

## THIS WEEK:

- **Sufficiency of the Evidence; Constructive Possession**
- **Retroactive First Offender Treatment; OCGA § 42-8-66**
- **Jury Questions; Mistake of Fact**
- **Ineffective Assistance of Counsel; Trial Strategy**
- **Juveniles; Record Restriction**

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### Sufficiency of the Evidence; Constructive Possession

*Bustos v. State, A22A0652, A22A0898 (9/26/22)*

Appellants Bustos and Portillo were convicted of trafficking methamphetamine and possession of methamphetamine with intent to distribute. Very briefly stated, the evidence showed that law enforcement learned through intercepted communications that Gonzalez was to receive a large delivery of methamphetamine in a county park. Officers observed Gonzalez walk up to a blue Honda and receive a bright blue bag (later found to contain 10 kilos of methamphetamine) from the Honda's driver. Officers then followed the Honda to a house at 1981 Winchester Court. The home had a basement apartment. Portillo then arrived in a BMW owned by Luis. During the 30 to 45 minutes the officers watched the residence, they saw four men outside the home. One of the men, Quintero, stayed near the curb. The other three men – Portillo, Bustos, and Luis – went in and out of the basement. When outside, the men repeatedly looked up and down the road and appeared to be nervous, and officers suspected they were performing counter-surveillance. Officers detained Portillo as he walked toward the BMW and Bustos as he walked toward the Honda. The keys to the Honda were recovered from Bustos's pocket. Inside the basement apartment, the officers found a very large methamphetamine conversion lab.

Bustos argued that the evidence was insufficient to support his trafficking conviction. The Court disagreed. Here, the Court found, Bustos did not have actual possession of any drugs at the time of his arrest. But he was present at a large-scale drug stash house, and officers testified that a drug organization would not allow individuals not involved in the organization to visit a stash house like this. Additionally, Bustos had in his pocket the keys to the Honda that had, shortly before his arrest, transported drugs for a sale. He was also headed towards the Honda as if to leave in it at the time the officers detained him. Further, Bustos initially told officers that he lived at the stash house, and the man who lived upstairs testified that Bustos spent a significant amount of time in the basement apartment. Given this evidence, the Court concluded, the jury was authorized to conclude that Bustos was in constructive possession of the methamphetamine. The evidence, therefore, was sufficient to sustain his conviction.

Portillo also argued that the evidence was insufficient to support his convictions. Relying on *Hill v. State*, 360 Ga. App. 143 (2021) and *Morales v. State*, 332 Ga. App. 794 (2015), the Court agreed. Although Portillo's presence at the residence tied him to the location where a trafficking operation was discovered, there was no other evidence tying Portillo to the basement apartment, to the car that was used to transport the drugs, or to the drugs themselves. To the contrary, Portillo arrived at the residence in a different vehicle after the Honda arrived, and the man who lived upstairs testified that he had never seen Portillo at the basement apartment in the three months he had leased it to Luis. Although an officer testified that he observed all three codefendants enter the residence at various times, the witness did not provide any specific

testimony about when or how many times Portillo went into the residence, and he testified that the men were only inside for 30 or 40 seconds at a time.

The Court acknowledged that officers testified that drug organizations typically would not allow individuals not associated with the trafficking operation to be at such locations, that the residence smelled like acetone used to process methamphetamine, and that methamphetamine was in plain view just inside the home. The Court stated that this evidence was sufficient to raise suspicion and, a jury reasonably could conclude Portillo was aware of the criminal activity, and perhaps even that he approved of it. However, such circumstantial evidence of knowledge and approval is not enough to prove that Portillo was in constructive possession of the contraband found in the residence.

