

THIS WEEK:

- **Right to be Present; Pre-trial Motions**
- **Motions for New Trial; General Grounds**
- **Sentencing; OCGA § 16-11-106 (b)**
- **Sufficiency of the Evidence; Value**
- **Aggravated Sexual Battery; Intoxication of Victim**
- **Search & Seizure**
- **Sentence Modifications; Void Sentences**

Right to be Present; Pre-trial Motions

Hardy v. State, S19A0654 (9/3/19)

Appellant was convicted of malice murder and other offenses. He contended that his absence during the pretrial motions hearing violated his right under the Georgia Constitution to be present during the criminal proceedings against him. The Court disagreed.

First, the Court noted, it has long recognized that a criminal defendant has a state constitutional right to be present during all critical stages of the proceedings against him and has defined a "critical stage" of a criminal proceeding as one in which the defendant's rights may be lost, defenses waived, privileges claimed or waived, or one in which the outcome of the case is substantially affected in some other way. If not waived by the defendant, a direct violation of the right to be present is presumed prejudicial and requires a new trial.

And here, the Court found, the record showed the Monday hearing at issue was a hastily called, last-minute pretrial motions hearing intended to address five motions filed by appellant's codefendant earlier that day. Appellant complained that he was absent when his counsel joined those motions on his behalf and when the trial court heard arguments regarding the motions. But, the Court found, that aspect of the hearing - that is, the announced purpose of the hearing - involved only legal arguments to which appellant would have made no meaningful contribution. The discussion of the motions in his absence therefore did not violate his constitutional right to be present.

Nevertheless, appellant argued, his right to be present was violated by his absence from the brief portion of the hearing when his counsel re-requested (and the trial court summarily denied) the one-week continuance that his counsel had requested (and the trial court denied) at the Friday hearing before this Monday hearing. But, the Court noted, appellant cited no case in which a defendant's absence from a proceeding discussing a continuance has been held to violate his constitutional right to be present. Nevertheless, the Court acknowledged the possibility that a proceeding called to consider a motion for a continuance that would affect a defendant's substantial rights, or at which evidence is presented of which the defendant has knowledge, could be one for which the defendant must be present. But in general, the right to be present

does not attach to proceedings involving logistical and procedural matters. And here, the Court found, the continuance request at issue was merely a perfunctory reiteration, made during a hearing called on short notice to discuss unrelated motions, of a request for a continuance of just one week made on the previous business day at a proceeding that the defendant attended, and as to which he expressed no opinion. Under these circumstances, the Court concluded, appellant's absence from this snippet of the hearing did not violate his right to be present.

Motions for New Trial; General Grounds

State v. Hamilton, S19A0722 (9/3/19)

Hamilton was convicted of felony murder and three counts of aggravated assault. The court, on its own motion, granted Hamilton a new trial on the general grounds and on legal grounds based on erroneous jury instructions. The State appealed.

First, the State contended that the trial court erred in granting the motion on the general grounds because the trial court applied the legal standard for the sufficiency of the evidence laid out in *Jackson v. Virginia* instead of weighing the evidence as the thirteenth juror. The Court noted that although the trial court did briefly mention the *Jackson v. Virginia* standard at the hearing at which it granted a new trial, it quickly followed that statement with the correct standard for the general grounds and by stating that it would grant a new trial based on those standards. Specifically, the court stated that it was "sitting as the 13th juror," that the evidence "at trial was decidedly and strongly against the weight of the evidence," and that "a new trial is consistent with the principles of equity and justice." Additionally, the court's written order unequivocally applied the correct standard of OCGA §§ 5-5-20 and 5-5-21 in granting Hamilton a new trial, explaining that it was granting a new trial because the verdict "was contrary to the evidence and principles of justice and equity." And, the Court noted, even if there were a discrepancy between an oral pronouncement and a written ruling, it is well settled that the discrepancy will be resolved in favor of the written judgment. Thus, the State's contention failed.

