

THIS WEEK:

- **Sufficiency of the Evidence; Criminal Gang Activity**
- **Venue; *Worthen***
- **Search & Seizure; Information from Dispatchers**
- **Determinate Sentencing; No Contact Provisions**
- **Inconsistent and Repugnant Verdicts**
- **Out-of-Time Appeals; *Ringold***
- **Search & Seizure; Collective Knowledge Rule**
- **Cross-examination; Authentication**

Sufficiency of the Evidence; Criminal Gang Activity

Kelly v. State, A18A1956, A18A2030 (2/12/19)

Kelly and Barge were tried together. Barge was convicted of criminal gang activity and Kelly was convicted of VGCSA. The evidence, very briefly stated, showed that based on a search of Kelly's bedroom of his mother's house, the police obtained an arrest warrant for him for VGCSA. An officer was conducting surveillance of Barge's residence when he noticed Kelly enter the home. The officer knew that Kelly had warrants for his arrest and called for back-up. As the officers approached the front door, Kelly and Barge ran out the back. They were stopped by two officers stationed outside the back door. Kelly was carrying a green backpack and Barge was carrying a black one. During a patdown search of Kelly, an officer found drugs, "a wad of cash," and a red bandana in his right back pocket. In the green backpack, the officer discovered another bag containing 1.5 ounces of marijuana, small jeweler's bags, some cigar blunt wrappers, and another red bandana. Inside the black backpack carried by Barge, the deputies found two bags of marijuana, rounds of ammunition, as well as a red bandana, a scale, and several small plastic baggies. A subsequent search of Barge's room revealed gang paraphernalia and digital scales.

At trial, a State's expert testified that Kelly and Barge had both been affiliated with the Bloods street gang, a national gang with various sects that had existed in the county for at least 12 years. In his expert opinion, Kelly and Barge were leaders of the "G-Shine Bloods," a sect within the "East Coast Blood gangs." He further testified to evidence on social media that showed Barge's gang affiliation.

Barge argued that the evidence was insufficient to support his conviction. The Court agreed. Assuming, without deciding, that sufficient evidence showed that Barge actively participated in an illicit street gang, the State failed to present evidence showing a sufficient nexus between Barge's commission of a predicate act and an intent to further the gang activity. Thus, the Court stated, the State was required to prove something more than the mere commission of a crime by gang members. The State must demonstrate that the commission of the predicate act was intended to further the interests of the gang.

And here, the Court found, the indictment alleged that Barge participated in criminal gang activity by possessing marijuana with the intent to distribute it. The evidence upon which the State relied to show a nexus between Barge's possession of the marijuana concealed in his backpack and an intent to further the gang activity is that he and Kelly were “repping” their gang at the time they possessed the drugs because Kelly was wearing a red bandana in his right back pocket and Barge had a red bandana inside the backpack he carried. The State also pointed to the expert's testimony that East Coast Bloods “are well-known for drug sales and drug distribution” and gang members promote their position in a gang by “[p]ortraying a certain image, whether it be that you're wealthy, [or] that you have power or influence.”

But, the Court held, this evidence failed to satisfy the State's burden. While Kelly might have been “repping” the gang generally by wearing the red bandana in his pocket, there was no evidence that he or Barge possessed or distributed the marijuana in a highly visible manner or that they referenced this particular crime on social media to enhance the gang's reputation. The expert's testimony about the East Coast Bloods' general reputation for drug sales and distribution also provided insufficient evidence that this particular transaction furthered the interests of the gang. Accordingly, the Court reversed Barge's conviction for criminal gang activity.

Venue; Worthen

Scott v. State, A18A1907 (2/14/19)

Appellant was convicted of armed robbery and possession of tools for the commission of a crime. The evidence showed that the victim, the manager of a restaurant, was making a night deposit at a bank adjacent to the restaurant, when appellant attacked him and stole the night deposit. Appellant contended that the State failed to prove venue beyond a reasonable doubt. The Court disagreed.

The Court stated that venue for the crime of armed robbery is the location where the victim lost complete dominion over the property taken. Here, the evidence showed that the robber began chasing the victim while the victim was in the bank parking lot. But before the robber took the money, the victim reached the end of the parking lot, fell, got up, and started running again toward the restaurant adjacent to the bank. Not until the victim fell again — after he had run from the end of the bank parking lot — did the robber take the money. Trial testimony established that the restaurant is in Chatham County and that the restaurant and bank are adjacent to each other along a seven-lane highway; that the bank night deposit box is about 50 yards from the restaurant; and that the restaurant and bank properties are separated only by a two-lane road.

