

THIS WEEK:

- **Immunity from Prosecution; TASERs**
- **Sufficiency of the Evidence; Possession of Tools for the Commission of a Crime**
- **Sentencing; Rule of Lenity**
- **Breath Tests; Alco-Sensor Tests**
- **Res Gestae; Intrinsic Evidence**

Immunity from Prosecution; TASERs

State v. Copeland, S20A0820, S20A0821, S20A0822 (11/2/20)

Three deputies, Copeland, Scott and Howell, were indicted for felony murder and other offenses in connection with the death of Martin. The facts, very briefly stated, showed that Martin was walking along a two-lane road with no sidewalk on a very hot summer afternoon. He walked up the driveway of a home and requested a drink of water from the homeowner by motioning with a cut-off Coke can that he was carrying. The homeowner, who was concerned by Martin's unkempt appearance, refused Martin's request. Martin continued on his way, but the homeowner called 911 to report Martin, describing him on the 911 recording as a "black man, probably 50-plus-years-old, about 6'3", 220 pounds," and saying that he did not know if Martin was "crazy, drunk, or what." The homeowner did not indicate that Martin approached merely to request water.

Howell, answering the suspicious person call, first attempted to speak to Martin while staying in his patrol car. Martin did not wish to engage the deputy. Howell then activated his vehicle's blue lights, and followed Martin down the road. Copeland arrived in response to Howell's request for backup. The officers attempted to get Martin to get out of the roadway. Martin told them to leave him alone because he didn't do anything. Martin then apparently "thr[ew] down [a] Coke can," took "a defensive stance" and "cl[e]nche[d] his fists," causing Deputies Howell and Copeland to believe that Martin was "about to fight." The deputies told Martin to put his hands behind his back and get on the ground. Martin refused. Copeland then tased Martin, who fell to the ground. However, he stood back up and then continued walking away from the deputies and away from the road. Deputy Scott arrived and the three deputies encircled Martin, who was standing with his arms at his side. Scott, who was positioned behind Martin, lifted Martin's shirt and tased him again. Martin spun "toward Deputy Scott with his arms flailing in an attempt to dislodge the [TASER] probes and possibly to hit Deputy Scott." Martin then fell to the ground. The deputies converged on him, repeatedly commanding him to roll over and show his hands. In the course of securing and handcuffing Martin, the deputies repeatedly tased him. After Martin was handcuffed, the tasing ceased. He remained on the ground, and a first responder who arrived at the scene found that Martin did not have a pulse and had died at the scene.

Each defendant sought immunity from prosecution under OCGA § 16-3-24.2, claiming that his actions resulting in Martin's death were in defense of himself or others. Following a hearing, the trial court issued an order granting immunity to all three deputies and the State appealed.

Prosecuting Attorneys' Council of Georgia **CaseLaw** UPDATE

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The Court stated that OCGA § 16-3-24.2 provides that a person is immune from prosecution where he can demonstrate by a preponderance of the evidence that he threatened or used force based on a reasonable belief that such threat or force was necessary to defend himself or a third person against another's imminent use of unlawful force. When the person claiming immunity uses force intended or likely to cause death or great bodily harm, that person must also prove by a preponderance of the evidence that such potentially lethal force was based on a reasonable belief that the force was necessary to prevent death or great bodily injury at the hands of the alleged victim or to prevent the commission of a forcible felony. See OCGA § 16-3-21 (a). A person is not justified in using force in self-defense if he was the aggressor. See OCGA § 16-3-21 (b) (3). Law enforcement officers may seek immunity from prosecution under OCGA § 16-3-24.2 when they are indicted based on their threats or use of force. When they do, their evidentiary burden is identical to that of any other defendant.

The trial court found that Howell and Copeland were engaged in a first-tier encounter from the time they first encountered Martin on the roadside until he demonstrated what the trial court found to be a “threatening demeanor” by turning toward Copeland and “bowing up” in a combative posture.” The trial court concluded that Martin's conduct at *that* point “provided an articulable suspicion” for Deputies Copeland and Howell to investigate “the possible offenses of loitering ... and walking upon highway,” and at that point, the encounter became a second-tier encounter. However, the Court found, there was simply no evidence that Martin, who was walking along a public road on a summer afternoon was loitering.

