

THIS WEEK:

- Sufficiency of the Evidence; Murder in the Second Degree
- Void Sentences; Res Judicata
- Void Sentences; Resentencing
- Rule of Lenity; Resentencing

Sufficiency of the Evidence; Murder in the Second Degree

Bell v. State, A21A1215 (2/18/22)

Appellant was convicted of murder in the second degree, cruelty to children in the second degree, and felony contributing to the dependency of a minor, in the death of her two-week-old daughter. The evidence, very briefly stated, showed that appellant lived in a trailer with McNabb, her boyfriend and father of the victim and the victim's two-year-old sister C. M. Appellant and McNabb were using meth constantly and neglecting their children. At times, they would leave their children at the home of appellant's cousin. The victim was placed in her bassinet the night of October 6. In the morning of October 7, appellant called her father to tell him the victim was missing. There were no signs of forced entry into the home and no signs of "any type of trauma" in the bedroom where the victim and C. M. had been sleeping. A search party could not locate the victim that day. However, the next day a searcher noticed a log sitting over a big open hole. In the hole was a blue and red drawstring bag with a Michael Jordan logo on it. Inside the bag, officers found a "Varsity" restaurant t-shirt, a pair of blue and black "camouflage-type" men's boxers, a small child-size light blue t-shirt, and the body of the victim wrapped tightly in a blue blanket. The bag was found about 856 feet from appellant's trailer. The victim died from blunt force trauma. It was later determined that the bag and clothing inside the bag belonged to McNabb.

Appellant contended that the evidence was insufficient to support her conviction for murder in the second degree. The Court noted that the indictment charged appellant with second-degree murder for "caus[ing] the death of [the victim] ... while in the commission of cruelty to children in the second degree, *by causing said [victim] ... cruel and excessive physical pain through the infliction upon her of blunt force trauma to her head*, in violation of OCGA § 16-5-1 (d)." (Emphasis supplied). The State argued that appellant's acts of leaving the victim at her cousin's home for two days; using methamphetamine (that would interfere with her ability to care for the child); and allowing the victim to remain in a home with an "extremely volatile" McNabb who also used methamphetamine, assaulted appellant on multiple occasions, and a few weeks before the victim's death, "beat up Mathew Lester[, a friend of McNabb's,] with brass knuckles" were sufficient to support the guilty verdicts. But, the Court found, none of these acts showed that appellant caused cruel and excessive pain to the victim by inflicting blunt force trauma to her head, as alleged in the indictment, or that she aided and abetted in the crime.

Likening the case to *Glenn v. State*, 278 Ga. 291 (2004) and *Johnson v. State*, 269 Ga. 840 (1998), the Court found that here, the evidence showed only that appellant last saw the victim when she and McNabb changed her diaper and fed her

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around 5:00 a.m., that she went back to the living room and left McNabb to put the victim to bed in her bassinet, and that when C. M. woke appellant up around 10:30 a.m., the victim was missing. The victim's body was found a day later in the woods near the home in McNabb's gym bag with some of his clothing, and it was determined that she died from blunt force trauma to her head. Although appellant initially told investigators that she did not use drugs and that McNabb did not physically abuse her, her several statements regarding what occurred the day the victim was taken from her home were consistent, and she was cooperative with investigators. Just as in *Glenn* and *Johnson*, the State offered nothing to discount the reasonable possibility that appellant did not contribute to the victim's death other than her presence in the home. And, unlike in *Glenn* and *Johnson*, there was no evidence here of prior abuse of the victim.

There was no evidence presented that appellant directly caused the victim cruel and excessive pain by inflicting blunt force trauma to her head; caused someone else to commit the act; aided or abetted in the act; or that she advised, encouraged, hired, counseled, or procured someone to commit the act. There was nothing to exclude the reasonable possibility that she was asleep when the victim was taken from the home and/or killed, and there was nothing in her actions before, during, or after the victim's disappearance and death from which the jury could make such an inference. Thus, the court concluded, under these circumstances, appellant's conviction for second degree murder must be reversed.

