

THIS WEEK:

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- **Recidivist Sentencing; Prior Convictions**
- **Indictments; OCGA § 17-7-52**
- **Sufficiency of the Evidence; Child Molestation**
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- **Stalking; Sufficiency of the Evidence**

Void Sentences; Withdrawals of Plea

Martinez-Chavez v. State, A19A1526 (10/4/19)

In 2014, appellant was charged with two counts each of incest, statutory rape, and child molestation in connection with his niece when she was 14 to 15 years old. He subsequently pled guilty to all counts as part of a negotiated plea, and he was sentenced to 20 years' imprisonment on one of the incest counts, a consecutive 20 years' probation on one of the statutory rape counts, and concurrent terms of probation on the remaining counts. He then filed a motion to correct void sentence because he was not sentenced to a split sentence, as required by OCGA § 17-10-6.2 (b) (2013). He also filed a motion to withdraw his plea prior to resentencing. The trial court granted appellant's motion to correct void sentence and resentenced him on the incest count to 20 years, to serve 19 and the balance on probation. The sentence imposed for the statutory rape charge remained 20 years' probation consecutive to the sentence for incest, and there was no change to the sentences imposed on the other counts. In the same order, the trial court denied the motion to withdraw the guilty plea.

Appellant argued that the corrected sentence was still void because the court failed to impose a split sentence on the statutory rape and child molestation charges. The Court agreed. Both statutory rape and child molestation are subject to the split sentence requirements in § 17-10-6.2 (b). And the requirement of split sentences applies to each count. Although the legislature amended OCGA § 17-10-6.2 (b) in 2017 to require that only the final sentence imposed contain a split sentence rather than each individual count, the trial court was obligated to sentence appellant pursuant to the statute in effect at the time he committed his crime. And, the Court noted, in *Hardin v. State*, 344 Ga. App. 378, 388-89 (2) (2018) it held that the amended statute does not apply retroactively. Also, the Court found, although appellant did not argue that his sentences for child molestation or the second incest conviction are void, the Court must correct these void sentences as well. Accordingly, the Court vacated the sentences imposed on the remaining incest conviction as well as the statutory rape and the child molestation offenses.

Appellant also argued that the trial court erred in denying his motion to withdraw his plea. The Court again agreed. As the State conceded, as a rule, a defendant has an absolute right to withdraw his plea before sentence is pronounced. Since a void sentence is the same as no sentence at all, the defendant stands in the position as if he had pled guilty and not been

sentenced, and so may withdraw his guilty plea as of right before resentencing, even following the expiration of the term of court in which the void sentence was pronounced. Therefore, because appellant's sentences were void, he had a right to withdraw his guilty plea.

Recidivist Sentencing; Prior Convictions

Collins v. State, A19A1282 (10/8/19)

Appellant was convicted of child molestation and enticing a child for indecent purposes. He contended that one of his prior convictions, in which he pled guilty to a felony burglary charge as a first offender and then had his probation revoked, was void for the purposes of recidivist sentencing. The Court disagreed.

The Court stated that the State bears the burden of showing both the existence of the prior guilty pleas and that the defendant was represented by counsel when he entered the pleas. If the defendant was not represented by counsel, the State can meet its burden by showing that the defendant waived this right. The State can do this by introducing a transcript of the plea hearing, a docket entry or another document affirmatively showing that the right to counsel was waived. Once the State has shown that the defendant either was represented by counsel or waived the right to representation, a "presumption of regularity" attaches to the plea proceedings and the burden shifts to the defendant to show any alleged irregularities.

And here, the record showed that the trial court admitted into evidence the transcript of appellant's guilty plea hearing on the burglary charge. The transcript established that appellant expressly waived his right to counsel after the trial court advised him of his right to an attorney. Although appellant was sentenced as a first offender on the burglary charge, his probation was revoked two years later due to his violations of the conditions of his probation.

