

## THIS WEEK:

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## Ineffectiveness of Post-Conviction Counsel; Failure to Call Trial Counsel as a Witness

*Leslie v. State, A19A0556 (4/30/20)*

Appellant was convicted of kidnapping and armed robbery. The evidence, briefly stated, showed that he and a codefendant robbed a convenience store. The store's video surveillance system recorded the incident.

Appellant contended that his post-conviction counsel was ineffective for failing to call any witnesses or present any evidence at the motion for new trial hearing. Specifically, he argued that counsel's failure to call his trial counsel as a witness warranted a remand for a new hearing to address several of his claims pertaining to ineffectiveness of trial counsel that were raised in his motion for new trial. The Court disagreed.

Citing *Godfrey v. State*, 274 Ga. App. 237, 240-241 (2) (2005), the Court stated that a claim that post-conviction counsel provided ineffective assistance at the new trial phase of a criminal proceeding could, under certain circumstances, be raised for the first time on direct appeal. Like appellant, the defendant in *Godfrey* had been represented by one attorney at trial, a second attorney at the new trial phase of the proceedings, and a third attorney on appeal. The defendant alleged that his second attorney provided ineffective assistance by, among other things, failing to call the first attorney as a witness at the new trial hearing. Finding the claim timely raised, the *Godfrey* Court held that because Godfrey's third attorney did not undertake his representation until after the appeal was filed, he did not have the opportunity to raise his claim of ineffective assistance of the second attorney before the trial court. Under such circumstances, the Court stated that it will generally remand the case to the trial court for an evidentiary hearing on the issue of ineffective assistance of post-conviction counsel unless the Court can determine from the record that the *Strickland* test for ineffectiveness cannot be met.

First, appellant argued that trial counsel was ineffective for failing to: (1) challenge the trial court's failure to strike a juror for cause; (2) object to hearsay testimony from the lead investigating officer when he repeated the anonymous tipster's out-

of-court statements during his testimony; and (3) object to the admission of other robberies as improper character evidence. The Court found that to the extent that appellant asserted that post-conviction counsel's failure to call trial counsel as a witness at the motion for new trial hearing impacted the viability of the foregoing ineffective-assistance claims, these contentions were without merit because such objections would have been meritless.

Next, appellant contended that his post-conviction counsel erred by failing to call trial counsel as a witness at the motion for new trial hearing to show that trial counsel was ineffective for failing to object to the State's use of leading questions during its direct examination of the store clerk. Specifically, appellant argued that establishing the amount of movement during the crime was "critical" to sustaining his kidnapping conviction. But, the Court found, there was sufficient evidence to establish the asportation element of the kidnapping charge apart from this limited testimony. Moreover, appellant failed to show how counsel's failure to object to the State's use of leading questions in its examination of the store clerk prejudiced his case, given the same facts were depicted on the surveillance camera footage that was played for the jury at trial and thus, the jurors were able to determine for themselves whether the assailants' conduct depicted in the store's surveillance video matched the store clerk's trial testimony.

Appellant also argued that his post-conviction counsel should have called his trial counsel as a witness as his motion for new trial hearing to show that trial counsel was ineffective for failing to request a jury charge on false imprisonment as a lesser-included offense, because the State failed to meet its burden to prove the asportation element required to sustain his kidnapping conviction. The Court noted that appellant raised this claim in his motion for new trial, and argued at the hearing that his trial counsel should have requested the "lesser-included offense of false imprisonment, which, if anything, was tailored more to what actually happened in this case." But, the Court found, the State presented sufficient evidence to prove the "asportation" element, as required under OCGA § 16-5-40 (b), to support appellant's kidnapping conviction and thus, the Court found no support for this ineffective-assistance claim.

Appellant next contended that his post-conviction counsel should have called his trial counsel as a witness at his motion for new trial hearing to demonstrate that his trial counsel rendered ineffective assistance by failing to object to the jury charge on kidnapping. Specifically, appellant argued that OCGA § 16-5-40 (b) (2) (B) is "unconstitutionally void for vagueness," and "[c]ounsel's failure to mount a proper challenge amounted to ineffective assistance of counsel." However, the Court found, appellant failed to point to any controlling precedent addressing the constitutionality of the post-*Garza* amendments to the kidnapping statute. Accordingly, because the objection appellant asserted that trial counsel should have made has no basis in existing law, failure to make the objection cannot serve as a basis for a claim of ineffective assistance of counsel.