However, it was a closer question whether there was a reasonable suspicion sufficient to detain Martin for the crime of walking upon the highway under OCGA § 40-6-96 (c). But, none of the video evidence supported a conclusion that Martin was committing the offense of walking upon the highway. And the Court found, contrary to the trial court's conclusion, such suspicion could *not* have been formed with respect to that offense when Martin later assumed a “defensive stance” and his demeanor became “threatening.” Defensive or threatening behavior on the part of Martin at the point he was confronted by the deputies had nothing to do with whether he previously committed the offense of walking in the roadway. Thus, the trial court's legal conclusions were inconsistent with its factual findings in regard to the circumstances surrounding the deputies' initial contact with Martin. Therefore, the Court found a remand was necessary for the trial court to resolve these inconsistencies.

Moreover, after reviewing the trial court's immunity order, the Court concluded that, in making its determination, the trial court conflated principles found in OCGA § 16-3-20 (2) and (4), which are not referenced in OCGA § 16-3-24.2, with self-defense under OCGA § 16-3-21, which is referenced in OCGA § 16-3-24.2. Specifically, the trial court relied on *State v. Hall*, 339 Ga. App. 237 (2016), and concluded that the force used by the deputies “in the seizure and arrest of [Martin]” was proportionate and “reasonably necessary.” But whether officers used reasonable force in effectuating a lawful detention or arrest is a separate inquiry from whether their use of force was in defense of themselves or each other under OCGA § 16-3-21 (a) such that they were entitled to immunity under OCGA § 16-3-24.2. The proper inquiry in determining whether to grant such immunity is whether the force used by each of the deputies was based on his reasonable belief that “such threat or force is necessary to defend himself ... or a third person against such other's imminent use of unlawful force; however, ... a person is justified in using force which is intended or likely to cause death or great bodily harm only if he ... reasonably believes that such force is necessary to prevent death or great bodily injury to himself ... or a third person or to prevent the commission of a forcible felony.” OCGA § 16-3-21 (a). Thus, regardless of whether the deputies' encounter with Martin was a first-, second-, or third-tier encounter, if Martin's conduct constituted an

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“imminent use of unlawful force,” OCGA § 16-3-24.2 requires an analysis of the threat or force needed by the deputies to reasonably defend against such threat or force rather than a consideration of proportionality or reasonability of the deputies' conduct in the fulfillment of police duties. Consequently, the Court held that to the extent that the decision of the Court of Appeals in *Hall* conflicts with this analysis, it is disapproved.

Additionally, the Court stated that the immunity statute requires the trial court to inquire into the deputies' reasonable beliefs regarding the severity of the force being used by Martin and the degree of force needed to defend against it. To the extent that each deputy's own use of force was intended or likely to cause death or great bodily harm, the trial court must consider whether each deputy used such force based on his own reasonable belief that Martin was threatening imminent use of unlawful force intended or likely to cause death or great bodily injury to the deputy or a third person or whether Martin was threatening a forcible felony. And to reach a proper conclusion on this issue, the trial court on remand must consider the actions taken by Martin as well as the means used by each deputy to defend himself or his fellow deputies against Martin. Here, the most prominent means of force employed against Martin were the TASERs used by the deputies at various times during the encounter with Martin. The trial court concluded, apparently based on expert testimony presented at the hearing on the immunity motions, that a TASER is “classified as a ‘non-deadly’ device.” But, the Court stated, that does not answer the question of whether, within the meaning of OCGA § 16-3-21 (a), a TASER (or multiple TASERs used in succession) could ever be used to inflict deadly force or whether they were intended or likely to do so in this case.

Finally, the Court also determined that the trial court's order, which granted immunity to Copeland, Scott, and Howell collectively, was improper because the trial court must make an *individual assessment* of each defendant deputy's immunity claim. The information available to each deputy informs the reasonableness of his respective belief about the lawfulness of Martin's threatened force and the necessity of any actions he took in alleged self-defense or defense of other deputies. While it appeared that the deputies made observations and interacted with Martin close in time to one another, the information available to each deputy was not identical and these differences in perspective can only be properly accounted for by an individual assessment of each deputy's immunity claim by the trial court.

Sufficiency of the Evidence; Possession of Tools for the Commission of a Crime

Williams v. State, A20A0831 (9/30/20)

Appellant was convicted of four counts of armed robbery, two counts each of theft by taking and possession of tools for the commission of a crime, and one count each of kidnapping and entering an automobile. The relevant evidence showed that appellant and two others, while wearing sunglasses and wigs, entered and robbed a Verizon store. The wig was recovered following appellant's apprehension. Appellant contended that the evidence was insufficient to convict him of possession of tools for the commission of a crime because the State failed to present any evidence that wigs are “commonly used” in the commission of crimes. The Court disagreed.

