

## THIS WEEK:

- Involuntary Manslaughter
- Hostile Witnesses
- Ineffective Assistance of Counsel
- Recidivist Sentencing; Void Sentences
- DUI; Breath Tests

### **Involuntary Manslaughter; OCGA § 16-5-3 (b)**

*McIver v. State, S22A0093 (6/30/22)*

Appellant was convicted of felony murder and other crimes arising out of the shooting death of his wife. Very briefly stated, the evidence showed that appellant, his wife, Diane and his wife's best friend, Carter, were driving home from a weekend out-of-town. Carter was driving, Diane was in the front passenger seat, and appellant was in the rear seat behind Diane. While appellant dozed, Carter got off the downtown connector because traffic was heavy. Appellant woke and asked for his gun that was in a plastic grocery bag in the center console. Appellant put the loaded weapon on his lap because he considered the area of town where they left the interstate to be dangerous. At some point, the gun discharged, killing Diane. Appellant contended that the weapon discharged while he was asleep. The State contended that appellant deliberately shot Diane.

Appellant argued that the trial court erred in refusing his written request to charge the jury on the lesser grade of involuntary manslaughter under OCGA § 16-5-3 (b). The Court agreed and reversed his convictions.

The Court concluded that Georgia has a long-established, statutory homicide offense of involuntary manslaughter, with two grades: first, the felony offense of involuntary manslaughter in the commission of an unlawful act other than a felony, and second, the misdemeanor offense of involuntary manslaughter in performance of a lawful act but with criminal negligence. The Court further concluded that the element of criminal negligence in unlawful manner involuntary manslaughter is distinguishable from ordinary negligence on the one hand and from the mental state required for statutory reckless conduct on the other. Specifically, in looking at the history of the law, the Court found that the General Assembly, in enacting the reckless conduct statute while retaining both grades of involuntary manslaughter, meant to preserve a distinction between criminal negligence as the mens rea element of the offense of unlawful manner involuntary manslaughter and the statutory offense of "reckless

conduct,” and that it reaffirmed that decision in 2004 by providing a statutory definition of “criminal negligence.”

Next, the Court addressed the trial court's ruling that as a matter of law, a jury should *never* be instructed on unlawful manner involuntary manslaughter in a shooting death case. The trial court relied upon *Manzano v. State*, 282 Ga. 557 (2007) for its ruling. The Court noted that while the trial court did not quote the language it relied upon, the *Manzano* Court broadly stated that “[a] defendant who handles a gun in such a way as to accidentally cause the death of another human being, albeit without any intention to do so, has necessarily committed the misdemeanor of reckless conduct. ... [Cit.]” (Emphasis supplied.) *Cook v. State*, 249 Ga. 709, 712 (4) (292 SE2d 844) (1982). See also *Reed v. State*, 279 Ga. 81, 85 (7) (610 SE2d 35) (2005).” The Court also noted that the same language relied upon in *Cook* and *Reed* appears to have originated in an expansive interpretation of language used in *Raines v. State*, 247 Ga. 504, 507 (3) (1981).

However, the Court found, a close reading of these decisions shows that the expansive language used in *Cook*, *Reed*, and *Manzano*, derived from, but not quoting the decision in *Raines*, failed to consider the context in which it originated and was applied. In *Cook*, *Reed*, and *Manzano*, the undisputed evidence established that the appellant acted with conscious disregard of a substantial and unjustifiable risk of harm, constituting a gross deviation from a reasonable standard of care — the elements of statutory reckless conduct under OCGA § 16-5-60 (b). An unlawful manner involuntary manslaughter charge was not requested in *Manzano*, and in *Cook* and *Reed* the Court concluded that the trial court correctly refused a charge on OCGA § 16-5-3 (b) because slight evidence did not support such a charge. But none of these decisions supports the proposition that any handling of a firearm resulting in an unintended death always constitutes at least the statutory offense of reckless conduct and therefore forecloses an instruction on unlawful manner involuntary manslaughter.

