

## THIS WEEK:

- **First Offender Act; Revocation of Probation**
- **Jury Charges; Grave Suspicion**
- **Ineffective Assistance of Counsel; Status as Convicted Felon**
- **Autopsy Photographs; Rule 403**
- **Search & Seizure; Harmless Error**

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### First Offender Act; Revocation of Probation

*Benton v. State, S22G0104 (8/23/22)*

Appellant was convicted of aggravated assault. Based on his three prior convictions, the court sentenced him as a recidivist under OCGA § 17-10-7 (a) and (c) to serve a term of 20 years — 15 years in prison and five years on probation. He appealed, contending that the State failed to prove that he had three prior felony convictions. Specifically, his conviction for VGCSA in July 1990 because he was sentenced as a first offender and later exonerated of that offense under the First Offender Act when he completed his sentence without revocation of his first-offender status.

The Court of Appeals affirmed his conviction. The Court found that the trial court revoked his probation three times for the 1990 offense and therefore, was not exonerated under OCGA § 42-8-60 (e). Consequently, his 1990 conviction qualified as a prior conviction such that the trial court did not err in sentencing him as a recidivist under OCGA § 17-10-7 (c). Appellant successfully petitioned the Supreme Court for a writ of certiorari.

The Court noted that although the State initially advanced the argument that the Court of Appeals adopted in its opinion, the State conceded that the Court of Appeals erred in its ruling. As the State rightly noted in its brief before the Court, a court's revocation of probation ordered as part of a first-offender sentence cannot be the basis for recidivist punishment under OCGA § 17-10-7 (c), absent an adjudication of guilt and the imposition of a sentence under OCGA § 42-8-60 (d) as to the offense once subject to first-offender treatment. In the absence of such an adjudication and sentence, OCGA § 42-8-60 (e) provides that the first-offender defendant "shall be exonerated of guilt and shall stand discharged as a matter of law" as soon as the enumerated statutory conditions are met. Moreover, contrary to the conclusion of the Court of Appeals, a first offender can be exonerated of his first offense even when his probation is revoked. In that circumstance, the first offender, during any period in which probation is revoked, simply serves time in prison, as provided in the first-offender sentence imposed by the court.

And the Court noted, a different panel of the Court of Appeals rightly reached this conclusion not long after appellant was decided. See *Giles v. State*, 362 Ga. App. 237 (2022).

Here, the Court found, appellant's probation in the 1990 case was revoked (and apparently reinstated) on three occasions by the court. However, the record contained nothing showing that his status as a first offender was revoked by the entry of an adjudication of guilt and sentence by the court under OCGA § 42-8-60 (d) as to the 1990 case. In the absence of such action by the court, at the completion of his first-offender sentence as to the 1990 case, appellant was exonerated of guilt and discharged as a matter of law as to that case. Thus, the 1990 case could not count toward showing that appellant had previously been convicted of "three felonies" under OCGA § 17-10-7 (c). As a result, the trial court erred in sentencing appellant as a recidivist under OCGA § 17-10-7 (c) on the aggravated assault charge on which he was found guilty in this case.

In so holding, the Court clarified that when referring to "probation" in regard to a first offender, it means to use that term in the way the First Offender Act does when it provides that an offender may serve a term of probation ordered by the court as part of a first-offender sentence under OCGA § 42-8-60 (a). Such probation may be revoked by the court, but, that action is not synonymous with revocation of first-offender status. Although a first offender's status is clearly "probationary" in nature, due to his ability to be exonerated of the offense at the conclusion of the first-offender sentence, the use of that descriptor by the General Assembly and the appellate courts may have created confusion about the nature of the probation that may be ordered and revoked by the sentencing court under the First Offender Act and the effect of any such revocation on the defendant's first-offender status.

### **Jury Charges; Grave Suspicion**

*Adkins v. State*, S22A0796 (8/23/22)

Appellant was convicted of malice murder and other crimes. He contended that the trial court erred in refusing to charge the jury on "grave suspicion." The Court disagreed.

The Court found that appellant requested a pattern jury charge on grave suspicion, but the trial court declined to give the instruction, stating, "I don't ever give it. I don't think I'm required to. I think it's discretion and I just don't give it." Instead, the trial court instructed the jury on reasonable doubt, the presumption of innocence, and mere presence. In reviewing this issue in conjunction with appellant's motion for a new trial, the trial court adhered to its decision to forego the charge on grave suspicion, reasoning that the charge was not required because the court gave an instruction on reasonable doubt and mere presence and because the evidence raised more than a grave suspicion of guilt.