OCGA § 16-7-20 provides that “[a] person commits the offense of possession of tools for the commission of crime when he has in his possession any tool . . . or other device commonly used in the commission of burglary, theft, or other crime with the intent to make use thereof in the commission of a crime.” Here, the State indicted appellant for possessing wigs,

"commonly used in the commission of [crimes] with the intent to make use of said tool in the commission of said crimes. . . ."

The Court stated that the import of appellant's argument was that some direct evidence, perhaps from an expert witness, must be introduced in each case to demonstrate the commonality with which a wig — or, for that matter, any other "tool" — is generally used during criminal activity. But, the Court stated, this is not so. To the contrary, in the vast majority of cases construing OCGA § 16-7-20, whether a tool is commonly used in the commission of a crime is within the ken of the average juror. For example, citing a number of cases the Court found that our law is replete with examples of wigs being used during the commission of various theft crimes, including armed robbery. Accordingly, the Court found that the evidence was sufficient to convict appellant.

Sentencing; Rule of Lenity

Austin v. State, A20A0914 (10/1/20)

Appellant was convicted of four counts of exploitation of an elder person pursuant to OCGA § 16-5-102 (a). He contended that the trial court erred in declining to apply the rule of lenity and sentence him under the theft by deception statute. The Court agreed.

The Court stated that the rule of lenity finds its roots in the vagueness doctrine, which requires fair warning as to what conduct is proscribed. More specifically, the rule of lenity ensures that if and when an ambiguity exists in one or more statutes, such that the law exacts varying degrees of punishment for the same offense, the ambiguity will be resolved in favor of a defendant, who will then receive the lesser punishment. But, if it is determined after applying the traditional canons of construction that the relevant statutory text is unambiguous, then the rule of lenity will not apply. The fundamental inquiry when making that assessment is whether the identical conduct would support a conviction under either of two crimes with differing penalties.

Here, the Court found, the indictment alleged that appellant "did knowingly and willfully financially exploit Kylon Thompson, an elderly person, over the age of sixty-five years, through deception and false pretense[.]" The indictment did not allege, nor did the State prove at trial, any mental or physical incapacity from Thompson. Upon review of both statutes at issue, although there are many ways the crime of exploitation of an elder person may be committed, appellant's conduct, as charged, subjected him to prosecution and sentencing under both OCGA § 16-5-102 (a) and OCGA § 16-8-3 (a). That is, appellant's conduct as charged in this case — obtaining an elder person's property through deceit — "define the same offense" of exploitation of an elder person and theft by deception, such that an ambiguity is created by different punishments being set forth for the same crime. Accordingly, the Court held, appellant was entitled to the rule of lenity.

However, the Court emphasized, not every conviction under OCGA § 16-5-102 (a) will result in an application of the rule of lenity. Additionally, a sentence under the theft by deception statute will not benefit every defendant, as that statute has a higher statutory minimum. Nevertheless, a sentence under the theft by deception statute would benefit appellant in this case. Accordingly, the Court reversed appellant's convictions for exploitation of an elder person, and remanded for resentencing under the theft by deception statute.

Breath Tests; Alco-Sensor Tests

State v. Bradberry, A20A1460, A20A1461 (10/7/20)

Bradberry was charged with two counts of DUI. He moved to suppress the results of his alco-sensor test and his breath test. The trial court granted the motion to suppress evidence of the Intoxilyzer breath test, but denied the motion to suppress evidence of Bradberry's refusal to take the alco-sensor breath test. The State appealed and Bradberry cross-appealed.

The State contended that the trial court made a clearly erroneous factual finding in support of its ruling on the motion to suppress evidence of the Intoxilyzer breath test. The record showed that the trial court found that although the officer did not use direct physical force against Bradberry, "[t]he officer's refusal to allow him to use the bathroom until the test was completed amounted to substantial *indirect* physical force against Bradberry." (Emphasis in original). The trial court found that this physical force, coupled with the reading of the implied consent notice in effect at the time, but a portion of which has now been held to violate the Georgia Constitution by *Elliott v. State*, 305 Ga. 179 (2019), rendered Bradberry's consent to the test involuntary.