Relying on the Supreme Court's recent decision in *Worthen v. State*, 304 Ga. 862, 865 (3) (a) (2019), the Court stated that a jury may reasonably infer that a crime committed near a location in one county was committed in the same county. Therefore, the Court concluded, the evidence allowed the jury to infer that the crimes committed near the restaurant in Chatham County were committed in Chatham County.

Search & Seizure; Information from Dispatchers

In re A. P., A18A1682 (2/15/19)

Appellant was adjudicated delinquent for unlawful possession of a handgun. He contended that the court erred in denying his motion to suppress. The evidence, briefly stated, showed that a complainant reported that a group of 14- to 15-year-old juveniles were in the process of stealing a vehicle outside of Building 13 of the Arbor Crossing Apartments. The dispatcher stayed on the line with the complainant and the officer dispatched to the scene. When police arrived, the group of juveniles, which had swelled to 10, ran off, but the direction was not clear from the record. The arresting officer stopped appellant, who he believed to be 15 or 16 years old, and another male because they were walking away from the area where the complainant said the cars were being stolen. The officer had another officer stand with the two boys while he walked around the building looking for more juveniles and the cars. He returned, then walked appellant and the other boy to Building 9, where more officers were standing with other juveniles. The officer had appellant put his hands on his head as they walked. As they walked, the officer noticed a "hard, heavy" object in appellant's front, right pocket. The officer patted appellant down for officer safety and when he felt the chamber of a revolver, arrested appellant.

Appellant argued that the officer lacked reasonable suspicion to briefly seize him and lacked probable cause to arrest him. The Court disagreed. The Court stated that a dispatcher who reports a crime at a specified location gives police an articulable suspicion to investigate and detain individuals at the scene, particularly where police observations on arriving at the scene corroborate the dispatcher's report. Even if the dispatcher's information comes from a citizen or an unidentified informant, the investigatory detention is valid, for patrolling officers are not required to question dispatchers about the source of the information. Corroboration only solidifies the existence of an articulable suspicion.

The Court found that under the totality of the circumstances, the officer had a reasonable suspicion that appellant was engaged in or had been engaged in criminal activity so as to support the brief seizure of him. The officer was dispatched to a crime in progress, arrived at the apartment complex where the crime was occurring while still speaking with the dispatcher, immediately went to the particular location where the complainant was reporting the crime to be occurring, and there spotted appellant and the other boy, whose ages matched the ages of the juveniles described in the dispatch. The juveniles were in the precise location where, according to the dispatch, the crimes were being or had just been committed. This corroboration solidified the existence of an articulable suspicion, and the officer was not required to wait until he actually observed appellant committing a crime.

In so holding, the Court rejected appellant's contention that the officer elevated the second-tier encounter to a third-tier encounter because he had the juveniles stand with another officer while the arresting officer circled the building. There was no testimony indicating that his doing so unreasonably extended the duration of the investigative detention. And the Court stated, the fact that the officer had appellant put his hands on his head did not elevate the investigative detention into a third-tier arrest either.

Nevertheless, appellant argued, the pat-down was impermissible. The Court again disagreed. In the context of a second-tier encounter, an officer may conduct a pat-down search of a person whom he reasonably believes to be armed or otherwise dangerous to the officer or others. And here, the officer testified that seeing the hard, heavy object in appellant's pocket prompted him to pat down appellant to protect officer safety. Accordingly, the trial court did not err in denying the motion to suppress.

Determinate Sentencing; No Contact Provisions

Jones v. State, A18A1912 (2/19/19)

Appellant entered a negotiated plea to the molestation of his stepdaughter. The trial court sentenced him to thirteen years, with eight to serve, concurrent with “any sentence currently serving.” As one of the conditions of his probation, appellant was ordered to have no contact with the victim or his biological son, the birth of whom resulted from the molestation. The trial court added a caveat to the no contact condition that would allow appellant to have contact with the victim or child if ordered by a judge, leaving open the possibility that appellant could legitimate the child and obtain visitation. Per the terms of his plea agreement, appellant agreed to waive any right to modification of his sentence and his right to appeal. Appellant filed a timely motion to modify his sentence under OCGA § 17-10-1 (f) which the trial court summarily denied.

Appellant contended that that he received an indeterminate sentence based on the special condition that he have no contact with the victim or his biological child. He argued that the victim explicitly wished to remain in contact with him and to allow him to be involved in his biological child's life, and he contended that the probation condition effectively terminates his parental rights.

The Court stated that under OCGA § 17-10-1 (a) (1), a trial court is required to impose a determinate sentence. A determinate sentence is one that establishes a specific number of months or years. Here, the trial court imposed both a specific term of imprisonment and a term of probation for a determinate number of years. Thus, the trial court did not impose an indeterminate sentence. Moreover, the Court found, nothing about the special conditions of probation transformed the sentence into one that was indeterminate given the specific term of probation imposed.