Nevertheless, appellant argued, the State failed to show that he was represented by counsel at his probation revocation hearing, after which he was adjudicated guilty of the burglary charge and re-sentenced. However, the Court stated, a probationer has no Sixth Amendment right to counsel at a revocation proceeding. A probationer has only a more limited due process right to counsel under the Fourteenth Amendment. And here, the Court found, the petition for an adjudication of guilt and imposition of sentence regarding appellant's probation revocation, which he signed, contained an acknowledgment stating: "I am aware that I may employ legal representation and I have the right to request an attorney be appointed for me. However, the Court is under no legal obligation to appoint such an attorney at said hearing." Appellant also admitted at the hearing to committing multiple crimes while on probation and that he failed to complete his probation requirements. Thus, the Court found, the record demonstrated that appellant was apprised of his right to request an attorney, he admitted to committing the other crimes and he failed to point to any Fourteenth Amendment due process violations. Therefore, the Court concluded, appellant did not establish that the trial court erred in considering his prior felony conviction for the purpose of recidivist sentencing under OCGA § 17-10-7. Accordingly, the trial court did not err in denying appellant's motion for new trial regarding his claim that the trial court erred by sentencing him as a recidivist.

Indictments; OCGA § 17-7-52

State v. O'Neal, A19A1464 (10/10/19)

O'Neal, a prison guard, was indicted for violation of oath by public officer (Count 1); simple battery (Count 2) and making a false statement (Count 3). O'Neal moved to quash the indictment on the ground that he had not been provided notice and an opportunity to be heard before the grand jury deliberated as required by OCGA § 17-7-52. O'Neal argued that at the time the alleged crimes were committed, he was employed as a POST-certified corrections officer, he was on duty during the events, and “there is no evidence that [he] ever stepped away from his duties as a peace officer.” The parties agreed not to have a hearing, and the trial court decided the motion on the briefs and the indictment. The court granted O'Neal's motion, ruling that “the alleged actions charged occurred while the Defendant was in the performance of his duties and it does not appear the Defendant ‘stepped away’ from his job.” The State appealed.

The Court noted that OCGA § 17-7-52 applies to indictments “charging the officer with a crime which is alleged to have occurred while he or she was in the performance of his or her duties. ...” Thus, the rights afforded by OCGA § 17-7-52 come into play if the crimes charged were committed while the officer was in the performance of his duties as a police officer. Therefore, the Court stated, the way to determine whether OCGA § 17-7-52 applies to a peace officer is to specifically examine the crime which is alleged to have occurred while he or she was in the performance of his or her duties. The operative inquiry is whether the specific conduct that predicated the criminal charges was within the scope of the defendant's official duties.

And here, the Court found, Count 1 charged that O'Neal violated his oath as a public officer. The predicate conduct is “willfully, and intentionally, while employed as a corrections officer at the Johnson State Prison, ... participating in and facilitating acts of abuse against inmates incarcerated at the Johnson State Prison, contrary to the laws of [Georgia].” The Court found that despite the lack of any other factual context for this count, the language accusing O'Neal of abusing inmates “while employed as a corrections officer” sufficiently characterizes O'Neal's conduct as within the performance of his duties such that OCGA § 17-7-52 applies. In the performance of their duties, corrections officers routinely interface with prisoners in situations that can escalate into physical altercations or other circumstances that allegedly could be abusive if done in an excessive and unlawful manner. The indictment did not allege unusual circumstances such as sexual conduct that would be outside an officer's duty under any scenario, despite occurring in uniform while on duty. Thus, the Court concluded, absent any additional context in the allegations in the indictment, a common-sense reading of the indictment supported the trial court's conclusion that O'Neal was engaged in his duties at the time of the alleged abuse. Therefore, the trial court did not err by granting the motion to quash Count 1.