Finally, the Court held, to the extent appellant contended that his post-conviction counsel was ineffective for failing to raise additional issues pertaining to the ineffectiveness of trial counsel in his motion for new trial, that argument did not provide a basis for remand. Appellant's post-conviction counsel raised the issue of appellant's trial attorney's ineffectiveness in the motion for new trial; thus, any allegations of ineffective assistance not raised in that motion are procedurally barred and appellant could not resuscitate these arguments by bootstrapping them to a claim of ineffective assistance of post-conviction counsel.

Accordingly, the Court concluded, it would not consider appellant's argument that his post-conviction counsel failed to raise additional claims related to trial counsel's ineffectiveness in the motion for new trial, and thus, the Court declined to order the remand of this case for further proceedings on this issue.

## **Voir Dire; Strikes for Cause**

*Johnson v. State, A20A0498 (5/1/20)*

Appellant was convicted of burglary, theft by taking and possession of a knife during the commission of a felony. He contended that the trial court erred in declining to strike one of the members of the jury pool for cause. The Court disagreed.

The record showed that one of the prospective jurors ("Juror 33") was the wife of the District Attorney. She did not express any bias for or against the State or appellant during voir dire. Neither the State nor defense counsel asked her if her relationship with her husband might impact her view of the case. The trial court gave the State and defense counsel the opportunity to question Juror 33 through individual voir dire, but both declined to do so. Defense counsel then moved to strike Juror 33 for cause, arguing that he did not "think it's possible that she can be unbiased" because she was married to the head prosecutor. The trial court denied the motion. Ultimately, she was not selected as a juror or as an alternate.

Relying on *Willis v. State*, 304 Ga. 686, 701-707 (11) (2018), the Court stated that in order to show harmful error when a trial court refuses to excuse a prospective juror for cause, a defendant must show that one of the challenged jurors who served on his or her twelve-person jury was unqualified. And here, the Court found, Juror 33 did not serve on appellant's twelve-person jury or as an alternate. Thus, any error in qualifying her despite her relationship to the District Attorney was harmless, because, based on her placement on the list of potential jurors and the parties' combined use and lack of use of their peremptory strikes, she never served as a member of appellant's jury.

## **Adoptive Admissions; Jury Charges**

*Neal v. State, A20A1256 (5/5/20)*

Appellant was convicted of three counts of child molestation. The evidence showed that appellant molested the teenaged daughter of his girlfriend. After the victim made her outcry to her mother, the mother did not immediately call the police. Instead, the mother called appellant at work and told him to come home to their apartment. When he did, he was confronted by the mother, appellant's niece (and best friend of the mother) and victim. The victim, who was crying and hysterical, told the niece that appellant had sexual intercourse with her. Appellant, who was sitting nearby, said nothing. The girlfriend then hit appellant several times until the niece was able to pull her off of him and call the police. The girlfriend shouted accusations at appellant and continued to do so when the police arrived on the scene a few minutes later. Appellant's girlfriend was shouting, "He touched my daughter," and "He was with my daughter." Appellant told one of the officers that his girlfriend had hit him but said nothing about the accusations being shouted by her.

Appellant contended that the trial court erred in allowing the State to comment upon and introduce evidence that he remained silent when the daughter and girlfriend accused him of having sexual intercourse with the daughter. The Court disagreed.

Citing OCGA § 24-8-801 (d) (2) (B) and *State v. Orr*, 305 Ga. 729, 740 (4) (2019), the Court found that the trial court was authorized to find that an accusation that a defendant had sexual intercourse with a minor was the type of statement that under the circumstances, an innocent defendant would normally be induced to respond. Likewise, the trial court was authorized to find that there were sufficient foundational facts from which the jury could infer that appellant heard, understood, and acquiesced in the accusations made by the daughter and girlfriend, given that the accusations were made in the apartment in his presence. Moreover, the trial court was entitled to find that there were no impediments to appellant responding to the accusations. Accordingly, the Court held, the trial court acted within its discretion in concluding that the daughter and girlfriend's accusations of sexual abuse and appellant's failure to respond to them were admissible as adoptive admissions under Rule 801 (d) (2) (B).