The Court also found that the trial court's inclusion of a no contact provision was also within the trial court's discretion and would not cause the sentence to be illegal. In fact, the Court noted, it has repeatedly approved of special conditions of probation that prohibit contact with the victim or minors, including the defendant's own children; a condition of probation which precludes contact between the perpetrator of a sexual crime and his victim bears a reasonable relation to future criminality especially where a family relationship provided the opportunity for the past criminal conduct. Also, the trial court left open the possibility that appellant could regain the right to have contact with his child by legitimating the child and obtaining approval from the court. Thus, there was no merit to his contention that the condition of probation effectively terminated his parental rights without notice or proper proceedings.

Accordingly, the Court concluded, because appellant did not established that the sentence imposed was illegal, his motion to modify his sentence was barred by the waiver provision in his plea agreement.

Inconsistent and Repugnant Verdicts

Smith v. State, A18A1858 (2/19/19)

A grand jury indicted appellant on two counts of aggravated assault, one count of criminal attempt to commit rape, one count of false imprisonment, and one count of simple battery. The aggravated assault charges alleged that he assaulted the victim with a gun (Count 1) and a boxcutter (Count 2), while the criminal attempt to commit rape charge alleged that appellant threatened the victim “with a gun and a boxcutter, forced her to take her pants off, and took his own pants off,

acts which constitute a substantial step toward the commission of said crime.” At the conclusion of the trial, a jury acquitted appellant of both counts of aggravated assault and convicted him of the remaining charges.

Appellant argued that his conviction for criminal attempt to commit rape “constituted a repugnant verdict, lacking in reasonable intentment.” He maintained that his acquittal on the aggravated assault charges and his conviction on the criminal attempt to commit rape charge could not be legally or logically reconciled because all three counts were based on the same alleged facts (that he used a gun and box cutter to assault/threaten the victim), and, therefore, his acquittal on the aggravated assault counts precluded a guilty verdict as to the criminal attempt to commit rape count. The Court disagreed.

First, the Court held, the inconsistent verdict rule was abolished in *Milam v. State*, 255 Ga. 560 (2) (1986). Therefore, appellant’s inconsistent verdict challenge was without merit.

Alternatively, to the extent that appellant asserted that the verdict is repugnant because it involved a finding of guilt and an acquittal on the same offense based on the same set of facts, that argument also failed. The Court noted that in *Wiley v. State*, 124 Ga. App. 654, 655-56 (185 SE2d 582) (1971), it identified a repugnant verdict as one that involved a finding of guilt and an acquittal on the same offense based on the same set of facts. However, *Wiley* and its progeny was overruled in the en banc decision in *Blevins v. State*, 343 Ga. App. 539, 550 (4) (2017). In doing so, *Blevins* noted that *Wiley* was an “outlier” and determined that the reasoning set forth in *Milam* for abolishing the inconsistent verdict rule in criminal cases also applied to repugnant verdicts as defined in *Wiley*. Thus, appellant’s repugnant verdict claim was foreclosed by *Blevins*.

Out-of-Time Appeals; Ringold

Cooper v. State, A18A1871 (2/19/19)

In 2017, appellant entered a non-negotiated plea of guilty to first degree home invasion, aggravated assault, and possession of a firearm by a convicted felon. In 2018, he filed a pro se motion for leave to file an out of time appeal. The trial court denied the motion.

The Court noted that having entered a guilty plea, appellant has no unqualified right to a direct appeal. In order to obtain an out-of-time appeal, appellant must show that the issues he seeks to appeal can be resolved by facts appearing on the record and that his failure to seek a timely appeal was the result of ineffective assistance of counsel. If the issues cannot be resolved from the existing record, appellant would have had no right to file even a timely direct appeal and, therefore, is also not entitled to an out-of-time appeal. Claims which require an expanded record must be pursued in a habeas corpus petition. And here, the Court found, a review of the record showed that appellant failed to identify any claims that would support a direct appeal from his guilty plea. The trial court, therefore, properly denied his motion for an out-of-time appeal.

However, the Court noted, the Supreme Court of Georgia recently called into question Georgia’s case law regarding out-of-time appeals in *Ringold v. State*, 304 Ga. 875 (Jan. 22, 2019) (citing *Roe v. Flores-Ortega*, 528 U.S. 470 (120 SCt 1029, 145 LE2d 985) (2000)). Under our body of cases, Georgia appellate courts have required a defendant to show an ability to prevail on the merits before opening the door to an out-of-time appeal. As the *Ringold* Court noted, however, that case

law appears inconsistent with U. S. Supreme Court precedent; instead, courts should presume prejudice from counsel's failure to file a notice of appeal because this denies the defendant access to the appellate process entirely.