However, when determining whether OCGA § 17-7-52 applies, a court must examine each count of the indictment because prosecution on counts of a separate character that do not implicate OCGA § 17-7-52 may proceed without following the procedures in that statute. And here, the Court found, Count 2 alleged that O'Neal committed battery by striking Thurston Waller, and aside from that bare allegation, the count neither mentions O'Neal's employment nor provides any other context for the offense such as the location or whether Thurston Waller was an inmate. The indictment alleged that the acts in each count are separate and distinct acts from the acts alleged in the other counts of the indictment, and nothing in Count 2 revealed information that would support a finding that O'Neal committed the alleged battery while performing his official duty as a corrections officer. In essence, the Court stated, the conduct charged could have

been committed against anyone at any time. Accordingly, Count 2 did not implicate OCGA § 17-7-52, and the trial court erred by granting O'Neal's motion to quash this count.

Next, the Court considered Count 3. That count alleged that O'Neal lied to an agent of the Georgia Department of Corrections by denying involvement in any incidents where Johnson State Prison inmates were assaulted. The conduct of lying to an agent of the Georgia Department of Corrections who is investigating him cannot be said to be within the performance of O'Neal's regular job duties at the prison, such as making routine incident reports or filling out a daily activity sheet. Accordingly, the Court held, Count 3 did not fall within the scope of OCGA § 17-7-52, and the trial court erred by quashing this count.

Sufficiency of the Evidence; Child Molestation

Chitwood v. State, A19A1247 (10/10/19)

Appellant was convicted of one count of aggravated sexual battery and three counts of child molestation. The evidence, briefly stated, showed that April Chitwood, who was appellant's wife and the minor victim's mother, left her residence to go to the store. Upon her return from the store, she went inside her bedroom and saw appellant lying in the bed with their six-year-old daughter, who was sleeping. She observed that appellant was not wearing his boxers and that their daughter's underwear had been pulled down. According to April, their daughter woke up screaming that her father had hurt her. Specifically, the victim said that while she was alone with appellant in her mother's bedroom, appellant touched her on her “wrong spot,” and that it “felt bad” when appellant touched it.

Appellant contended that the evidence was insufficient to support his convictions for child molestation in Counts 3 and 4 of the indictment. The Court agreed. In Count 3, the State alleged that appellant “did commit an immoral and indecent act in the presence of [the victim], a child under the [age] of sixteen years, with the intent to arouse and satisfy the sexual desires of said accused by exposing said child'[s] primary genital area. ...”

Here, April testified that when she entered her bedroom, she saw appellant lying in bed with the victim and that the victim “had her gown up” and her underwear had been pulled down. The Court noted that the victim said that during the incident her clothes had been pulled up to her neck. There was, however, no evidence presented at trial to show that the victim's “primary genital area,” as opposed to her buttocks, had been exposed as alleged in the indictment. The State also did not elicit any testimony as to what position the victim had been laying in the bed, which, depending on the position, could have led to an inference that the victim's genital area was exposed. Also, the trial transcript showed that the State did not question any of its witnesses as to whether the victim's genital area had been exposed during the incident. Moreover, April provided no testimony as to the position of the victim's underwear before she left the residence. Thus, the Court concluded, the State failed to put forth any evidence that appellant exposed the victim's genital area, as was alleged in the indictment. Accordingly, the Court held that the evidence was insufficient to sustain appellant's conviction for child molestation (Count 3) as alleged in the indictment, and reversed appellant's conviction for this offense.

Next, in Count 4, the State alleged that appellant committed child molestation in that he “did commit an immoral and indecent act in the presence of [the victim], a child under the age of sixteen years, with the intent to arouse and satisfy the sexual desires of said accused by exposing his penis in said child's presence. ...” Here, the Court found, the testimony

elicited by the State from its witnesses showed that when April entered into the bedroom, she observed appellant lying in the bed with his "boxers down." However, the State failed to elicit testimony from any of its witnesses as to whether appellant's penis had been exposed in the victim's presence as alleged in the indictment. Also, the trial transcript reflected that the State never asked any of its witnesses whether appellant's penis had been exposed in the victim's presence at the time of the incident. Moreover, the DFCS worker testified that she did not "recall the length of how far [April] said his pants were down." Thus, the State did not present any evidence to show that appellant's penis had been exposed in the victim's presence at the time of the incident as was alleged in the indictment. Accordingly, the Court concluded that the evidence was insufficient to sustain appellant's conviction for child molestation (Count 4) as alleged in the indictment, and reversed his conviction for this offense as well.