Nevertheless, the State argued, Portillo's conviction may be sustained because he intentionally aided or abetted the crime by acting as a lookout. Indeed, a witness testified that Portillo was acting in a manner consistent with counter surveillance during the time he was outside the residence with his codefendants. However, the Court found, this testimony was limited — only one officer testified that the three men outside the residence were "looking around awfully a lot" and looking at the officer's vehicle such that the officer noted it in his report. This testimony was the only evidence the State presented to support its contention that Portillo was intentionally aiding or abetting the criminal activity. While the circumstances raise suspicion, the Court concluded that this officer's limited testimony (of conduct susceptible of multiple interpretations), without more, was not enough to sustain Portillo's conviction.

Finally, although the State presented evidence that Portillo was previously convicted of trafficking in heroin, the Court again did not believe that evidence of his prior conviction was sufficient to support his convictions. Thus, under these circumstances, where the State's case against Portillo was circumstantial and did not rule out a hypothesis that he was an innocent bystander, (that is, did not rule out that he was innocent of having constructive possession of the methamphetamine), the Court concluded that there was insufficient evidence to support a finding that Portillo was guilty of the offenses for which he was convicted. Consequently, the Court reversed his convictions.

## **Retroactive First Offender Treatment; OCGA § 42-8-66**

*Wilkin v. State, A22A0897 (9/27/22)*

In March 2017, pursuant to a negotiated plea agreement that resolved three separate criminal cases, appellant pled guilty to several misdemeanors and felonies, including, as relevant to this appeal, four counts of aggravated assault and one count of possession of marijuana with intent to distribute. Roughly four years later, appellant petitioned for retroactive first offender treatment on the aggravated assault charges pursuant to OCGA § 42-8-66 and conditional discharge of the drug possession charge pursuant to OCGA § 16-13-2. Following a hearing, the trial court determined that the prosecutor assigned to the case at the time of sentencing incorrectly concluded that appellant was not eligible for conditional discharge pursuant to OCGA § 16-13-2 and that this "erroneous" statement of the law "probably colored" the plea negotiations. Based on this finding, the court granted appellant's request to conditionally discharge the possession of marijuana conviction. However, the court denied appellant's request for retroactive first offender treatment on the aggravated assault charges, concluding that it was the State's intent for appellant "to be convicted of at least one felony case."

The Court stated that a petition requesting retroactive first offender treatment is like an initial request for first offender treatment pursuant to Georgia's First Offender Act, OCGA § 42-8-60 et seq., except that it is available to an individual who did not request first offender treatment at the time of sentencing. OCGA § 42-8-66, like OCGA § 42-8-60, provides for the exoneration of guilt and discharge under certain circumstances. Pursuant to OCGA § 42-8-66 (a) (1), "[a]n individual who qualified for sentencing pursuant to [the First Offender Act] but who was not informed of his or her eligibility for first offender treatment may, with the consent of the prosecuting attorney, petition the court in which he or

she was convicted for exoneration of guilt and discharge[.]” If requested, the court must hold a hearing on the petition and may consider any relevant evidence, including evidence introduced by either party. OCGA § 42-8-66 (b)-(c). And, “if the court finds by a preponderance of the evidence that the defendant was eligible for sentencing under the terms of [the First Offender Act] at the time he or she was originally sentenced . . . and the ends of justice and the welfare of society are served,” the court may retroactively grant exoneration of guilt and discharge the conviction. OCGA § 42-8-66 (d). The determination of whether to offer criminal defendant first offender treatment rests solely with the trial court and its decision will be reversed only when the record clearly establishes either that the trial court refused to consider first offender treatment on the merits or erroneously believed that the law did not permit such an exercise of discretion.

The Court noted that neither appellant nor the State appealed the trial court's ruling as it related to retroactive conditional discharge of the possession of marijuana with intent conviction. Thus, the Court stated, while it expresses no opinion as to the propriety of that ruling, it accepts, for the limited purpose of the appeal, the court's conclusions that (1) appellant was eligible for conditional discharge of the drug possession charge at the time of sentencing, and (2) the prosecutor's purported misstatement about appellant's ineligibility “colored” plea negotiations and left the parties with the impression that appellant “was going to end up as a felon.”