Next, relying on *State v. Holmes*, 304 Ga. 524 (2018), the State argued that the trial court erred by ruling that it made several errors in its jury charges during trial and by then relying on that ruling, at least in part, to grant the motion for new trial on the general grounds. But the Court found, here, unlike in *Holmes*, the trial court did not, in fact, rely on the legal errors it identified when it granted a new trial on the general grounds. Indeed, the trial court's order granting a new trial bore that out: following the paragraph in which the court outlined the jury-charge errors on which it granted a new trial, the court began a new, separate paragraph in which it clearly and separately applied its discretion as the thirteenth juror to grant a new trial. Because the trial court did not purport to grant a new trial on the jury-charge error under the mantle of its discretion as a thirteenth juror, and because it separately conducted a thirteenth-juror analysis that provided a second basis on which a new trial could be granted, the Court rejected this contention.

Nevertheless, the State also attacked the trial court's grant of a new trial on procedural grounds, arguing, among other things, that the court erred in acting on its own to grant a new trial, erred in failing to specify in detail why it believed the weight of the evidence was against the verdict, and erred in failing to wait for the transcript to be prepared before granting a new trial. The Court disagreed. First, trial courts are authorized under OCGA § 5-5-40 (h) to grant motions for new trial on their own motion within 30 days of the entry of judgment, which is what happened here. Second, the trial court did need to not make detailed findings regarding its exercise of discretion as a thirteenth juror. Third, the State failed to point to any authority that requires a trial court to wait for a transcript to be prepared before exercising its discretion as a

thirteenth juror. Finally, the trial court's written order specified that it evaluated the testimony and evidence at trial in reaching its decision to grant a new trial, and the State did not demonstrate that the trial court failed to exercise properly its discretion. Thus, the Court stated it will thus presume, in the absence of affirmative evidence to the contrary, that the trial court did properly exercise such discretion.

Sentencing; OCGA § 16-11-106 (b)

Williams v. State, S19A0707 (9/3/19)

Appellant was convicted of malice murder of Felton, aggravated assault of Felton and Sanders, and possession of a firearm during the commission of a felony. Appellant argued that the trial court erred when it ran his sentence for possession of a firearm consecutively both to his sentence for malice murder and to his sentence for the aggravated assault of Sanders. The Court agreed.

Under OCGA § 16-11-106 (b), a defendant convicted of possession of a firearm during the commission of certain felonies "shall be punished by confinement for a period of five years, such sentence to run consecutively to any other sentence which the person has received." The Court stated that it has construed the "run consecutively to any other sentence which the person has received" language of OCGA § 16-11-106 (b) as requiring that a sentence for possession of a firearm during the commission of a felony run consecutively only to the sentence for the *underlying felony* for the possession of a firearm offense. The trial court retains the discretion to decide whether to run the firearms possession consecutively to, or concurrently with, sentences on counts other than the underlying felony.

Here, the indictment charged appellant with possessing a firearm during the aggravated assault of Felton. Although the jury found appellant guilty of that underlying felony, that felony merged into his conviction for malice murder. The merger of the count charging appellant with the aggravated assault of Felton meant that no sentence (or conviction) was entered on the felony underlying appellant's firearm possession conviction. Thus, OCGA § 16-11-106 (b) did not require the trial court to run the sentence for appellant's firearm possession count consecutively to his sentence on any other count, including the malice murder count.

However, the trial court retained the discretion to run appellant's sentences consecutively to, or concurrently with, his sentences on other counts. And the Court stated, it generally presumes that a trial court understood the nature of its discretion and exercised it, unless the record shows otherwise. And here, the record rebutted that presumption. At sentencing, both the prosecutor and appellant's attorney told the trial court that the sentence on appellant's firearm possession conviction had to run consecutively to some other sentence. The record contained no evidence that the trial court understood its obligations differently. And where a trial court rules in a particular manner while erroneously believing that it lacks discretion to do otherwise, it is error. Accordingly, because the Court could not affirm the firearm possession sentence as an exercise of discretion, it vacated the sentence on the firearm possession count and remanded for resentencing.

Sufficiency of the Evidence; Value

Motes v. State, A19A1456 (8/22/19)

Appellant was convicted of aggravated cruelty to animals, criminal damage to property in the second degree, battery, and criminal trespass. The evidence showed that appellant and his sons got into an argument with the victim. During the argument, the sons shot into the victim's car, shattering its rear driver-side window, and killing the victim's dog.

The Court noted that the State charged appellant with criminal damage to property in the second degree for "intentionally damag[ing the victim's] automobile ... by shooting into said automobile, said damage exceeding \$500.00. ..." Appellant contended that because the State failed to prove the amount of damage to the victim's automobile, insufficient evidence supported his conviction for criminal damage to property in the second degree. Specifically, he contended that the evidence of the total amount to repair the automobile provided insufficient evidence of damage exceeding \$500 because labor costs must have been included in this total amount and labor cannot be used to show the total amount of damage.