Sentencing; Merger

Anderson v. State, A19A1118 (10/15/19)

Appellant was convicted of robbery by sudden snatching, two counts of simple battery, and drug offenses. The evidence, briefly stated, showed that the victims, Monselvo and Aliaz, were standing by Monselvo's vehicle when appellant approached them and asked for money. When Monselvo refused to give appellant money, appellant hit Monselvo in the face. Monselvo's car keys fell from his pocket onto the ground. Appellant immediately grabbed Monselvo's car keys and refused Monselvo's requests to return them.

Monselvo went inside the gas station and asked the cashier to call the police and report the incident. While the cashier was speaking with the 911 operator, Monselvo and the cashier observed appellant slap Aliaz in his face "real hard."

Appellant argued that the trial court erred in failing to merge the simple battery charge against Monselvo into the robbery by sudden snatching charge. The Court agreed.

Under OCGA § 16-1-7 (a) (1), when the same conduct establishes the commission of more than one crime, a defendant may be prosecuted for both crimes, but cannot be convicted of more than one crime if one crime is included in the other. For purposes of merger, one crime is included in another if either it is established by proof of the same or less than all the facts or a less culpable mental state than is required to establish the commission of the other crime charged or if the included crime differs from the crime charged only in the respect that a less serious injury or risk of injury to the same person or a lesser kind of culpability suffices to establish its commission.

Here, the Court found, it was undisputed that simple battery is not, as a matter of law, a lesser included offense of robbery by sudden snatching since the elements required to prove each offense are different. Simple battery focuses on injury to the person while the robbery by sudden snatching offense involves the taking of property from the person of another. Thus, the question was whether the simple battery offense should merge into the robbery by sudden snatching offense as a matter of fact. The key question in determining whether a merger has occurred as a matter of fact is whether the different offenses are proven with the same facts. For example, if one crime is complete before the other takes place, the two crimes do not merge. However, if the same facts are used to prove the different offenses, the different crimes merge.

The Court noted that as indicted in this case, appellant's charges for robbery by sudden snatching in Count 1 and simple battery in Count 4 both involved appellant's act of striking Monselvo. Specifically, the indictment averred that appellant

committed the offense of robbery by sudden snatching in that appellant "caused [Monselvo] to drop his car keys on the ground by slapping him, grabbed the keys, and refused to return them[.]" Appellant's act of slapping Monselvo was alleged as part of the robbery purportedly to reflect the force necessary for appellant to transfer Monselvo's car keys to his possession. In setting forth the simple battery offense, the indictment also averred that appellant "slapp[ed] [Monselvo] in the face[.]" And, because averments in an indictment as to the specific manner in which a crime was committed are not mere surplusage, the State was required to prove that appellant struck Monselvo in the commission of both offenses.

At trial, Monselvo testified that appellant struck him in the face once. Thus, the Court found, because the simple battery was established by proof of the same or less than all the facts required to support the robbery by sudden snatching offense as charged, those offenses should have merged for purposes of sentencing. Accordingly, the Court vacated the sentence and remanded the case to the trial court for resentencing.

Rule 404 (b); Rule 403

Green v. State, A19A1122 (10/15/19)

Appellant was convicted of aggravated assault and possession of a firearm by a convicted felon. The evidence, very briefly stated, showed that in November of 2012, there may have been a cookout at the victim's mother's house attended by 20-25 people. Appellant, the victim's mother's boyfriend, the victim's brother, and other adults, were playing cards at the kitchen table. An argument ensued between the brother and appellant. Appellant went out the front door and may have invited the brother to join him. The victim reached the front door before the brother. She closed the door and was then shot through the closed door. Appellant was seen with a handgun matching the caliber of the bullet that hit the victim.