Accordingly, the Court disapproved the statement in *Cook*, *Reed*, and *Manzano* that “[a] defendant who handles a gun in such a way as to accidentally cause the death of another human being, albeit without any intention to do so, has necessarily committed the misdemeanor of reckless conduct,” to the extent it suggests that an instruction on unlawful manner involuntary manslaughter is never appropriate in a case involving a fatal shooting. Under the specific circumstances outlined in those decisions, a jury instruction on unlawful manner involuntary manslaughter was not appropriate. But when there is slight evidence, even if in dispute, that the defendant caused the death of another person in the commission of a lawful act but in a merely criminally negligent manner, a charge on unlawful manner involuntary manslaughter is supported.

And here, the Court found, the evidence presented at trial provided some support for the requested instruction on unlawful manner involuntary manslaughter. Evidence was presented that, at the time of the shooting, Appellant was asleep in the back seat of a moving car with the loaded revolver on his lap in

a plastic grocery bag, and that he was startled awake by the doors locking, someone speaking, or the vehicle going over a bump in the road. In addition, expert testimony was presented that at the time the revolver discharged, appellant was not holding it upright in a raised position, but rather that the gun was lying sideways and resting on his lap. Some evidence was also presented that appellant suffered from a sleep-related disorder that could produce involuntary movements when he was awakened or startled.

From this evidence, the Court determined that the jury could have concluded that the revolver was not deliberately or intentionally fired, but rather, as appellant contended, discharged as a result of his being startled awake, reflexively or involuntarily clutching at the bag holding the firearm, and inadvertently contacting the trigger. While the jury could have found from the evidence that the shooting that killed Diane was an accident under OCGA § 16-2-2, the jury also could have concluded that, while it was not unlawful for appellant merely to have a loaded revolver in his lap in the back seat of the vehicle, he was criminally negligent in his manner of handling it by keeping it in his lap unsecured, without a holster and in a plastic bag, in a moving vehicle with two other people in the front seats, and by allowing himself to doze off while the gun was so situated. This was at least slight evidence that the fatal discharge of the firearm was a lawful act but performed in a criminally negligent manner, but not necessarily statutory reckless conduct — an act performed in conscious disregard of a substantial and unjustifiable risk of harm to another amounting to a gross deviation from a reasonable standard of care. Accordingly, the Court concluded, the evidence at trial constituted the slight evidence necessary to support an instruction on unlawful manner involuntary manslaughter, and therefore, the trial court erred in refusing to give appellant's requested instruction on this point.

### **Hostile Witnesses; Rule 611**

*Brown v. State, S22A0603 (6/30/22)*

Appellant was convicted of malice murder and other related offenses. Tyeesha Gray told the police at the scene that she witnessed appellant shoot the victim. At trial, however, she testified during direct examination that she couldn't remember who shot the victim or replied that what she knew was "hearsay." Over appellant's objection, the prosecutor was allowed to treat Tyeesha as a hostile witness and ask her leading questions. Tyeesha then admitted that when she spoke with the police, she admitted that she saw appellant shoot the victim; that after he was hit, the victim screamed "I've been hit"; and that after appellant shot the victim, appellant fired several shots in the air. She also told the police that her sister Nyeesha was behind her during the shooting.

Citing *Hayes v. State*, 268 Ga. 809, 812-813 (6) (1997), appellant argues that "the only time a witness may be asked leading questions is when that witness is nervous, reluctant, or hostile," and argued that Tyeesha was none of these things when the prosecutor moved to treat her as a hostile witness. Appellant further argued that the prosecutor's proffered reason for treating Tyeesha as a hostile witness — her unresponsiveness — is not a permitted situation for such treatment. The Court disagreed.

The Court noted that under OCGA § 24-6-611 (c), “[l]eading questions shall not be used on the direct examination of a witness except as may be necessary to develop the witness’s testimony.” However, “[w]hen a party calls a hostile witness, an adverse party, or a witness identified with an adverse party, interrogation may be by leading questions.” *Id.*

Here, the Court found, the record showed that Tyeesha was uncooperative in answering the State’s questions regarding her account of the shooting that she had previously provided to the police, answering “I don’t know” to several questions and “What I heard was hearsay” to two questions about the shooter’s identity. Further, her assertions that her previous account was based on hearsay amounted to a recanting of her previous statement to the police that she saw appellant shoot the victim and an unwillingness to be forthcoming in her testimony. Furthermore, the Court noted, appellant failed to cite any authority indicating that leading questions are not allowed when a witness is unresponsive in this way. And federal cases applying Federal Rule of Evidence 611 (c) indicate that leading questions are appropriate in situations like this one. Accordingly, the Court concluded that the trial court did not abuse its discretion in allowing the State to treat Tyeesha as a hostile witness.