In so ruling, the Court noted that appellant's girlfriend continued to make accusations once the police officers arrived and that one of the officers testified that appellant did not say anything in response to those accusations. Citing Milich's Georgia Rules of Evidence, the Court stated that where the accusatory statement was made by or in the presence of the police, the defendant's silence may exercise of his right to remain silent. But, here, the Court found, appellant was not under arrest or police interrogation when he failed to respond to his girlfriend's accusations, and in fact, willingly spoke with the police by telling them that his girlfriend had hit him. Nor did appellant argue that a distinction should have been drawn between the accusations made before or after the police arrived on the scene. Thus, the Court concluded, under the circumstances, the trial court did not abuse its discretion in permitting the officer to testify about appellant's failure to respond to the girlfriend's allegations under Rule 801 (d) (2) (B).

Appellant also contended that the trial court erred by instructing the jury on the issue of whether his silence was an adoptive admission. Specifically, he argued that the trial court's instruction was improper because it "differed noticeably" from Suggested Pattern Jury Instructions, Volume II: Criminal Cases § 1.36.15 (4th ed., 2020), the current pattern jury instruction for adoptive admissions predicated on the pre-*Miranda* silence of a criminal defendant. The Court again disagreed.

The Court found that the trial court's instruction adequately informed the jury of the pertinent issues pertaining to adoptive admissions by silence. The jury instruction given by the trial court mirrored the admission-by-silence instruction given in *United States v. Carter*, 760 F2d 1568, 1579-1580 (VII) (A) n.5 (11th Cir. 1985), and in that case, the Eleventh Circuit found that the jury instruction adequately instructed the jury on the important considerations regarding such statements. Furthermore, the Court noted, in *Wilkins v. State*, \_\_\_ Ga. \_\_\_, (2) n. 7 (Case No. S19A1403, decided Feb. 28, 2020), our Supreme Court stated that "[t]he jury may be instructed on [the] issue [of admissions by silence]" and cited to *Carter*. Consequently, the Court found no error in the trial court's instruction.

## Enhanced Punishment; Requirement of Jury Findings

*Rodriguez v. State*, A20A0404 (5/5/20)

Appellant was convicted of child molestation and incest for crimes he committed against the victim, his minor daughter. The trial court sentenced him to 50 years on the incest count, with the first 49 years to be served in confinement. He contended that the trial court erred in imposing an enhanced sentence on the incest count because the question of the

victim's age (for the purposes of the incest count) was not submitted to the jury for determination. Specifically, he argued that any fact that increases a penalty beyond the statutory maximum must be determined by a jury, and that the trial court thus erred by failing to submit the issue of her age to the jury.

The Court stated that unless a criminal defendant waives his right to a jury trial, other than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt. The dispositive question is one not of form, but of effect. If the State makes an increase in a defendant's authorized punishment contingent on the finding of a fact, that fact - no matter how the State labels it - must be found by a jury beyond a reasonable doubt.

Thus, the Court stated, in order for appellant to receive enhanced sentencing under OCGA § 16-6-22 (b), the jury would have to find that the victim was under the age of 14 years when the alleged incest occurred. However, the jury was never instructed to make a specific finding on that issue.

Nevertheless, the Court stated, even if there were a constitutional error here, that error would be harmless. The failure to submit an enhancing sentencing factor to a jury is not a structural error and can be harmless. The test for determining whether a constitutional error is harmless is whether it appears beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained. Specifically, when a defendant claims that the jury did not consider an essential element of the crime, a reviewing court may find the error harmless where it concludes beyond a reasonable doubt that the omitted element was uncontested and supported by overwhelming evidence.

And here, the Court found, the indictment alleged that appellant committed the crimes of child molestation and incest on or about July 13, 2014. Both the victim and her mother testified that the victim was born in December 2000 and that the acts supporting the incest count occurred in July 2014, when the victim was 13 years old. Also, the Court noted, there was no evidence contradicting those dates. Therefore, the Court held, because the evidence demonstrating that the victim was under the age of 14 at the time the incest was committed was uncontested and was overwhelming, any error in not submitting the issue of her age to the jury was harmless.