At trial, the court allowed the State, pursuant to Rule 404 (b), to present evidence of appellant's 1982 guilty plea to felony murder. The evidence showed that in 1981, appellant and an accomplice robbed a store and shot the store clerk. The trial court allowed the evidence "for the limited purpose of proving knowledge, identity, intent, and to establish the absence of mistake or accident."

Appellant contended that the trial court erred in allowing this 404 (b) evidence. The Court agreed. First, the Court stated that other act evidence offered for the purpose of showing identity must be so similar as to demonstrate that the other act and the charged offense were "signature crimes," with the defendant using a modus operandi that is uniquely his. But, here, the Court found that it could not say that appellant's conduct in shooting a store clerk during the course of an armed robbery was so similar to the charged offense that the charged offense must have been his handiwork.

Next, the Court stated that other act evidence should not be admitted on the ground of absence of mistake or accident when the defendant never claimed, nor was there any evidence to suggest, that the shooting was the result of an accident or mistake. And here, appellant did not claim that he accidentally fired the shot through the door. Instead, his defense at trial was that the State couldn't prove that he was the one who did the shooting. Nor was there evidence suggesting that appellant fired the gun by accident or mistake. While it was theoretically possible for a defendant in appellant's position to assert that the gun fired by accident or mistake, the circumstances of the 1981 shooting did nothing to rebut that possibility. Accordingly, the Court also concluded that lack of accident or mistake was not a proper purpose for admission of the other act evidence in this case.

As to allowing the evidence to prove knowledge, the Court found that the State charged appellant with aggravated assault with a deadly weapon, a general intent crime requiring no proof of knowledge. Also, appellant made no claim that he was unfamiliar with firearms. And appellant did not claim accident or mistake, and no evidence was presented showing that he fired the gun accidentally. Thus, the Court concluded, based upon the particular facts and circumstances of this case, knowledge was not a permissible purpose for admission of appellant's conduct in 1981.

However, the Court found, because appellant put his intent at issue by pleading not guilty, and he did not take any affirmative steps to relieve the State of its burden to prove intent, the only proper purpose to admit the other act evidence in this case was to show appellant's intent.

The Court then addressed the trial court's application of the Rule 403 balancing test. The Court found that the prosecutorial need for the evidence was negligible with regard to intent as no evidence was presented showing that the shooting was unintentional and appellant presented no such defense. There were also significant differences between the 1981 shooting and the charged offense. In the former, appellant shot a store clerk in the course of an armed robbery, and in the latter, it was alleged that he shot through a door following an altercation inside a home. While both involved firing a gun, the similarities end with that common fact. The probative value of the prior shooting was also diminished by its temporal remoteness from the charged act. The shooting took place more than thirty years before the charged offense, and appellant was released from prison approximately seven years before the charged offense. Nevertheless, based upon appellant's lengthy incarceration, the Court could not say that they were so remote as to be lacking in evidentiary value. Having considered all of the circumstances, the Court concluded that the probative value of the 1981 shooting to show appellant's intent was minimal at best.

Thus, the Court held, the trial court committed a clear abuse of discretion by failing to conclude that the probative value of the other act evidence in this case was outweighed by its prejudicial impact of appellant having a propensity toward violence. Moreover, the evidence regarding the identity of the person who shot through the door was entirely circumstantial; there was conflicting evidence about the number of persons present, whether it was a small gathering for an indoor card game or a cookout attended by 25-30 people, and whether numerous people were standing outside when the victim was shot. Additionally, the jury was improperly advised by the trial court that the 1981 shooting could be used for the purpose of identity — a central issue in the case. Therefore, the Court reversed appellant's convictions so that he may receive a new trial.

Stalking; Sufficiency of the Evidence

Stephenson v. State, A19A0810 (10/15/19)

Appellant was convicted of giving a false statement in a government matter and two counts of misdemeanor stalking. The evidence, very briefly stated, showed that on December 21, 2013 appellant spent less than ten minutes shopping in a Buckle store located in an Augusta mall. While in the store, he attempted to socially engage with three young women, including the two victims in this case, who, at the time of the trial, were 14 years old and 21 years old. One of the victims testified that appellant made her nervous because he stood so close to her. However, she helped him while he was looking at boots, and he didn't threaten her in any way or make any sexually-suggestive comments. In fact, this victim spent four

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or five minutes discussing boots with appellant. Appellant left the store a few minutes later, while the girls continued shopping. The victims never told appellant at the Buckle store that he was making them nervous or that he should back away from them.