#### **Fruit of the Poisonous Tree; Ineffective Assistance of Counsel**

*Holland v. State*, S22A0468 (6/30/22)

Appellant was convicted in 2008 for malice murder and other related crimes. Very briefly stated, the record showed that after appellant was arrested, he was questioned by a detective. The detective essentially promised that if he helped “clear up” other murders, he would not be charged with them; he would only be charged with the murder for which he was arrested. Appellant made a video-recorded statement admitting his involvement in other homicides. Thereafter, and over the course of time, he made other Mirandized statements, including State’s Exhibits 3-A, 3-B, and 14.

Appellant contended that Exhibits 3-A, 3-B, and 14 were improperly admitted as similar-transaction evidence because they were “fruit of the poisonous tree” from the video-recorded statement, which was induced by an improper hope of benefit. Specifically, he argued that the detective’s promise during appellant’s video-recorded statement — that appellant would not be charged with any additional crimes he divulged — was “the poisonous tree” that tainted the exhibits as involuntary and rendered them wholly inadmissible, even as similar-transaction evidence. However, the Court found, while the detective’s promise that appellant would not be charged with the additional crimes was unquestionably a hope of benefit under former OCGA § 24-3-50, the “fruit of the poisonous tree” doctrine does not apply to violations of that statute, so Appellant’s claim was meritless.

Appellant also contended that he was denied the effective assistance of counsel when his trial counsel failed to object or move for a mistrial when the court declined to question the jury after two alleged jury

issues. In the first instance, the trial court was informed that it was possible a juror overheard someone from the prosecution team discussing the case during a recess. Trial counsel declined the judge's invitation to question the panel. The trial court then stated to the jury that if they accidentally overheard anything to report it to a deputy. No juror reported overhearing anything and trial counsel later told the court he did not object to the way the issue was handled.

In the second instance, a juror sent out a note during deliberations that said, "Judge, I have reason to believe that a juror could have been compromised. This is due to [a] complete turn around from the juror's previous stance and a complete refusal to change their mind." Trial counsel told the court, "I don't know what to do, to be honest." The court decided then that no further action should be taken and stated in open court: "I have read and gone over the note concerning whether or not some of the jurors have been changing their mind and refusing to change their mind and whatever their stance. Both the prosecution and the defense agree that based on this note alone, no one is requesting further action." The court also determined that there was no evidence "that anyone's not deliberating." The jury came back with a verdict shortly thereafter.

The Court concluded that the record showed that trial counsel's decisions were the result of trial strategy that was professionally reasonable. After the court became aware that a juror potentially overheard the prosecution's conversation during recess, the court gave an explicit curative instruction to the jury to report any external communications they may have heard to a deputy, to not discuss any external communications with any other juror, and to only consider evidence presented in the courtroom. Qualified jurors under oath are presumed to follow the trial court's instructions. Trial counsel testified at the motion for new trial hearing that, in light of the curative instruction, his decision not to request further action was strategic, as he did not want to bring greater attention to the incident.

As to the second instance, the juror's note during deliberations was based on pure speculation and contained no direct evidence of any outside influence on the jury. Trial counsel also testified that his decision not to request any action by the court was strategic, as the note could have even meant "a potential of a juror swinging in our direction." Thus, trial counsel made a reasonable strategic decision and was not deficient.

### **Recidivist Sentencing; Void Sentences**

*Hutcheson v. State, A22A0501, A220502 (6/6/22)*

Hutcheson was convicted of aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. At sentencing, the State argued that the trial court should sentence Hutcheson as a recidivist under OCGA § 17-10-7 (a) and (c) because he had prior felony convictions: (1) first-degree forgery in 2002; (2) possession of a firearm by a convicted felon in 2003; (3) possession of cocaine and obstruction of a law enforcement officer in 2008; and (4) aggravated

assault in 2018. The trial court sentenced Hutcheson as a repeat offender under OCGA § 17-10-7 and imposed a sentence of 25 years with the first 15 years to be served in confinement.

Hutcheson filed a motion for resentencing. At the resentencing hearing, the trial court found that two of Hutcheson's prior felony convictions could not serve as predicate convictions supporting sentencing under OCGA § 17-10-7 (c) and sentenced him as a repeat offender only under OCGA § 17-10-7 (a). The State appealed.