Next, appellant argued that her conviction for cruelty to children in the second degree was based on insufficient evidence. The Court agreed. The indictment alleged that appellant committed cruelty to children in the second degree by "caus[ing] [the victim] ... cruel and excessive physical pain through the infliction upon her of blunt force trauma to her head, in violation of OCGA § 16-5-70 (c)." But the evidence was insufficient to show that appellant caused the victim cruel and excessive physical pain by inflicting blunt force trauma to her head, either directly or as a party to the crime. Therefore, the evidence was also insufficient to sustain the guilty verdict for conviction as well.

Next, appellant argued that the evidence was insufficient to support her conviction for contributing to the dependency of a minor. The Court disagreed. The Court noted that the indictment charged appellant with "willfully fail[ing] to provide proper parental care or control for [the victim] ... and fail[ing] to provide said child with adequate supervision necessary for such child's well-being, said act resulting in [the victim] being a deprived child, in accordance with the provisions of Code section 15-11-2 ... and said act[s] resulted in the death of said child, in violation of OCGA § 16-12-1 (b) (3)." Here, the Court found, the evidence showed that appellant used methamphetamine and marijuana on a regular basis including the night before the victim was taken from the home; left the eight-day-old victim along with her sister for two days with a family member who had four children of her own; told the victim's grandfather that he could keep her children in exchange for him returning the car she was using; regularly had others in her home to use methamphetamine; and resided with McNabb, who also used methamphetamine daily, was physically violent toward her, and had recently assaulted another individual with brass knuckles. Appellant herself admitted that she did not properly care for the victim and that there was drug use in the home, stating further that she was "guilty of ... neglect because [she] did drugs." Thus, the Court found, there was some evidence for the jury to conclude that appellant committed acts that caused the victim to be neglected.

However, the Court stated, because the indictment charged that appellant's "act[s] resulted in the death of [the victim]," resulting in a felony charge of contributing to the dependency of a minor, see OCGA § 16-12-1 (d.1) (1), the Court must also consider whether appellant's conduct carried with it the foreseeable risk of death. The Court noted that it had never

analyzed foreseeable risk of death under the contributing to the dependency or delinquency of a minor statute because in the criminal context, a foreseeability and proximate cause analysis appears most often in murder cases. In a criminal case, proximate cause exists when the accused's act or omission played a substantial part in bringing about or actually causing the victim's injury or damage and the injury or damage was either a direct result, or a reasonably probable consequence of the act or omission. It imposes liability for the reasonably foreseeable results of criminal conduct if there is no sufficient, independent, and unforeseen intervening cause.

Nevertheless, the Court noted, proximate cause is a jury question. And here, there was some evidence for the jury to conclude that there was a "foreseeable risk of death" to the victim from appellant's neglect that included placing the victim in an environment of methamphetamine and violence. There was evidence of violence in the home before and after the victim was born, and appellant herself admitted that McNabb had people "in and out" of the house. Appellant used methamphetamine and marijuana on a regular basis and allowed McNabb and others to do the same in her house, including the night before the victim disappeared. Although appellant's acts of neglect were not the sole proximate cause of the victim's death, the evidence was sufficient for the jury to conclude that those acts played a substantial part in her death and that death was a reasonably probable consequence of that neglect. Therefore, the Court affirmed appellant's felony conviction for contributing to the dependency of a minor under OCGA § 16-12-1 (d.1) (1).

Void Sentences; Res Judicata

Bryant v. State, A21A1377 (2/18/22)

In 2018, appellant entered an entered an *Alford* plea to two counts of enticing a child for indecent purposes. On October 25, 2018, the trial court sentenced him on each count to thirty years, twenty to serve in confinement and the remainder on probation, to run concurrently. Thereafter, appellant began filing a series of pro se motions, including motions to withdraw his plea, a motion in arrest of judgment, motions to vacate or modify his sentence, and motions for an out-of-time appeal. Some of these motions were appealed but dismissed. On October 5, 2020, almost two years after he entered his *Alford* plea, appellant filed a motion to vacate a void sentence and another motion to withdraw his *Alford* plea. The trial court denied his motions.