But, the Court stated, the *Ringold* Court did not overrule any of its prior cases, nor did it overrule — even implicitly — any of the Court of Appeals' cases involving out-of-time appeals from guilty plea convictions. And, in a concurring opinion, Justice Nahmias stated that the opinion “sounds a clear death knell for ... our prior holdings” in out-of-time appeal cases. He further encouraged the Supreme Court of Georgia to overrule the cases “at the first available opportunity.”

Thus, the Court stated, “Clearly, the *Ringold* decision, and Justice Nahmias's concurrence, have informed us that our jurisprudence in this area of the law is ‘unsound’ ...[b]ut we are left with little choice except to adhere to that precedent, however misguided, because those cases remain binding. Although we are authorized to overrule our own line of case law, because the Supreme Court did not overrule their precedent, we remain bound by it...We are thus ‘powerless to do anything but apply’ the existing precedent to the case before us.”

Search & Seizure; Collective Knowledge Rule

State v. Preston, A18A1922 (2/19/19)

Preston was charged with VGCSA, possession of a firearm during commission of a felony, obstructing a police officer, and loitering after police found drugs, drug-related paraphernalia, and a weapon during a search of his car. The trial court granted Preston's motion to suppress the evidence from the search, and the State appealed.

The evidence, briefly stated, showed that a police sergeant was at a gas station when he observed Preston make contact with multiple people in a five minute period. Based on this training and experience, the sergeant believed that Preston had engaged in hand-to-hand drug sales. The sergeant contacted two nearby officers, relayed what he had observed, and asked them to investigate. The officers drove into the gas station parking lot, and shortly thereafter, Preston got into his car and pulled up to an available gas pump. As Preston exited his car and walked toward the store, one of the officers approached him and requested identification. The officer instructed Preston to sit on the cement near the pump. When Preston gave the officer his name, the officer asked him to produce his identification. As Preston opened the car door to get his identification, the officer observed a firearm in the car, and he believed that Preston was reaching for the weapon. A subsequent search of Preston and the vehicle revealed numerous Xanax and oxycodone pills, powder cocaine, crack cocaine, and instrumentalities of drug sales.

The State contended that the trial court erred in concluding that there was no reasonable suspicion for the stop because the collective knowledge of the officers provided a reasonable suspicion that drug transactions occurred. The Court agreed. To meet the reasonable suspicion standard for conducting a second-tier investigatory detention, the police must have, under the totality of the circumstances, a particularized and objective basis for suspecting that a person is involved in criminal activity. The “collective knowledge” rule provides that reasonable suspicion may exist based on the collective knowledge of the police when there is reliable communication between the officer supplying the information and the officer acting on that information instead of the arresting officer's knowledge alone. Thus, the officers were entitled to consider, and draw reasonable inferences from, the fact that Preston had parked his car near the building outside the gas station, met with several people in a five-minute period while standing outside his car, and returned to his car and pulled

up to a gas pump after the officers pulled into the gas station lot. Making reasonable inferences from this behavior, coupled with the observation of suspected hand-to-hand drug transactions, the officers had reasonable suspicion of criminal activity and the interaction was a permissible second-tier encounter that permitted the officers to detain Preston.

The State also argued that the trial court erred in finding that the officers lacked probable cause to search the car. The Court again agreed. When the officer was standing by the driver's side door of Preston's vehicle, he was looking from a lawful vantage point. And he had a legitimate reason to be there as he was seeking Preston's identification while following up on Preston's possible drug activity. Moreover, the officer also had a legitimate reason to look in the car when Preston turned his back toward the officer while seated in the car. As a result, the officer observed the firearm in plain view.

Finally, once police observed the gun in the car, they had probable cause to search the vehicle under the automobile exception to the warrant requirement which allows a police officer to search a car without a warrant if he has probable cause to believe the car contains contraband, even if there is no exigency preventing the officer from getting a search warrant. This is true even if the defendant has been placed under arrest prior to the search. Consequently, in light of the officer's observation of the gun, and the suspected hand-to-hand drug transactions, there was a fair probability that there was contraband in the car. Therefore, there was probable cause to conduct the search. Accordingly, the Court concluded, the trial court erred in granting the motion to suppress.