## **Motions to Suppress Identification; Right against Self-Incrimination**

*Thomas v. State, A20A0094 (5/5/20)*

Appellant was convicted of two counts of aggravated assault and a single count each of armed robbery, kidnapping, possession of a firearm during the commission of a felony, and entering an automobile with intent to commit theft. The relevant facts, very briefly stated, showed that on October 16, 2016, appellant armed robbed a cabdriver and his passenger at the apartment complex where the passenger lived. As he was driving out of the apartment complex, the cabdriver saw a car driven by his assailant. The cabdriver followed the vehicle and, while doing so, called 911. Eventually, the robber lost control of his vehicle and crashed, at which point he abandoned the vehicle and fled on foot. Given that the assailant's car was registered to appellant, the detective put together a photographic lineup of six pictures, including a mug shot of appellant the officer pulled from police files. The cabdriver was unable to identify anyone from the initial photographic lineup, in which all of the photos were of men with short hair. The detective subsequently interviewed the cabdriver and learned that his assailant had dreadlocks. Following that interview, the detective obtained a copy of appellant's driver's

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license photo, which showed him with dreadlocks. Police then put together a second six-photo lineup, featuring appellant's driver's license picture. From this lineup, the cabdriver identified appellant with 90% certainty as his assailant.

In September 2017, before the case went to trial, police showed the cabdriver a third photo lineup. This lineup again contained pictures of men with dreadlocks, but all the photographs were in color. Appellant's photo, which was identical to the photo in the second lineup, was the only one repeated from the second lineup. Additionally, appellant's photo was the only one that appeared in all three lineups.

Prior to trial, appellant moved to suppress the cabdriver's identification of him in the second and third photographic lineups. Additionally, given what he alleged was the impermissibly suggestive nature of the second and third lineups, appellant asked that the court suppress any in-court identification of him by the cabdriver. After the hearing on the motion to suppress, the trial court entered an order granting appellant's motion in part and denying it in part. Specifically, the court found that the third photographic lineup was impermissibly suggestive because appellant's hairstyle appeared different from the other suspects pictured, the photo appeared to be framed differently, and the photo was the only one to appear in both the second and third lineups. The court concluded, however, that both the identification from the second photographic lineup and the cabdriver's in-court identification of appellant would be allowed.

Appellant contended that the trial should have suppressed the cabdriver's identification of him in both the second photographic lineup and in court. Specifically, appellant argued that the method used in the first and second photographic lineups was unduly suggestive because he was the only individual shown in both lineups. However, the Court stated, the fact that the defendant's picture was the only one to appear in two separate photo spreads does not demonstrate that the spreads were impermissibly suggestive. And this is especially so where two different photographs of the defendant were used.

And here, the Court found, not only were two different photographs of appellant used in the different lineups, but the trial court expressly found that the two pictures bore little resemblance to one another. Not only did appellant have different hairstyles in each picture but, as the trial court explained, the bottom portion of the photo used in the first lineup was "obscured, giving no definition to the lower outline of the face of the person displayed in the photo. Furthermore the face of the person portrayed is not uniform in its angle, further[ ] distorting the features of the person on the right side of the face and lower portion." Thus, the Court concluded, the trial court's findings were supported by the evidence. Accordingly, the trial court was authorized to find that there was no impermissible suggestiveness in the second photographic lineup.

Nevertheless, appellant argued, given that the trial court found that the third photographic lineup was impermissibly suggestive and the cabdriver saw the third photographic lineup only three months before the hearing on the motion to suppress, the trial court erred when it refused to suppress the cabdriver's in-court identification of him. The Court disagreed. Even if a pretrial identification is tainted, an in-court identification is not constitutionally inadmissible if it does not depend upon the prior identification but has an independent origin. And here, the trial court found that such an independent origin existed, crediting the cabdriver's testimony that he had the opportunity to observe his assailant's face during the incident. Additionally, the court noted that the cabdriver had identified appellant with 90% certainty in the second photo lineup, which took place almost one year before the third lineup. Therefore, the Court held, in light of this

evidence, there was no error in the trial court's conclusion that the cabdriver's in-court identification of appellant had an origin independent of the third photo lineup.