The Court noted that when a sentencing court imposes a sentence of imprisonment, its jurisdiction to later modify or vacate the sentence is limited. The sentencing court generally has jurisdiction to modify or vacate such a sentence for only one year following the imposition of the sentence. OCGA § 17-10-1 (f). However, a sentencing court retains jurisdiction to correct a void sentence at any time. A sentence is void if the court imposes punishment that the law does not allow. This is true even for defendants who plead guilty because a defendant who knowingly enters into a plea agreement does not waive the right to challenge an illegal and void sentence. Thus, in cases where the trial court has lost jurisdiction to vacate or modify a sentence, a direct appeal from the denial of a motion to vacate a void sentence is authorized only when the defendant has raised a colorable claim that his sentence is, in fact, void. Hence, if a defendant does not raise a colorable void-sentence claim, his appeal is subject to dismissal.

Notwithstanding that a void sentence may be challenged at any time and a direct appeal from the denial of a motion raising a colorable claim of void sentence is authorized, these principles are subject to the equally well-established principles of res judicata and the law-of-the-case rule once the issue has been raised and ruled upon. The State contended that these

principles applied, and thus, appellant's appeal should be dismissed. In support of its argument, the State pointed to appellant's motion to modify his sentence filed on March 1, 2019, and his motion to vacate and set aside void conviction and sentence filed on May 5, 2019, as well as to the dismissal of his appeals following the trial court's denial of those motions. However, the Court found, a review of these motions, as well as other motions appellant filed seeking to modify his sentence or purporting to attack his sentence as void, showed that appellant had not previously raised the issue set out in his October 5, 2020 void sentence challenge which was the subject of this appeal — that a condition of his probation is illegal and void — and that such motion, for the first time, raised a colorable claim that at least a portion of appellant's sentence is void. Accordingly, the Court held, to the extent that appellant raised a colorable claim of a void sentence, his appeal was properly before the Court as to that issue and was not subject to dismissal.

Appellant argued that the no-contact provision imposed as a special condition of probation was overly broad and was therefore void because it lacked specificity. The Court agreed. The Court noted that the special condition of probation prohibited appellant from having any contact with minors or any person unable to give consent because of mental or emotional limitations. Relying on *Ellis v. State*, 221 Ga. App. 103, 104 (1) (1996), the Court found that the special condition failed to provide appellant with sufficient notice of the groups and places he was required to avoid and was so overbroad and lacking in specificity that it could be applied to prohibit appellant from shopping at virtually any store, visiting any restaurant, or literally going to any other location in which appellant would come into contact with the general public. Furthermore, the Court found, the trial court's condition violated the principle that conditions must not be so broadly worded as to encompass groups and locations not rationally related to the purpose of the sentencing objective. Georgia law does not support the kind of universal special condition of probation, prohibiting contact with an individual or particular cohort without limitation. Accordingly, the Court concluded, the no-contact special condition of appellant's probation was vacated, and the case was remanded to the trial court for resentencing as to the vacated condition.

Appellant also argued that because his sentence was void, he should be allowed to withdraw his plea on remand. However, the Court stated, because it vacated only the no-contact special condition of appellant's probation and remanded only for resentencing as to that provision, leaving the remainder of his sentence intact, he has no right to withdraw his plea.

Void Sentences; Resentencing

Harris v. State, A21A1764, A21A1765 (2/23/22)

In 2016, appellants were each convicted of two counts of armed robbery (Counts 1 and 2) and other charges in connection with their robbery of restaurant employees. They were sentenced, in relevant part, to serve 10 years on Count 1 (armed robbery) and 20 years to serve 10 in confinement on Count 2 (armed robbery) with the sentences to be served consecutively. In 2019, appellants filed extraordinary motions for new trial, arguing that Counts 1 and 2 should have merged for sentencing purposes because the acts constituted a single armed robbery. The trial court agreed that Count 2 was void because it should have merged into Count 1, and in the new sentencing order, the trial court imposed a sentence of 20 years on Count 1, noted that Count 2 was void, and stated that the sentences remained the same on the other (assault) counts. Appellants filed motions to declare the new sentences illegal as to Count 1, arguing that they were void because the trial court could not legally increase their sentences on Count 1 after they began serving them and after the Court affirmed their convictions. The trial court denied the motions.