The Court held that the trial court's decision not to give the requested charge on grave suspicion was not error because the concept was covered in other jury instructions that the court did give to the jury.

However, as for the trial court's statement that it does not ever give an instruction on "grave suspicion," the Court cautioned against a blanket policy of never giving such a charge, which is in tension with the duty to give jury charges that are tailored to the evidence of each case. But the refusal to include the charge here was not error in light of the balance of the charge given by the court. Accordingly, appellant's claim of error failed.

### **Ineffective Assistance of Counsel; Status as Convicted Felon**

*Prickett v. State, S22A0531 (8/23/22)*

Appellant was convicted of felony murder, possession of a firearm by a convicted felon and other offenses. He contended that the trial court erred in denying his motion for new trial because his trial counsel rendered ineffective assistance by failing to stipulate that he was a convicted felon (possession of cocaine with intent to distribute), thereby exposing his criminal record to the jury and "tainting" his trial.

Pretermitted whether appellant could have shown that his counsel's performance was deficient in this regard, the Court concluded that he failed to demonstrate a reasonable probability that the result of his trial would have been different if his trial counsel had sought a stipulation. The Court noted that while it has previously acknowledged that error may occur if, for example, a trial court refuses to allow a stipulation to a prior offense where a defendant's prior conviction is of the nature likely to inflame the jury's passions and raise the risk of a conviction based on improper considerations, and the purpose of the evidence is solely to prove the defendant's status as a convicted felon, it also has determined that even violent crimes, crimes involving firearms, and drug offenses were not likely to inflame the jury's passions in murder cases. Therefore, the absence of a stipulation does not always have prejudicial impact.

And here, the Court found, appellant's prior drug offense was identified only in passing when the prosecutor introduced, without objection, a certified copy of the conviction. The prosecutor then immediately began eliciting testimony unrelated to the prior conviction and did not mention the nature of the prior offense again. During closing argument, the prosecutor stated only that if the jury found that appellant brought a gun to the crime scene and was a convicted felon, they could find him guilty of the charge of possession a firearm by a convicted felon. Thus, any impact from the disclosure of this conviction was minimal. And, the Court added, the evidence against appellant was strong.

Moreover, during its final jury charge, the trial court gave a limiting instruction on the use of the prior conviction evidence. That instruction informed the jurors that evidence sometimes is admitted for a limited purpose and directed them to consider the evidence of appellant's prior conviction only as it related to a required element of Count 3 (felony murder based on possession of a firearm by a convicted felon) and Count 6 (possession of a firearm by a convicted felon) "and not for any other purpose or

count.” The trial court's charge later defined the crime of possession of a firearm by a convicted felon and instructed the jury that possession of cocaine with intent to distribute is a felony. Furthermore, it is ordinarily presumed that jurors follow such instructions without clear evidence to the contrary, which was not shown here.

Thus, the Court concluded, under these circumstances, appellant's claim of ineffective assistance of counsel failed because appellant did not show that there was a reasonable probability that the outcome of the trial would have been different if trial counsel had stipulated to appellant's felony status.

### **Autopsy Photographs; Rule 403**

*Albury v. State*, S22A0616 (8/23/22)

Appellant was convicted of malice murder and other related offenses. He contended that the trial court erred by admitting into evidence a post-incision autopsy photograph. Specifically, he argued that the trial court never properly subjected the photograph to the balancing test required under Rule 403 and that a thorough balancing test would have resulted in exclusion of the photograph. The Court disagreed.

The Court stated that courts generally evaluate the admissibility of autopsy photographs under OCGA §§ 24-4-401, 24-4-402, and 24-4-403 (“Rule 401, 402, and 403’), relying on our cases decided under the new Evidence Code, and looking to federal case law for guidance. Autopsy photographs may be relevant and probative to show the nature and location of a victim's injuries, even if the cause of death is not disputed.

The Court noted that appellant filed a pre-trial motion in limine to exclude from evidence a post-incision autopsy photograph of an injury to the victim's head after the skin of his scalp and face had been peeled back. In the motion, he argued that the photograph did not depict a fatal injury, was not required to assist the jury's understanding of the circumstances surrounding the victim's death and could be described effectively with the medical examiner's diagram of the injuries, as it was at his co-indictee's trial. When the motion in limine was heard at trial, the State provided the trial court with a copy of the Court's opinion in *Venturino v. State*, 306 Ga. 391 (2019) and referred to that decision's recognition of “the balancing test in 403.” Both parties extensively argued about the relevance of the photograph, including the weight of its probative value and its danger of unfair prejudice. The trial court said that it did not see the photograph as “that gory,” ruled that it would be relevant “based on the law being cited by the State,” and admitted it over appellant's objection.