But, the Court found, contrary to the trial court's finding, there was no evidence that the delay in Bradberry's use of the bathroom until after the breath test amounted to a physical force that influenced Bradberry's decision to consent to the test. It was undisputed, and plainly shown on the officer's body camera video of the encounter, that Bradberry had already consented to the test *before* he asked to use the restroom. Moreover Bradberry never mentioned the delay in using the bathroom during his testimony, and he certainly never testified that the delay had any impact on his decision to agree to take the test. Rather, Bradberry, who told the officer he had never been arrested before, claimed that he agreed to take the breath test because once he was arrested he thought his rights were not the same as before the arrest, and based on the implied consent notice read to him by the officer, he believed he had no choice but to take the test because it was required by the state and his situation would be worse if he did not submit to it. Thus, while the video showed that Bradberry asked to use the bathroom after he had consented to the breath test and that he later asked at the precinct if he could use the bathroom after the test, there simply was no evidence to support the trial court's finding that the delay in using the bathroom constituted physical force that impacted Bradberry's decision to take the test. Therefore, the Court concluded, the trial court's clearly erroneous finding could not be used to support its ruling that Bradberry did not voluntarily consent to the Intoxilyzer breath test. Accordingly, the Court vacated the trial court's order suppressing evidence of the Intoxilyzer breath test and remanded the case for the trial court to consider whether the totality of the circumstances, without consideration of the bathroom delay, shows that Bradberry's consent to the breath test was given freely and voluntarily.

Bradberry contended that the trial court erred in ruling that evidence of his refusal to take an alco-sensor breath test at the scene of the accident is admissible against him. The evidence showed that Bradberry refused to blow into the alco-sensor device because he was afraid it might show that he "was over the legal limit."

The Court noted that although the issue involves an alco-sensor preliminary breath test, rather than the type of breathalyzer breath tests involved in *Elliott* and *Olevik*, it did not find this distinction to be controlling since the evidence plainly showed that Bradberry would have been required to perform the affirmative act of blowing into the alco-sensor device for a sustained period of time. Thus, because Bradberry had the right to refuse to provide incriminating evidence by performing

such an affirmative act under Paragraph XVI, the admission of evidence of his refusal violates the state constitutional right against self-incrimination.

Nevertheless, the State argued, in *MacMaster v. State*, 344 Ga. App. 222 (2018), the refusal to take an alco-sensor preliminary breath test was held to be admissible at trial. But, the Court stated, *MacMaster* was decided before the express holding in *Elliott* that Paragraph XVI precludes admission of evidence that a suspect refused to consent to a breath test. Accordingly, the rationale of *MacMaster* is no longer sound and no longer provides controlling precedent on this issue. Rather, Bradberry's refusal to submit to the alco-sensor breath test is inadmissible and therefore the trial court erred in denying his motion to suppress evidence of that refusal.

Res Gestae; Intrinsic Evidence

Gray v. State, A20A1160 (10/7/20)

Appellant was convicted of two counts of aggravated assault and two counts of terroristic threats. The evidence, briefly stated, showed the victims, brothers Dellan and Brandon, argued with appellant over the quality of the marijuana appellant sold. Appellant threatened the victims and then shot at the victims, hitting one of them.

Appellant contended that the trial court erred in permitting the State to introduce evidence that the police found currency and a scale with marijuana residue inside his home after the shooting. Specifically, he argued, this evidence was not relevant to any issue in the case and amounted to bad character evidence that was prejudicial, and the trial court erred in finding it admissible pursuant to the res gestae doctrine. The Court disagreed.

Initially, the Court found, because there was no objection to this evidence at trial, its review was limited to whether its admission amounted to plain error. The Court noted that before the current Evidence Code became effective, the concept of res gestae provided that all acts and circumstances surrounding the charged offense were admissible even if they reflected upon the defendant's character. This rule of admissibility has been carried forward to the current Evidence Code under the concept of "intrinsic" evidence, as opposed to "extrinsic" evidence, i.e., evidence of "other crimes, wrongs, or acts," which is subject to the admissibility requirements of OCGA § 24-4-404 (b). Intrinsic evidence includes evidence that is necessary to complete the story of the crime or inextricably intertwined with the evidence regarding the charged offense.

Here, the Court noted, Dellan, testified that the genesis of the confrontation at appellant's home was a marijuana sale in which appellant sold marijuana to Dellan's friend, that he asked appellant to return the friend's money, and that he became involved in the dispute because he knew that appellant had sold him a better quality of marijuana. According to Brandon, appellant demanded that he and Dellan fight at appellant's home because the "issue" (evidently, the marijuana sale) did not concern Dellan. And the State's theory of the case, as presented in its opening and closing arguments, was that the incident stemmed from an argument over marijuana, after which appellant baited Dellan into coming to his home to fight before shooting him. Accordingly, the Court concluded, the evidence of the currency and scale with marijuana residue found at appellant's home was inextricably intertwined with the other evidence that the victims provided about the shooting, and that it partly advanced the State's theory of the case and was necessary to complete the story of the crime for the jury. Accordingly, the trial court did not commit plain error in admitting this evidence.