Appellants argued that the trial court erred by denying their motion to declare the new sentences void because it lacked jurisdiction to impose an increased sentence on Count 1. The Court agreed.

The Court stated that in the multiple-punishment context, the Double Jeopardy Clause of the Fifth Amendment protects a defendant's legitimate expectation of finality in his original sentence. But a convicted defendant has neither a vested right to nor a reasonable expectation of finality as to a pronounced sentence which is null and void. A trial judge has the authority to correct a void sentence at any time, and a sentence is void if the court imposes punishment that the law does not allow. Thus, the Court stated, the trial court was authorized to correct the void sentence it previously imposed, including by resentencing appellants.

And in that resentencing, the Court noted, the trial court had the discretion to decide which armed robbery count to vacate. Therefore, the question was whether the trial court, having elected to vacate Count 2, could increase appellants' sentences on Count 1, which were not void. Generally speaking, Georgia law gives trial judges great discretion in imposing a sentence within statutory parameters. Nevertheless, in the multiple-punishment context, the Double Jeopardy Clause of the Fifth Amendment protects a defendant's legitimate expectation of finality in his original sentence." Here, Count 1 was not void and appellants had a legitimate expectation of finality in their sentences on that count, which they had already begun to serve. Therefore, the Court held, the trial court lacked jurisdiction to increase appellants' sentences on Count 1, and it erred by denying their motions to declare the new sentences illegal as to that count. Accordingly, the Court vacated appellants' amended sentences imposed in 2019 on Counts 1 and 2 and remanded the cases to the trial court for resentencing.

Rule of Lenity; Resentencing

Tanksley v. State, A21A1401 (2/24/22)

In 2008, appellant was convicted of burglary, armed robbery, aggravated assault, and possession of a firearm during a felony. The superior court sentenced him as a recidivist to life plus 45 years' imprisonment. The Court affirmed his convictions but vacated and remanded for resentencing because certified copies of appellant's convictions were never entered into the record before the trial court. At the resentencing hearing, the prosecutor proffered three certified copies of prior felony convictions. The court "allow[ed] admission of the three certified copies of convictions." The resentencing court found that the convictions were three separate felonies for the purpose of sentencing as a recidivist. The court imposed a sentence of life imprisonment plus 45 years, noting that it was without the possibility of parole.

Appellant contended that the resentencing violated the rule of lenity because there is an ambiguity between application of OCGA § 17-10-7 (a) and (c), and that his sentence thus should not have been enhanced. However, the Court found, the statutory scheme is clear; once the trial court allowed admission of the prior felony convictions and found that they were three separate felonies for sentencing purposes, it properly sentenced appellant to life imprisonment without parole on his armed robbery conviction, and in fact had no discretion to do otherwise. OCGA § 17-10-7 (a) and (c) can be read together so that the former recidivist statute applies where the defendant has one or two prior felony convictions and the latter provision applies when the defendant has at least three prior felony convictions. Thus, the Court concluded, because the two subsections can be read in harmony, there is no ambiguity. And, because there is no ambiguity, the rule of lenity does not apply.

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Next, citing *Higdon v. Cooper*, 247 Ga. 746 (1981), appellant argued that his resentencing violated the Double Jeopardy Clause and that his sentence was thus void as a matter of law under the general rule that once a defendant is sentenced and begins to serve his sentence, the sentence may not be increased. However, the Court noted, the Supreme Court in *Wilford v. State*, 278 Ga. 718, 720 (2004) stated that *Higdon* was no longer good law, clarifying: "the double jeopardy considerations that bar reprosecution after an acquittal do not prohibit review of a sentence that is statutorily permissible." A retrial to establish a prior conviction for the purpose of enhancing a sentence is not prohibited: Whether double jeopardy precludes a retrial to establish a prior conviction depends upon whether the purpose of the conviction is to enhance the sentence or to prove an actual element of the offense. And here, the Court found, because the prior convictions were not elements of the offenses and were only used for sentencing, this claim was without merit.