Cross-examination; Authentication

Johnson v. State, A18A2132 (2/19/19)

Appellant and Lynch were jointly indicted for three counts of first-degree cruelty to a child and one count of second-degree cruelty to a child relating to their three-month-old twins. Prior to trial, Lynch entered into a negotiated plea in which he agreed to testify against appellant. At trial, appellant was convicted of first-degree cruelty to a child, but acquitted of the remaining charges.

Appellant argued that the trial court erred by excluding evidence of child pornography found on Lynch's phone. The record showed that during a pretrial hearing, the prosecutor stated that the images "are not child sexual abuse images that would likely lead to any type of prosecution against [] Lynch or anyone else." He further gave multiple technical reasons why the images could not be shown to have been intentionally downloaded, and even assuming they were child pornography, could not be attributable to Lynch. Ultimately, the trial court ruled that Lynch could be questioned "about the plea offer, the plea deal, what was entailed there, all the circumstances of that and how that has affected him and whether he has any bias or whether he is testifying in order to curry favor with the State regarding that plea deal." But as to the sexually explicit images, the court ruled that appellant was limited to asking Lynch the following questions: "You know you had images shown on a phone seized by police that shows young women, who may be underaged, engaged in sexual activity, don't you? You're testifying this way because you are trying to curry favor with the State. He can say yes or no. The State and the public defender [are] stuck with whatever answer he gives [and,] ... can't tender separate evidence to challenge [it]." During her cross-examination of Lynch, appellant did indeed ask him these questions, and he answered "no" to both of them.

Appellant argued that the trial court erred in limiting her cross-examination of Lynch. Specifically, she contended that the sole purpose of admitting evidence of the images was to reveal Lynch's bias in favor of testifying for the State in hopes of avoiding being charged with crimes unrelated to the cruelty-to-a-child charges in this case. The Court noted that OCGA § 24-6-608 does not preclude introduction of extrinsic evidence to prove a witness's bias. But here, the trial court *did* permit appellant's counsel to question Lynch as to whether he was testifying against her in an attempt to "curry favor with the State" immediately after she asked him about the images. More importantly, the evidence she sought to admit did not suggest that Lynch was at risk of being charged with any particular crimes in the future that might have motivated him to testify for the State. Indeed, the Court noted, in a somewhat circular argument, appellant contended that, while it is irrelevant whether the State had enough evidence to prosecute Lynch for child-pornography offenses, he was nevertheless motivated to curry favor with the State to avoid such a baseless prosecution. The Court found this argument unavailing because the potential bias alleged by appellant could not exist if the State did not have enough evidence to indict Lynch for any crimes related to the images.

Furthermore, the Court noted, appellant never disputed or objected to the State's description of the images or its assertion that it lacked sufficient evidence to prosecute Lynch for possessing the images. In this regard, attorneys are officers of the court, and their statements in their place, if not objected to, serve the same function as evidence. Additionally, as an officer of the court, in the absence of an objection, a prosecutor's evidentiary proffers to the trial court during a hearing will be treated on appeal as the equivalent of evidence. In fact, an officer of the court may make a statement in his place which is taken to be *prima facie* true unless verification of such statement is required by the opposing party at the time the statement is made. Consequently, the Court credited, as *prima facie* true, the prosecutor's representation that Lynch faced no future risk of criminal prosecution related to the images at issue, and therefore, any evidence related to the images was irrelevant to show the specific bias appellant has alleged. Under such circumstances, the trial court was authorized to exclude as irrelevant any cross-examination of Lynch related to the images, and it certainly did not abuse its discretion in merely limiting cross-examination on the matter.

Appellant also argued that the trial court erred in allowing the State to introduce unreliable and unauthenticated text messages retrieved from her phone. Specifically, appellant argued that the State failed to properly authenticate the text messages because it must show more than the electronic communications being provided from a particular device, and she suggested that the State was *required* to authenticate the messages through Lynch's testimony because he was a participant in the conversations. But the Court stated our Evidence Code recognizes a wide variety of means by which a party may authenticate a writing and the State was not limited to authenticating the text messages through appellant's preferred method.

Moreover, the Court found, contrary to appellant's arguments, the State presented ample evidence to authenticate the outgoing text messages found on her phone and to establish that she authored those messages. Thus, the trial court did not abuse its discretion in admitting the text messages because there was ample circumstantial evidence to establish that the messages were sent by appellant from her phone. In so holding the Court acknowledged, that every form of electronic communication can be "spoofed," "hacked" or "forged" but this does not and cannot mean that courts should reject any and all such communications. In fact, the Court stated, the vast majority of these communications are just as they appear to be—quite authentic. And here, the State supplied sufficient, non-hearsay evidence as to the identity of the source such that a reasonable factfinder could conclude that the evidence is what it is claimed to be.