

THIS WEEK:

- **Habeas Corpus; Pretrial Petitions**
- **Rule 803; Rule 807**
- **Closing Arguments; Burden of Proof**
- **Sufficiency of the Evidence; Affirmative Defenses**
- **Search & Seizure; No-Knock Search Warrants**
- **Jury Charges; Affirmative Defenses**

Habeas Corpus; Pretrial Petitions

Gay v. Jackson, S22A1204 (1/18/23)

Appellant received a uniform traffic citation for driving 100 miles per hour in a 60-mile-per-hour zone. He appeared in court, pleaded not guilty, and invoked his right to a jury trial, which meant that the case would be bound over to state court. Before the case was bound over, the municipal court ordered appellant to surrender his driver's license and restricted most of his driving privileges, finding that he posed a danger to other drivers considering his youth (he was 20 years old) and his excessive speeding. The municipal court characterized this action as a bond modification. In the court's view, although appellant was not subject to a bond in the usual sense, he was subject to a "quasi bond" because his license would have been suspended if he had not shown up in court. The municipal court concluded that it had authority to modify that "quasi bond." Appellant's case was then bound over to state court for adjudication.

Thereafter, appellant filed a petition for habeas corpus, naming as respondents the municipal court judge and the solicitor general of Atlanta. The respondents filed a motion to dismiss; Appellant did not respond. The habeas court granted the motion and dismissed the petition.

Relying on its recent decision in *Phillips v. Jackson*, 314 Ga. 347 (2022), the Court stated that OCGA § 9-14-1 (a) applies to a pretrial habeas petition like the one appellant filed here, but this provision includes an important limitation: habeas relief is not available under OCGA § 9-14-1 (a) if the proceedings under which the petitioner's liberty is restrained are still pending undisposed of, and the ordinary established procedure is still available to him. In other words, having another adequate remedy available in the form of pending proceedings relieves the need to issue this high extraordinary writ to challenge the legality of the restraint in question.

The Court noted that *Phillips* addressed the claims of a habeas petitioner in the same posture as appellant. There, as here, the petitioner's case was bound over to state court after the municipal court imposed restrictions on his driving privileges, and the petitioner sought pretrial habeas relief under OCGA § 9-14-1 (a). *Phillips* affirmed the habeas court's dismissal, reasoning that the petitioner could have asked the state court to remove any conditions on the petitioner's "bond" other than his appearance in court, and if the state court declined to do so, the petitioner could have sought an interlocutory appeal. Because these potential remedies were available to the petitioner in *Phillips* when he sought habeas relief, and it appeared that they remained available to him at the time of the Court's decision, pretrial habeas relief was not available.

The Court stated that appellant's case was "on all fours with *Phillips*." Appellant's case was still pending when he filed his habeas petition, so he had the same remedies available for challenging the restrictions on his driving privileges. And as far as the Court could tell from the record, his case remains pending in state court, and these remedies remain available to appellant. So, as in *Phillips*, pretrial habeas relief was not available to appellant at this time.

Rule 803; Rule 807

State v. Kenney, S22A0891 (1/18/23)

Kenney was indicted for malice murder and related offenses in connection with the shooting death of Laquitta Brown ("Laquitta"). Before trial, Kenney moved in limine to exclude hearsay statements that Sharrie Dixon, a witness present during the shooting who was unavailable to testify at trial, allegedly made to Aisha Brown ("Aisha"), Laquitta's partner. In response, the State filed a notice of intent to admit Dixon's statements to Aisha under Rule 807 (the residual exception) or "Rule 807," which provides that, if certain conditions apply, "[a] statement not specifically covered by any law but having equivalent circumstantial guarantees of trustworthiness shall not be excluded by the hearsay rule." The court construed the State's notice as a motion to admit Dixon's statements. Then, finding that the State had failed to establish exceptional guarantees of trustworthiness, the court granted Kenney's motion in limine and denied the State's construed motion to admit Dixon's statements. The State timely appealed.

The State first argued that the trial court abused its discretion in excluding Dixon's hearsay statements because they were admissible as present sense impressions, under Rule 803 (1), and excited utterances, under Rule 803 (2). However, the Court found, upon a review of the hearing on the motion in limine, the State affirmatively waived admission of Dixon's statements under those exceptions.

Nevertheless, citing *State v. Holmes*, 304 Ga. 524 (2018), *Hickman v. State*, 299 Ga. 267 (2016), and *State v. Hamilton*, 308 Ga. 116 (2020), the State argued that even if it waived admission of Dixon's hearsay statements under Rules 803 (1) and (2), its arguments on appeal that the statements were admissible as present sense impressions and excited utterances are properly before the Court because a court cannot determine whether evidence is admissible under the residual exception of Rule 807 without "first determin[ing] the evidence's admissibility under other law."