The Court disagreed. The expenses incurred by the owner of the damaged property *for the owner's labor in dealing with the damage* cannot be used as a substitute for the value of the damage to the property and thus cannot be considered in determining whether the damage exceeds \$500. But here, there was no evidence that the amount to repair the car included the owner's own labor.

Appellant also argued that the State presented insufficient evidence from which the jury could determine the cost to repair the window because the victim testified about the total expense to repair his car rather than the window. The Court again disagreed. The victim testified that the damage to the car was the window, that the window was intact before the incident, and that it cost more than \$500 to repair the car. The victim did not identify any additional damage to the car other than the window in his testimony, which would therefore allow the jury to infer that the cost to repair the car was the same as the cost to repair the window. The Court noted that it has repeatedly held that the State has met its burden when it submits evidence of the cost to repair the property in conjunction with photographs of the damage. And here, the Court found, the State presented testimony from the victim that the damage to his car was the shot-out window and that the "cost to get th[e] car fixed" exceeded \$500.00, as well as a photograph showing the damaged window. Thus, the Court held, the evidence was sufficient to support appellant's conviction of criminal damage to property in the second degree.

Aggravated Sexual Battery; Intoxication of Victim

Johnson v. State, A19A1064 (8/23/19)

Appellant was convicted of aggravated sexual battery. The evidence, briefly stated, showed that the victim went with appellant's ex-wife over to appellant's house for a drink. The three then drank alcohol and smoked marijuana. But after consuming half a bottle of Jack Daniels and some Wild Turkey, the victim began to feel sick. As a result, appellant and his ex-wife helped the victim to the bathroom, where she vomited. They then led the victim to the guest bedroom to lay down, where she lost consciousness shortly thereafter. The victim regained consciousness when she felt someone—who she later realized was appellant—lie down beside her on the bed and begin rubbing her back. She then felt a hand rubbing her bottom and unbuttoning her pants before digitally penetrating her vagina. At that point, the disoriented victim said "no" and grabbed appellant's hand. Appellant said "ok, ok," and rubbed the victim's back again, before repeatedly telling her

that he was going to perform oral sex on her. The victim then became fully aware of who was touching her and, when he again attempted to touch her vagina, she moved his hand and got up from the bed.

Appellant contended that the evidence was insufficient to support his conviction. Specifically, he contended that when he inserted his finger into the victim's vagina, the encounter was consensual because she was conscious and responded positively to his earlier advances by arching her back to make herself more accessible. But the victim definitively testified that, although her initial instinct was that appellant's touches felt good, she was "so out of it," she "didn't know what was going on at first," she only became fully conscious and "realized something was wrong" when "he went in," and she did not enjoy it when he made contact with her vagina.

The Court noted that although a majority of states do not criminalize conduct when a victim has become voluntarily intoxicated by drugs or alcohol, Georgia is not such a state. Citing *Drake v. State*, 239 Ga. 232, 234-35 (1)(1977), superseded by statute on other grounds as stated in *Loyd v. State*, 288 Ga. 481, 492 (4) (c) (2011) and its progeny, the Court stated that under our well-established case law, when a victim is "intoxicated, drugged, or mentally incompetent" and her "will is temporarily lost from intoxication or unconsciousness arising from the use of drugs or other cause," she is "physically or mentally unable to give consent to the act" of sexual intercourse. The Court stated that it sees no reason why this same logic should not apply to sexual battery. And here, the State presented sufficient evidence by which the jury was authorized to conclude that the victim was intoxicated to the point her will was temporarily lost. Indeed, the victim vomited, required assistance to walk, and lost consciousness. Thus, in light of the victim's level of intoxication in this case, the jury was presented with evidence by which it could determine that she was unable to consent to appellant's act of penetrating her vagina with his finger—i.e., that he did so without her consent to the act. Accordingly, the Court affirmed his conviction.

Search & Seizure

Hall v. State, A19A1444 (8/23/19)

Appellant was convicted of trafficking in methamphetamine. He contended that the trial court erred in denying his motion to suppress. The Court disagreed.