However, the Court stated, once the court reached its conclusions regarding the impact of the prosecutor's purported misstatement about conditional discharge on plea negotiations, it necessarily follows that, in considering appellant's petition for retroactive first offender treatment, the court was required to consider how the prosecutor's purported misstatement of the law influenced both the State's and appellant's understanding of, and positions regarding, first offender treatment, given that appellant may not have ended up with a felony conviction on his record. Specifically, because the false statement charge was reduced to a misdemeanor pursuant to the plea agreement, and the possession of marijuana with intent conviction was conditionally discharged, requesting first offender status on the aggravated assault charges would not have been futile (as the parties appeared to assume during appellant's plea and sentencing hearing), insofar as no other felony charges remained. But in its ruling, the court simply deferred to what it believed to have been the State's (subjective and unilateral) “intent” during plea negotiations and denied appellant's petition for retroactive first offender treatment solely on that basis. Therefore, the Court determined, it was unclear from the record whether, by deferring to the State's purported intent, the trial court (1) considered appellant's request for retroactive first offender treatment on the merits, see OCGA § 42-8-66, or (2) understood that it could exercise its discretion to grant appellant's request for retroactive first offender treatment, despite the State's alleged intent that appellant be convicted of at least one felony. And, because the record was insufficient in this regard, it was impossible for the Court to review whether the trial court exercised and/or abused its discretion by denying appellant's petition for retroactive first offender treatment and discharge.

Therefore, the Court vacated the trial court's order and remanded the case for the court to make additional findings of fact, as necessary, to support its decision with respect to appellant's request for first offender treatment, including holding an evidentiary hearing to consider the above and determine (1) whether appellant was informed of his eligibility for first offender status before he was sentenced, see OCGA § 42-8-66 (a), and (2) if he was not, whether “the ends of justice and the welfare of society are served by granting” appellant's request under all of the circumstances, see OCGA § 42-8-66 (d).

## Jury Questions; Mistake of Fact

*Fluker v. State*, A22A1146 (9/30/22)

Appellant was convicted of family violence simple battery, aggravated battery, and possession of a firearm during commission of a crime. Briefly stated, the evidence showed that appellant had briefly been married to Hines in 2014. In 2019, Hines was living in a house she owned and had rented the bottom floor to Martin. Appellant, who was always armed with a pistol, came over to the house to move a refrigerator and saw Hines leaving Martin's bedroom. Appellant assaulted

Hines and then went to Martin's bedroom and demanded he leave the house. Martin came out with an assault rifle. Hines got between the two. Martin said he was going back to his bedroom and then appellant shot him. As he lay on the floor wounded, appellant fired another shot at him. At trial, appellant told a different version of the events and claimed self-defense.

During deliberations, the jury sent a note to the judge asking: "Self defense doesn't apply to the aggressor. Is this true[?]" The trial court asked how the parties thought he should respond, and counsel for both sides agreed that the trial court should recharge on the issue. The trial court had previously sent all of the charged jury instructions out with the jury, and in response to the question the trial court wrote back: "The charge of the court given to you orally and in writing contains all of the instructions the court may give you regarding self-defense or justification. Please read sections 3.00.00, 3.01.10, 3.10.10, 3.10.12, 3.10.13, 3.16.20, 3.16.30." The highlighted jury charges referred to instructions on affirmative defenses, justification, reasonable beliefs, retreat, excessive force, and revenge for a prior wrong. The section describing mistake of fact was not specifically listed. Appellant did not object to the trial court's response to the jury question.

Appellant contended that the trial court committed plain error in not recharging the jury on mistake of fact. Specifically, he argued that because he was under the mistaken belief that his ex-wife had been previously held against her will by Martin, he was justified in ordering Martin to leave the house and to act in self-defense. But, the Court stated, setting aside whether the mistaken belief jury charge was initially warranted, the trial court gave a jury charge on mistake of fact during its charge of court. Furthermore, while not highlighted specifically, the mistake of fact jury charge was contained in the written jury charges that the jurors were given in the deliberation room. Therefore, the Court found, the court's recharge, taken as a whole, and considering the court's initial charge on these principles which contained no omissions and which the jury had with it during deliberations, did not constitute plain error requiring reversal.