Finally, appellant argued that the trial court erred in overruling his objection to being required to stand in front of counsel table at the pretrial hearing so that the cabdriver could observe his height and build. Specifically, appellant contended that the Georgia Constitution prohibited the trial court from asking him to stand for observation by the cabdriver.

But, the Court found, even assuming arguendo that the trial court's ruling violated appellant's rights under the Georgia Constitution, the violation provided no basis for reversal. Even an error of constitutional magnitude may be harmless where the record shows beyond a reasonable doubt that the error did not contribute to the verdict. And here, the record showed that observing appellant while he was standing did not contribute to the cabdriver's identification of appellant as his assailant. After the trial court had appellant stand in front of counsel table, it questioned the cabdriver as to whether he recognized appellant. The cabdriver responded that he recognized appellant's face but that he did not recognize "anything else" about appellant other than his face. Thus, the Court found, the cabdriver's testimony showed that he did not recognize appellant from either his height or his build. Consequently, any error in requiring appellant to stand was harmless.

## **Pleas in Bar; Prior Acquittal**

*Daniels v. State, A20A0454 (5/6/20)*

Appellant was charged with two counts of armed Robbery at a Waffle House committed on October 2, 2016. The record showed that appellant was charged with committing armed robbery on October 23, 2016, at a Shell Food Mart. The Waffle House was across the street from the Shell Food Mart.

The State proceeded to trial on the Shell Food Mart case first. The trial court allowed evidence of the Waffle House armed robbery to be admitted as intrinsic evidence and alternatively, as Rule 404 (b) extrinsic evidence at trial. At the conclusion of the trial, on January 25, 2018, the jury acquitted appellant of the Shell Food Mart robbery.

On July 10, 2018, the State indicted appellant for two counts of armed robbery at the Waffle House. Appellant filed a plea in bar, asserting that his acquittal in the Shell Food Mart case barred further prosecution for the Waffle House robbery pursuant to OCGA § 16-1-8 (b) because he should have been charged with the latter in the Shell Food Mart case pursuant to OCGA § 16-1-7 (b). Following a hearing, the trial court denied the plea in bar, concluding that the two robberies "involve different conduct[,] and the second prosecution is not barred on double jeopardy grounds."

Appellant contended that the trial court erred in denying his plea in bar. The Court stated that in addition to constitutional proscriptions of double jeopardy, the extent to which an accused may be prosecuted, convicted, and punished for multiple offenses arising from the same criminal conduct is limited even more strictly by the Georgia Criminal Code. Under OCGA § 16-1-7 (b), if several crimes 1) arising from the same conduct are 2) known to the proper prosecuting officer at the time of commencing the prosecution and are 3) within the jurisdiction of a single court, they must be prosecuted in a single prosecution. A second prosecution is barred under OCGA § 16-1-8 (b) (1) if it is for crimes which should have been brought in the first prosecution under OCGA § 16-1-7 (b). In order for this procedural aspect of double jeopardy to prohibit a prosecution, all three prongs must be satisfied.

The State conceded that prongs 2 and 3 of the analysis — that the Waffle House robbery was known to the State at the time of the Shell Food Mart prosecution, and that both cases are within the jurisdiction of a single court — have been met. Thus, the Court stated, the only issue was the first prong: whether the crimes arose from the same conduct. Appellant contended that the crimes did arise from the same conduct, relying heavily on the State's position in the Shell Food Mart case that the two robberies were not two separate incidents and "not just a crime spree" because they were in the same location, with the same participants, and committed in the same manner.

However, the Court found, although the robberies were committed at nearby locations, they occurred three weeks apart at different locations, and against different victims. Thus, the crimes did not constitute a continuing course of conduct. Moreover, the State could establish each set of offenses without proving the other. The fact that the State introduced evidence of the Waffle House robbery at the Shell Food Mart trial and may attempt to introduce evidence of the Shell Food Mart robbery at the Waffle House trial does not mean that the State needs to prove the unrelated Shell Food Mart robbery to establish that appellant committed the Waffle House robbery nor that evidence of the Waffle House robbery was necessary to convict him of the Shell Food Mart robbery. Similarly, the trial court's prior decision to admit the evidence of the Waffle House robbery in the first trial as intrinsic evidence does not eliminate the applicable statutory requirement that the crimes must arise from the same course of conduct in order to preclude a subsequent prosecution.