The evidence, briefly stated, showed that drug task force agents were surveilling a known drug dealer. They watched as this person met with appellant in a Home Depot parking lot. The agents saw what they suspected was a drug deal. In fact, they recognized appellant as someone who had previously met with the known drug dealer in the same parking lot and engaged in a similar suspected drug deal. Based on this information, a task force officer notified a uniformed traffic officer to watch appellant's vehicle after it left the parking lot. The uniformed officer stopped appellant's vehicle after watching the vehicle cross over the white line and change lanes without signaling. As a result of the stop, a K-9 officer with a drug dog was called to the scene. The dog alerted on the vehicle and a subsequent search revealed the methamphetamine and a small amount of marijuana.

The Court found that the officer had reasonable, articulable suspicion that appellant was involved in criminal activity—even independent of the observed traffic offenses—upon initiating the traffic stop. This is because reasonable, articulable suspicion need not be based on an arresting officer's knowledge alone, but may exist based on the "collective knowledge"

of the police when there is reliable communication between an officer supplying the information and an officer acting on that information. And here, when the officer stopped appellant's vehicle, the task force agent identified himself to the officer, pointed out appellant's vehicle, and informed the officer that he suspected appellant had only minutes earlier engaged in an illegal drug transaction. Thus, this "collective knowledge" provided the officer with reasonable, articulable suspicion, which, in turn, justified prolonging the traffic stop until the arrival of the K-9 officer and his dog.

Moreover, the Court found, before the officer completed the tasks related to the investigation of appellant's traffic violations—specifically, determining if appellant had insurance—he smelled an odor of marijuana emanating from appellant's pickup truck. Consequently, in addition to the knowledge obtained from his discussion with the task force agent, the officer had further reasonable articulable suspicion that appellant was engaged in illegal activity, which also justified prolonging the duration of the stop. And, of course, once the K-9 officer's drug dog alerted, the officer had probable cause to search appellant's truck. Accordingly, the Court concluded, the trial court did not err in denying appellant's motion to suppress the evidence seized from his truck.

Sentence Modifications; Void Sentences

Gray v. State, A19A1258 (8/26/19)

In January, 2017, appellant entered a non-negotiated plea of guilty to five counts of sexual exploitation of children. He was sentenced to ten years to serve in prison followed by ten years on probation, with sexual offender requirements. Ten months later, he filed a motion to modify his sentence. Eleven months later, a substitute judge, sitting by designation, granted a consent order agreed to by the State and appellant. The modification order sentenced appellant to five years to serve followed by 15 years of probation. However, three weeks thereafter, the original sentencing judge, acting sua sponte and without holding a hearing, vacated the modification order and reinstated the original sentence in a reinstatement order.

Appellant contended the reinstatement order was void because he had begun to serve the reduced sentence and the trial court lacked the authority to increase his sentence by reimposing the original sentence. The State also contended that the Reinstatement Order was void, but on the ground that "[a]ny order modifying a sentence which is entered without notice and an opportunity for a hearing as provided in this subsection shall be void." OCGA § 17-10-1 (f). The Court stated that it was constrained to disagree with both parties.

The Court held that except as provided by statute, a sentencing court has no power to modify a valid sentence of imprisonment after the term of court in which it was imposed has expired. Pursuant to OCGA § 17-10-1 (f), the legislature has provided that sentencing courts have "jurisdiction" to correct or reduce a sentence for one year following the original sentence or within 120 days of receiving the remittitur following a direct appeal. Thus, here, where appellant did not argue that his sentence was void, the plain language of OCGA § 17-10-1 (f) dictates that the trial court lost jurisdiction to correct or reduce appellant's sentence months before it entered the Modification Order. And, even though appellant filed a motion to modify his sentence within the one-year period provided in OCGA § 17-10-1 (f), this does not alter the result under the plain meaning of that statute.

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

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Thus, under the Court's construction of OCGA § 17-10-1 (f), the Modification Order itself was void because the trial court (here with a judge sitting by designation) lacked jurisdiction to enter that order more than one year after the original sentencing, and the original sentencing judge was authorized to correct the void sentence. In so holding, the Court noted that the parties' interpretation of the statutory rule may have been reasonable given that one could read many of its prior cases as suggesting that the only factor relevant to the time limitations set forth in OCGA § 17-10-1 (f) is whether the defendant filed a timely motion. However, the Court found, these cases are distinguishable because none addresses the specific issue resolved in this particular case.