too many. And according to the officer, the HGN test indicated appellant was impaired to some degree. The officer then informed appellant that he was under arrest for driving with a suspended license and driving under the influence. He placed appellant in his patrol car, read him Georgia's implied consent notice, and appellant agreed to take the State's breath test. The officer and appellant then waited in the patrol car for appellant's father to come pick up his car.

A videotape of the stop showed that after appellant was placed under arrest and put in the patrol car, he pleaded with the officer to let his parents pick him up instead of arresting him. The video also showed that after the reading of the implied consent notice, appellant asked the officer if he was going to let him go if he did not register .080 and then agreed to take the State's breath test. Appellant then continued to plead with the officer to let his parents take him home and not to charge him with DUI, stating at one point that he passed the field sobriety tests. The officer responded that he still had to go to jail on the suspended license and to take the Intoxilyzer test. Appellant continued to plead with the officer and then stated "Give me some more like tests, like please." The officer responded that appellant had to take the State's test at the jail. Appellant indicated some confusion, asking the officer "what's the state's test" or words to those effect. The officer replied, "I read you the card."

Appellant contended that he exercised his right to an additional test of his own choosing by requesting that he be given "more tests" and therefore, since his request was not accommodated, the results of the breath test should have been suppressed. The Court noted that although it is true that appellant was not entitled to take an independent chemical test until after he completed the State's test, it is not true, as the State argued, that only requests made after the completion of the test need be accommodated. Implied consent warnings do not specify to the accused any requirement for requesting an independent chemical test —linguistically, temporally, or otherwise. Rather, an accused's right to have an additional, independent chemical test administered is invoked by some statement that reasonably could be construed in light of the circumstances, to be an expression of a desire for an additional, independent test. In adhering to this principle, courts must be guided by the circumstances surrounding an alleged request, not simply the semantics of the alleged request itself.

Here, the Court found, the circumstances showed that appellant's primary goal was to get the officer to release him to his father when he arrived instead of arresting him. While that goal could have been accomplished if the officer agreed to let him take more field sobriety tests and release him if he passed those tests, that immediate goal would not have been accomplished by taking additional chemical tests because that would have required that appellant remain in custody. Moreover, the request was made for more "tests" plural, not an additional "test." And, as the superior court noted, his request was for the officer to give him more tests, not for an independent test. Further, appellant had just mentioned the field sobriety tests, which he believed did not indicate impairment. And appellant clearly was not focused on any potential tests conducted after he left the scene, as he appeared confused about the state-administered test he was going to take at the jail. Based on these circumstances, the Court agreed that appellant's statement that he wanted "more tests" could not reasonably be construed as a request for an independent chemical test of his own choosing, and the results of the state-administered test were properly admitted at trial.

Fatal Variance

Martin-Argaw v. State, A11A0935 (9/8/11)

Appellant was convicted of four counts of aggravated assault, one count of possession of a firearm during the commission of a felony, one count of burglary, and one count

of aggravated stalking. The evidence showed that he attacked his wife, Peter Vandepool and Dolores Elder as the three of them were sitting on the back deck of the wife's house. He then chased his wife into the house and tried to shoot her again. He contended that there was a fatal variance between the allegations in Counts 1 and 4 of the indictment and the evidence introduced at trial with regard to those respective aggravated assault counts, and, therefore, that the evidence was insufficient to support his conviction on those counts. The Court disagreed.

Count 1 of the indictment alleged that appellant committed an aggravated assault upon his estranged wife "with a handgun, a deadly weapon, by firing his gun at [his wife], outside of the residence . . . ." Similarly, Count 4 of the indictment alleged that appellant committed an aggravated assault upon Vanderpool "with a handgun, a deadly weapon, by firing the handgun at [Vanderpool], outside of the residence . . . ." And Count 5 of the indictment alleged that he committed an aggravated assault upon Elder "with a handgun, a deadly weapon, by firing the handgun and striking her in the head outside of the residence . . . ." Appellant argued that although there was evidence he "fired" his handgun at Elder, contrary to the allegations in Counts 1 and 4 of the indictment, there was no evidence that he "fired" his handgun at his estranged wife or at Vanderpool, and, therefore, his convictions on those two counts should be reversed.

The Court found this argument wholly without merit. It is well settled that the act of firing a weapon into a group makes each individual in the group a separate victim and justifies a separate count of aggravated assault for each victim. And here, the evidence showed that appellant's wife, Vanderpool, and Elder were all sitting together eating when appellant rushed up onto the back deck of his wife's house and fired his gun toward them. Thus, there was no fatal variance between the allegations in Counts 1 and 4 of the indictment and the evidence at trial.

Appellant also contended that Count 3 of the indictment alleged that he committed an aggravated assault upon his estranged wife "with a handgun, a deadly weapon, by pointing the handgun and pulling the trigger at [his wife] in the kitchen area of the residence. . . ." Appellant argued that, contrary to the allegations in Count 3, the evidence showed that his wife was in the living room of her home, rather than in the kitchen area, when he pointed his pistol and attempted to shoot her; and, based on this alleged fatal variance, he argued, his conviction on Count 3 should be reversed. But the Court found that the part of the indictment that appellant argued was unsupported by the evidence —i.e. , the exact room of the house where this specific aggravated assault occurred —was an unnecessary specification of a legally unnecessary fact. "Indeed, when we ignore this portion of the indictment as mere surplusage, the remainder of the indictment sufficiently apprised [appellant] that he was being charged with the specific assault that occurred inside the house in which he pointed his handgun at his wife and pulled the trigger but the gun failed to fire." Accordingly, because Count 3 of the indictment informed appellant of this aggravated-assault charge and differentiated it from the other charges so that he could not be prosecuted again for that offense, any alleged variance between the allegations and proof was not fatal.