## **Ineffective Assistance of Counsel; Trial Strategy**

*State v. Shelnett, A22A1085 (10/4/22)*

Shelnett was convicted by a jury of two counts each of aggravated assault on a law enforcement officer and interference with government property. The evidence, briefly stated, showed that Shelnett got into a physical altercation with G.T., who was evicting him from a residence on property owned by G. T.'s daughter, who was also Shelnett's wife. Shelnett left the property in his Ford F-150 truck. G. T. called the police. Two deputies arrived in separate vehicles. While talking to G. T. near their respective vehicles, Shelnett came "flying up" the driveway at a high rate of speed and deliberately crashed into the back of one police cruiser with such force that it was pushed into the other cruiser.

The trial court granted Shelnett's motion for new trial, finding that trial counsel rendered ineffective assistance by (a) failing to object to testimony that lacked proper foundation, (b) failing to call an expert or other witnesses in support of his defense, (c) leaving the jury with the impression that Shelnett had a criminal history, and (d) negatively characterizing Shelnett during his closing argument. The State appealed and the Court reversed.

The State contended that the trial court erred in finding that Shelnett's counsel rendered ineffective assistance by failing to raise an objection, based upon the lack of foundation, to lay testimony about the speed of Shelnett's vehicle. The Court agreed. Counsel testified that he did not object to the testimony, in part, because it supported his trial strategy and accident defense — that Shelnett's speed contributed to the "accident" and the Court found, this strategy was not professionally unreasonable. Also, even if trial counsel performed deficiently, the failure to raise a foundation objection was not prejudicial to Shelnett's defense because, as argued by the State, other evidence presented at trial established his speed.

Next, the State argued that the trial court erred by determining that Shelnutt's counsel rendered ineffective assistance by failing to (a) call an accident reconstructionist as an expert to testify or (b) support the accident theory of defense with other available evidence. The Court agreed. The Court found that counsel articulated valid reasons at the motion for new trial hearing for not calling an expert as a trial witness and thus, it concluded that trial counsel's decision not to call an expert or additional witnesses to testify was strategic and derived from the evidence available to him at the time of trial. Furthermore, the Court found, Shelnutt also could not establish prejudice because he did not proffer the testimony of the accident reconstructionist, or any other witness, as to the cause of the collision at the new trial hearing.

The State next contended that the trial court erred in finding that Shelnutt's trial counsel rendered ineffective assistance during his cross-examination of the officer who interviewed Shelnutt following his arrest. The record showed that on cross-examination, trial counsel asked whether Shelnutt had a gun at the time of his arrest, and the investigator testified that Shelnutt did not. Trial counsel then asked the investigator if he had investigated Shelnutt's criminal history and whether the investigator knew if it was "a crime for [Shelnutt] to have a firearm" at the time of his arrest. The investigator testified that he did not know whether Shelnutt could legally possess a firearm because he did not know Shelnutt's criminal history. The Court found that while counsel's cross-examination may have been inartful, his strategy of portraying Shelnutt's post-crash behavior as legal and not relevant to the crimes for which he had been charged was not objectively unreasonable. And, even if trial counsel performed deficiently, Shelnutt also failed to show a reasonable probability that, if the questions had not been asked, the result of the trial would have been different because there was no indication that trial counsel's questions about Shelnutt's criminal record elicited evidence that he was a convicted felon or unlawfully possessed a firearm. Moreover, any testimony elicited about whether Shelnutt could have lawfully possessed a firearm or had a criminal record was not so significant to have contributed to the jury's verdict given the significant evidence that Shelnutt acted intentionally when he drove his truck toward the deputies and into their vehicles.