On January 6, 2014, appellant's vehicle drove into the parking lot of a Kohl's in Evans, GA. His vehicle followed another vehicle that dropped off the victims. Appellant pulled over to the curb for four minutes, then he parked and entered the store through a different entrance than that used by the victims. After entering the store, appellant at some point approached the victims and interjected two comments during their conversation. The girls walked off, but appellant followed them and attempted two to four times to engage them in conversation over approximately 20 minutes. According to the victims, appellant never touched them, made any sexually derogatory comments or obscene gestures, or threatened any harm. He simply followed them around the store and watched them as they moved around the store. The girls were nervous and scared, so they reported appellant to a store manager and called 911. Appellant left before the police arrived.

Appellant contended that the evidence was insufficient to sustain his convictions for stalking. The Court stated that it was "constrained to agree."

The Court noted that OCGA § 16-5-90 (a) (1) does not specify how many incidents constitute a "pattern," nor does it specify the time period within which these incidents must occur. However, cases interpreting this statute uniformly hold that a pattern of harassing and intimidating behavior refers to more than a single instance. And here, the State admitted that the indictment did not reference the December 21, 2013 Buckle store encounter in the stalking charges and should not be considered in determining whether there was a sufficient number of acts to constitute a course of conduct. Thus, the fact that appellant may have followed the victims on January 6, 2014, a single date, was not sufficient to establish a course of conduct or pattern of behavior.

Nevertheless, the State argued, it presented the encounter at the Buckle store, and appellant's false statement that he had not seen the victims prior to the Kohl's encounter when, in fact, he had encountered them at the Buckle store 16 days prior to the Kohl's incident, as "intrinsic evidence" of appellant's pattern of intimidating behavior. But, the Court stated, pretermittting whether the use of intrinsic evidence permits a jury to consider uncharged conduct when determining whether the State has established a course of conduct or pattern of behavior, the evidence was still insufficient.

Specifically, the Court found, the record was devoid of any evidence that appellant threatened or scared the victims during their brief encounter at Buckle. At most, one of the victims was "nervous" during the Buckle encounter. In fact, the victims did not even remember appellant or the Buckle incident until after they returned home from Kohl's. In addition, the victims admitted they never saw appellant or his red Mustang after the Buckle encounter, they never received any Facebook messages or suspicious calls from appellant, and they never saw anyone suspicious at their homes or university following the Buckle incident. Moreover, none of the items seized from appellant's home following his arrest revealed any communications or connection between appellant and the victims, and social media searches likewise revealed no communications or connection between appellant and the victims, including no indication that appellant had visited the victims' social media pages. Thus, the Court found, there was simply no evidence to support a course of conduct or pattern of harassing and intimidating behavior based on the Buckle encounter.

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Furthermore, the Court found, the mere fact that appellant happened to drive into the Kohl's parking lot, a place where he had the right to be, without more, does not support the reasonable inference that he followed the victims to the store and put them under surveillance. The Court found most of the State's arguments to be based on pure speculation, but, in any event, these incidents occurred on a single day, thus failing to establish a pattern of behavior. And, citing *Pilcher v. Stribling*, 282 Ga. 166, 168 (2007), there was no evidence that appellant followed the victims or placed them under surveillance prior to the Kohl's encounter.

Thus, the Court concluded, although a jury was entitled to reject appellant's version of the events surrounding the charged acts, it is well-established that there must be competent evidence in favor of conviction for the jury's ruling to be upheld and here, there simply was none. Even construed in the light most favorable to support the jury's verdict, the evidence introduced at trial was insufficient to establish the necessary elements of a stalking conviction under OCGA § 16-5-90 (a) (1). Therefore, the Court reversed appellant's convictions for stalking.