The Court found that although the trial court did not cite the text of Rule 403 in its ruling, the trial transcript showed that both parties argued the text of the rule, that the trial court discussed the photograph's relevance and potential prejudice, and that it based its ruling on the case the State cited,

*Venturino*, 306 Ga. at 395-396. In so doing, the trial court implicitly conducted the proper analysis under Rule 403, even though it did not expressly reference that rule.

Next, the Court considered whether the trial court's ruling amounted to an abuse of its discretion and concluded that it did not. Appellant describes the photograph at issue as “gory,” “graphic,” “ghastly,” and “gruesome,” and argued that it neither showed the victim's cause of death nor supported the State's theory that more than one person attacked the victim. However, the medical examiner testified that because of the victim's thick hair, she could see his head injury only after pulling back his scalp. The photograph shown to the jury thus depicted the only way that the victim's head injury was visible. Moreover, the wound depicted in that photograph differed from numerous other injuries that were consistent with evidence of the co-indictee's participation in the crimes by striking the victim with the co-indictee's knife and perhaps his fist. Because the medical examiner testified that the particular injury depicted in the photograph was caused by a blunt force consistent with a person striking the victim's head with a heavy object—and not with a fist or a sharp object like a knife—the photograph had a tendency to make it “more probable” that someone other than the co-indictee participated in the crimes—a fact of great consequence in appellant's trial. Accordingly, the Court held, although the photograph at issue could be characterized as somewhat gruesome, it nevertheless had significant probative value in showing the nature of the victim's various injuries and supported the theory that appellant (and not just the co-indictee) participated in the attack—particularly considering other testimony that appellant stayed with his co-indictee during the attack and later admitted his participation in the attack.

Therefore, the Court concluded, it could not say that the trial court abused its discretion when it concluded that the photograph was relevant and implicitly ruled under Rule 403 that the photograph's probative value was not substantially outweighed by the danger of unfair prejudice.

### **Search & Seizure; Harmless Error**

*Wheeler v. State*, S22A1236 (8/23/22)

Appellant was convicted of murder, aggravated assault, and other crimes arising from the fatal shooting of Corbett and non-fatal shooting of Carter, Corbett's cousin. Appellant testified at trial and admitted that he shot Corbett repeatedly, pausing between firing to berate her about how it was her fault he was shooting her. Corbett suffered three gunshot wounds and died. As appellant drove away from the home, he shot the fleeing Carter five times from behind. Appellant claimed that he shot both victims in self-defense.

Prior to trial, appellant filed a motion to suppress. The evidence showed that while searching for appellant, the police were directed to the apartment of Burly, one of appellant's girlfriends. When police arrived, Burly ran to them, saying, “He's in there. Get him out.” Five minutes later, appellant exited;

police ordered him onto the ground and handcuffed him. Burley gave police consent to search her apartment, and during the search, police recovered a 9mm handgun in a fireplace, an empty box of 9mm ammunition, and a black garbage bag containing blood-stained clothing. Police did not obtain consent for the search from appellant, who had been placed in the back of a police vehicle. Burley told the police at the time that appellant did not live there. However, at the motion hearing, she testified that at the time of the search, appellant still lived in the apartment, paid rent, had a key, and kept clothing there. The trial court denied the motion.

Appellant contended that the trial court erred in denying his motion to suppress. Specifically, he argued that he had an expectation of privacy in the apartment, especially in the bag containing his bloody clothing. He further argued that Burley's consent without his own was insufficient to authorize the entire search at issue under *Georgia v. Randolph*, 547 U.S. 103 (126 Sct 1515, 164 LE2d 208) (2006).

The Court stated that only harmful evidentiary errors warrant reversal. In determining the harmlessness of nonconstitutional error, it must decide whether it is highly probable that it did not contribute to the verdict. To do so, the Court must review the record de novo and weigh the evidence as it would expect reasonable jurors to have done so.

And here, the Court noted, appellant argued that “absent the gun and the bloody clothes, there was no physical evidence tying him to the murder.” But, the Court found, physical evidence tying appellant to the crimes would have been merely cumulative of his admission that he shot the victims. And the evidence appellant sought to suppress had no bearing on his claim that he shot the victims in self-defense, and thus it was highly probable that its admission did not contribute to the verdicts. Accordingly, the Court concluded, any error in admitting the evidence was harmless.