Accordingly, the Court concluded, the Shell Food Mart and Waffle House robberies did not arise from the same conduct and therefore, the trial court properly denied appellant's plea in bar.

## **Motions to Withdraw Guilty Pleas; Jurisdiction**

*Branner v. State, A20A0424 (5/7/20)*

In November 2018, while represented by counsel, appellant entered a negotiated *Alford* plea to three counts of child molestation. At the end of appellant's plea hearing, the trial judge orally pronounced sentence. Three days later, on November 16, appellant filed a pro se motion to withdraw his plea. On November 28, 2018, the trial court entered judgment upon appellant's *Alford* plea.

The term of court during which appellant was convicted and sentenced ended on March 11, 2019. After the expiration of the term of court during which appellant was sentenced, additional pleadings were filed, orders were entered, and a hearing was conducted on his motion to withdraw. In particular, on March 29, 2019, appellant's plea counsel filed a motion to withdraw as counsel; the trial court granted that motion on April 1, 2019; the court also appointed new counsel (hereinafter, "motion-to-withdraw counsel"); and motion-to-withdraw counsel filed a notice of representation on May 13, 2019. In July 2019, the trial court conducted a hearing on appellant's motion to withdraw his plea. Thereafter, the trial court denied his motion on the merits.

Appellant contended that the trial court erred in denying his motion to withdraw his plea. However, the Court stated, it is well settled that a criminal defendant in Georgia does not have the right to represent himself and also be represented by an attorney, and pro se filings by represented parties are therefore unauthorized and without effect. And here, prior to the

end of the term, no order was entered either for plea counsel to withdraw or for substitution of counsel. Consequently, appellant's pro se motion amounted to a legal nullity, presenting the trial court with nothing to decide.

Moreover, a trial court lacks jurisdiction to permit the withdrawal of a guilty plea once the term of court has expired in which the defendant was sentenced. Thus, although motion-to-withdraw counsel argued at the July 2019 hearing that appellant should have been allowed to withdraw his guilty plea, he could not breathe life into appellant's inoperative pleading. The trial court therefore should have dismissed appellant's November 2018 pro se motion, rather than denied it. Accordingly, the Court vacated the contested judgment, and remanded the case with instruction to dismiss appellant's pro se motion to withdraw his plea.

## **Search & Seizure; Theft by Receiving**

*In Re G. M. W., A20A0514 (5/13/20)*

Appellant was adjudicated delinquent on charges of misdemeanor obstruction, giving a false name to a law enforcement officer, possession of a handgun by a person under 18 years of age, and misdemeanor theft by receiving stolen property. The facts, briefly stated, showed that appellant and another boy were seen by a couple of officers at a shopping area on a weekday morning. They approached them and the first officer asked for appellant's name and date of birth. Appellant gave the officer a false name and date of birth and told him he went to a certain school and his classes did not start until the afternoon. While the first officer was checking this information, appellant asked the second officer if he was being detained. That officer said yes. However, when the first officer was not able to verify the information given by appellant, the two boys were allowed to walk away.

About ten minutes later, the first officer heard back from the school's resource officer who stated no one by the name given by appellant attended the school. The officers located appellant in another part of the shopping area. Appellant told the officers his real name and date of birth and stated that he was on probation and wearing an ankle monitor. Appellant resisted when the officers attempted to frisk him and search his backpack. Once in handcuffs, appellant told the officers the backpack contained a pistol. The officers then opened the backpack and retrieved the pistol, which was later determined to be stolen.

Appellant contended that the court erred in denying his motion to suppress. The Court disagreed. The officers originally initiated a first-tier encounter with appellant. But, when the second officer informed appellant that he was being detained until the officers completed their investigation, the matter was elevated to a second-tier encounter. Nevertheless, the Court found, although the officers had no articulable suspicion to detain appellant, the detention was very brief. The entire first encounter lasted only four to five minutes and the detention did not occur until after appellant had already given his identifying information to the first officer and thus was even shorter. The officers then let the two young men go without further questioning or search. Thus, the Court found, under these circumstances, no evidence was seized as a result of this brief investigatory detention during the first encounter.