Finally, the State argued that the trial court erred in finding that Shelnutt's trial counsel's closing argument comments about Shelnutt's post-crash behavior constituted ineffective assistance. The record showed that trial counsel, in discussing Shelnutt's interview with the investigator, called Shelnutt a "stubborn son of bitch," a "smart ass" and that he was an "ornery...pain in the ass." At the motion for new trial hearing, counsel testified that, during his closing argument, he was trying to: (i) "personalize Mr. Shelnutt"; (ii) "illustrate even in this, even when he's in serious trouble, he is still being [himself], a stubborn man but not someone who's trying to hit police officers"; and (iii) convey that the jury did not have to "like" his client in order to acquit him of the charges.

The Court noted that the trial court compared counsel's comments about Shelnutt to other cases in which defense counsel criticized a defendant during trial and found that in Shelnutt's case "there was no prior bad act, similar transaction, impeachment, or gang activity evidence that would have made [trial counsel's comments] necessary." However, the Court stated that it did not agree that the only circumstances under which it may be reasonable for defense counsel to address negative evidence about a defendant is limited in this way. Thus, the Court found, even if trial counsel's language arguably may have been ill-phrased, it could not say that his decision to comment on Shelnutt's behavior was objectively unreasonable — especially considering counsel's testimony that his "Hail Mary" strategy for closing argument was to convince the jury that they did not have to convict Shelnutt merely because he was a stubborn, hardheaded man. And even if trial counsel performed deficiently, the Court agreed with the State that his comments were not prejudicial considering the substantial evidence that Shelnutt acted intentionally when he drove his truck toward the deputies and into their vehicles and that it was not trial counsel's comments, but Shelnutt's own recorded behavior, that was prejudicial.

## Juveniles; Record Restriction

*In re S. D., A22A1416 (10/11/22)*

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING DECEMBER 23, 2022

Issue 50-22

The State filed a delinquency petition in juvenile court alleging that, by bringing a knife to school, S. D. had committed an act which, if committed by an adult, would have constituted the felony offense of carrying a weapon in a school safety zone or at a school function without a license to carry weapons, in violation of OCGA § 16-11-127.1 (b) (2021). Following S. D.'s February 2022 arraignment, and at his counsel's request, the juvenile court entered an order holding adjudication in abeyance for 90 days. As conditions of the abeyance, the court required S. D. to write two one-page essays on topics specified by the court and to participate in a conflict-resolution program or therapy. The order provided that "if the child is compliant with the conditions of abeyance this matter will be administratively closed and the record sealed." After S. D. completed the two essays, but before he participated in a conflict-resolution program or therapy, S. D. filed an emergency motion for a review hearing on the ground that his aunt — who was his guardian in Georgia — planned to permanently return the child to his mother in Chicago in a few days' time. Following a hearing, and after reviewing several of the pertinent circumstances in this case — including the probation officer's recommendation to close the case "successfully" — the court closed and sealed the case over the State's objection. The State appealed.

First, S. D. contended that the Court lacked jurisdiction over the appeal because none of the provisions of OCGA § 5-7-1 authorizes an appeal by the State from the order at issue here. The Court disagreed. OCGA § 5-7-1 (a) (1) authorizes the State to file a direct appeal from a juvenile court "order, decision, or judgment setting aside or dismissing ... a petition alleging that a child has committed a delinquent act ..." And here, the Court found, the juvenile court's order closing and sealing the case is the functional equivalent of an order dismissing a delinquency petition because, as a result of the order, S. D. will no longer be held to answer for the allegations in the petition.