The State argued that the trial court erred in granting Hutcheson's motion for resentencing as the four felony convictions presented by the State were sufficient to support sentencing Hutcheson as a recidivist under OCGA § 17-10-7 (c). Specifically, the State contended the trial court erred in finding that because Hutcheson's 2008 sentence for possession of cocaine and obstruction of an officer was void, his convictions for these offenses could not be used to sentence him as a recidivist under OCGA § 17-10-7 (c). The Court agreed.

Here, the Court found, the record showed that in 2008 Hutcheson pled guilty to possession of cocaine and obstruction of a law enforcement officer, and the court imposed a ten-year sentence to run concurrently on both counts. The trial court correctly found that this sentence was void because under OCGA § 16-10-24 (b) the maximum sentence for obstruction of an officer is five years. However, the Court stated, although the sentence was void, a claim challenging a conviction and a claim challenging the resulting sentence as void are not the same. In this case, Hutcheson's conviction for obstruction of an officer constituted a felony, and there was no assertion that his guilty plea was invalid or that there were grounds to reverse his conviction. Moreover, OCGA § 17-10-7 itself states that paragraph (c) applies to individuals who have been previously convicted of three felonies but does not contain any requirements related to the individuals' prior sentences for these offenses. Thus, the Court concluded, as Hutcheson's 2008 felony conviction remains, the court erred in ruling that the conviction could not be used to support his sentence under OCGA § 17-10-7 (c).

#### **DUI; Breath Tests**

*Blazek v. State*, A22A0576 (6/6/22)

In *State v. Blazek*, 353 Ga. App. 127 (2019) (*Blazek I*), the State appealed the trial court's decision granting appellant's motion for reconsideration of the denial of his motion in limine and motion to suppress the results of the State-administered breath test and field sobriety evaluations. The trial court relied upon *Price v. State*, 269 Ga. 222 (1998) as "binding precedent requiring *Miranda* warnings to precede an officer's request for a breath sample from an in-custody suspect." After the trial court reached this decision, the Supreme Court of Georgia overruled *Price* in *State v. Turnquest*, 305 Ga. 758 (2019). Because the trial court relied solely on *Price* in granting appellant's motion, the Court vacated

the suppression order but remanded for a consideration of other arguments raised by appellant. On remand, the trial court denied appellant's motion to suppress, and a jury found him guilty of DUI.

Appellant argued that the trial court erred in not suppressing the results of his breath test as he did not knowingly and willingly consent and as he was induced by inaccurate statements in the implied consent card and the understating of the legal limit for the type of vehicle he had been driving. The Court noted that there was no dispute that the implied consent notice improperly advised appellant that he was required to submit to a breath test and that his refusal to consent to a breath test could be used against him at trial. But, the Court noted, while there was no dispute that appellant was not read the notice for commercial drivers, the trial court found in its original order that it was not relevant because appellant was not charged with commercial DUI. The trial court did not address this issue on remand.

In *Blazek I*, the Court stated that it vacated and remanded specifically because "the trial court's resolution of the motion to suppress based on *Price* meant that it did not consider alternative arguments for suppression raised by [appellant]." On remand, however, the trial court found that the only issue before it was a per se challenge to the reading of the former implied consent notice.

And, the Court found, the record did not indicate that appellant waived his argument that he did not voluntarily consent to the breath test under a totality of the circumstances, including the misstatements in the former implied consent notice and the reading of the notice for civilian drivers rather than commercial drivers.

Although the reading of the implied consent notice may be one factor that is considered in determining whether consent to a breath test was voluntary, the trial court also must consider factors such as a defendant's age, education, capacity, the nature of questioning, and any threats employed. Where a trial court's order does not reflect consideration of voluntariness under the totality of the circumstances, remand is required.

Accordingly, the Court again vacated the order denying appellant's motion to suppress and remanded for the trial court to consider whether appellant's consent to a breath test was voluntary under a totality of the circumstances. In so holding the Court stated that its opinion is not a determination that the trial court admitted the test results in error, and so the Court was not vacating appellant's conviction or ordering that he be granted a new trial. The trial court, however, is free to order such relief upon remand if it determines that the breath test results should be suppressed.