When the officers approached appellant the second time, they had an objective and particularized basis for suspecting that the misdemeanor crime of giving false information had occurred. They were thus authorized to detain appellant to investigate the matter further, and appellant, in effect, confessed to the crime by providing his correct name and date of

birth, giving the officers probable cause to arrest him. And thus, the officers were authorized to search him at that time because they had probable cause to arrest.

Finally, the Court found, premitting whether a lawful search incident to arrest would have encompassed the backpack, the officers did not conduct a search at that time, because appellant became agitated and began to move away, causing the officers to restrain him. When appellant resisted the officers' hold, the second officer put him on the ground and handcuffed him. And, although appellant was in handcuffs and could no longer reach the gun, the Court found that his statement concerning his possession of the weapon was sufficient to authorize the police to secure it for their own safety before transporting the backpack. Accordingly, considering the totality of the circumstances, the Court found that the evidence was not seized as a result of any violation of appellant's Fourth Amendment rights, and the juvenile court properly denied the motion to suppress.

Appellant also contended that the evidence was insufficient to support his conviction for theft by receiving. The Court agreed. Here, appellant was charged with unlawfully retaining a stolen handgun. The only evidence regarding appellant's acquisition of the gun was his statement that he had obtained the gun from an individual the night before. However, knowledge that a gun was stolen cannot be inferred even when the defendant bought a gun on the street. Although the State argued that appellant's attempts to flee showed "guilty knowledge" that the gun was stolen, as a minor, the Court noted that appellant's mere possession of a gun was a crime and thus, the Court found that while his attempts to escape may reflect guilty knowledge of the gun's presence in his backpack, this evidence did not establish beyond a reasonable doubt that he knew the gun was stolen. Accordingly, the Court concluded, because the evidence only showed that appellant was in possession of a stolen weapon, which is insufficient to support his conviction for theft by receiving, his adjudication of delinquency on this charge was reversed.

## **Sentencing; Merger**

*Dobbs v. State, A20A0738 (5/15/20)*

Appellant was convicted of several offenses related to a shooting, including attempted murder and aggravated battery. After filing his appellate brief and enumeration of error, appellant sought to amend his enumeration of error to add a claim that the trial court erred in merging or failing to merge his convictions for the purpose of sentencing. The Court initially denied appellant's motion because an appellant generally may not amend his or her brief to assert an untimely enumeration of error. However, noting that it may address a merger issue even if the appellant does not enumerate it as error, the Court permitted appellant and the State to file supplemental briefs on the issue.

The record showed that the jury found appellant guilty of two counts of aggravated battery in violation of OCGA § 16-5-24, for seriously disfiguring the victim by shooting her in the face, and for seriously disfiguring her by shooting her in the hand. The trial court sentenced appellant on both of these counts. The Court held, and the State conceded, that because the two counts were based on the single unlawful act of appellant shooting the victim, the trial court should have merged the aggravated battery convictions for sentencing purposes.

Citing *Hernandez v. State*, 317 Ga. App. 845 (2012) and *Zamudio v. State*, 332 Ga. App. 37 (2015), appellant contended that the trial court erred by merging his aggravated battery convictions into his conviction for attempted murder, instead

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of vice versa. The Court agreed. The Court noted that it held in *Hernandez* that attempted murder is the lesser crime of family violence aggravated battery because it requires a less serious injury to the person than family violence aggravated battery, as personal injury is not a required element of attempted murder. Relying on the rationale of the *Hernandez* decision, the *Zamudio* Court held that the trial court erred in merging a conviction for aggravated battery into a conviction for attempted murder, rather than the other way around.

The State contended that the Court should overrule *Hernandez* and *Zamudio*. The Court declined to do so because those decisions flowed out *Ledford v. State*, 289 Ga. 70 (2011), disapproved in part on other grounds by *Willis v. State*, 304 Ga. 686, 706 (11) n. 3 (2018). And, the Court noted, it considered — and rejected — the State's request in *Zamudio* that it overrule *Hernandez* on this same point.