The State argued that the juvenile court lacked the authority to seal the case because neither of the prerequisites to sealing a case was satisfied. Specifically, the State contended that the juvenile court may dismiss a delinquency petition only under two specific limited circumstances, neither of which, the State claimed, was present here: (i) following a transfer of the case to superior court, OCGA § 15-11-566 (a); and (ii) when the evidence presented at an adjudication hearing does not establish the allegations of delinquency, OCGA § 15-11-582 (d). However, the Court stated, the juvenile court's order closing this case had the same practical effect as a dismissal of the delinquency petition. Consequently, the court was required to seal the case under OCGA § 15-11-701 (a). Furthermore, the Court stated, the State's arguments ignored several other reasons why a delinquency petition may be dismissed, citing OCGA §§ 15-11-540 (authorizing the dismissal of a delinquency petition "upon the motion of the prosecuting attorney setting forth that there is not sufficient evidence to warrant further proceedings") and 15-11-660 (d)-(e) (authorizing the dismissal of delinquency petitions for reasons related to a child's competency). Consequently, the Court rejected the State's argument that the juvenile court's authority to dismiss a delinquency petition is limited to these two instances.

The Court also found that the juvenile court's disposition here also constituted a "completion of the process" through a "nonadjudicatory procedure" under OCGA § 15-11-701 (a). In so holding, the Court noted that the parties did not cite, and research did not reveal, any Georgia appellate decisions explicitly defining the phrases "completion of the process" or "nonadjudicatory procedure" as used in this context.

Using the familiar and binding canons of statutory construction, the Court found that the plain meaning of the phrase "nonadjudicatory procedure" includes, at the very least, the disposition of a delinquency petition without an adjudication of its merits. Thus, by closing and sealing the case without adjudicating the merits of the delinquency petition, the juvenile court in this case disposed of the petition via a "nonadjudicatory procedure." In so holding, the Court rejected the State's contention that a "nonadjudicatory procedure," as used in OCGA § 15-11-701 (a), must be narrowly defined by the following provisions in OCGA § 15-11-510: "(c) A juvenile court intake officer may elect to pursue a case through informal adjustment or other nonadjudicatory procedure in accordance with the provisions of Code Section 15-11-515; and (d) If a case is to be prosecuted further and handled other than by informal adjustment or other nonadjudicatory procedure, a

referral shall be made to the prosecuting attorney and a petition for delinquency shall be filed within 30 days of the filing of a complaint.” Rather, the Court held that the phrase “nonadjudicatory procedure” includes, at a minimum, any disposition of a delinquency petition that does not entail adjudication of the petition's merits.

Nevertheless, the State contended, even if this case was disposed of through a nonadjudicatory procedure, no “completion of the process” occurred under OCGA § 15-11-701 (a) because S. D. did not participate in a conflict-resolution program or therapy, as required by the juvenile court's prior order of abeyance. However, the Court found, the State's statutory interpretation was too narrow. Nothing in the plain language of OCGA § 15-11-701 (a) suggests that the phrase “completion of the process” places such narrow limits on a juvenile court's authority to find that the “process” of the specific “nonadjudicatory procedure” it employed in a particular case has been completed under all of the circumstances and in light of the best interest of the child at issue. And the State identified no legal authority so limiting the meaning of the phrase “completion of the process” as used in OCGA § 15-11-701 (a).

Finally, the Court found that during the final hearing in this case, the juvenile court determined that: (i) S. D. had “no prior history”; (ii) there was no indication that he used the knife at issue in this case offensively; (iii) his failure to participate in a conflict-resolution program resulted from the decisions of adults in his life to move him to Chicago and thus was beyond his control; and (iv) in light of those circumstances, it was in S. D.'s best interest to “have a clean record.” And in its ensuing written order, the court further found that S. D.'s mother understood the need for conflict-management services and had agreed to attend therapy with the child, based on the testimony of S. D.'s aunt. Also, the Court noted, the State did not challenge any of these findings on appeal. Therefore, given the specific facts and procedural posture of this case, the Court held that the juvenile court was authorized under the statutory scheme at issue to conclude that the “process” of the “nonadjudicatory procedure” employed by the court was completed considering all of the circumstances and S. D.'s best interest.