But, the Court stated, neither *Holmes* nor *Hickman* nor *Hamilton* purported to hold that a trial court must determine that other hearsay exceptions do not apply before concluding for an independent reason that hearsay statements are inadmissible under the residual exception. To the contrary, a court may conclude that statements are inadmissible under the residual exception if the proponent of the evidence fails to establish any one of the preconditions for admitting a statement under Rule 807.

Next, the State argued that the trial court abused its discretion in concluding that Dixon's statements were inadmissible under Rule 807 because the trial court (a) improperly relied on case law applying the former Evidence Code, and (b) made several clearly erroneous factual findings. The Court stated that the residual exception to the hearsay rule applies only when the circumstances under which the statements were originally made establish exceptional guarantees of trustworthiness. In assessing whether exceptional guarantees of trustworthiness exist, relevant factors include the trustworthiness of the original declarant and whether the circumstantial guarantees of trustworthiness are equivalent in significance to the specific hearsay exceptions enumerated in Federal Rules of Evidence 803 and 804. Such guarantees must be equivalent to cross-examined former testimony, statements under a belief of impending death, statements against interest, and statements of personal or family history. A trial court should consider the totality of the circumstances in determining whether to admit evidence pursuant to Rule 807.

As to the State's first argument, the Court noted that the trial court did cite former Evidence Code opinions, but only after correctly describing Rule 807's requirements based on controlling authority and after expressly acknowledging that, because "the [Rule] 807 Residual Exception replaced the necessity exception of the old code," former necessity-exception cases no longer controlled. Thus, because the trial court ultimately applied the appropriate evidentiary standard despite its citation to cases construing the former Evidence Code, the Court found it unnecessary to vacate the trial court's order on this ground.

Finally, the State contended that the trial court clearly erred in making several findings of fact. But, after reviewing the record in detail, the Court found that none of the findings was clearly erroneous and that it could not say that the trial court abused its discretion in refusing to admit Dixon's hearsay statements pursuant to Rule 807.

Closing Arguments; Burden of Proof

Ridley v. State, S22A1081 (1/18/23)

Appellant was convicted of malice murder and other related crimes in connection with the shooting death of Bynum. The evidence, very briefly stated, showed that Scruggs, a homeless crack addict was working as a prostitute. Bynum was her pimp. Bynum wanted a romantic relationship with Scruggs, but she refused because he was married and living with his wife. Scruggs then took up with appellant and moved into his apartment. But then two or three days later, Bynum kicked his wife out and convinced Scruggs to come live with him. Appellant was not happy about this. A few nights later, Scruggs and Bynum were out at a gas station where Scruggs apparently turned at least one trick. At some point, Scruggs walked away from Bynum with a man named Green. Appellant then appeared "from out of nowhere," yelled something about being threatened by Bynum, and how Scruggs chose Bynum over him. Appellant then shot Bynum.

Appellant contended that the trial court abused its discretion in overruling his objections to certain statements the prosecutor made during closing arguments. The record showed that on several occasions during closing argument, the prosecutor noted for the jury that the defense had the same power to subpoena witnesses as the State. The Court noted that this point was responsive to the defense's efforts throughout the trial to cast doubt on the State's case by highlighting its failure to present testimony from various people who, the defense claimed, would have had information relevant to the investigation. After each comment, appellant objected, claiming that the argument was burden shifting. The court overruled each objection.

The Court stated that a prosecutor has wide latitude in the conduct of closing argument, the bounds of which are in the trial court's discretion. And where the defense presents no evidence to rebut the evidence of guilt, it is not improper for the prosecutor to point out that fact to the jury. And here, the Court found, the prosecutor's statements were proper comments on the defense's failure to present evidence, made with express reference to the fact that the burden of proof rests "completely" with the State. Thus, the Court concluded, these statements were well within the bounds of proper closing argument, and the trial court did not abuse its discretion in overruling appellant's objections to them.

Appellant also argued that the prosecutor argued facts not in evidence. The record showed that in an apparent attempt to rebut the defense's argument that Scruggs's account of walking off with Green down the street just before the shooting was not believable, the prosecutor stated: "I'm sorry to have to do this, but if you're a prostitute and a strange man say[s] hey, let's go to the really real dark area by the wood in exchange for money for sex does your—" Trial counsel objected on the ground that the remark stated facts not in evidence. The court responded by directing the jury to "remember the evidence to the best of your collective ability." The prosecutor went on: "I'm not talking about evidence, ladies and gentlemen. The defense got up here and said it was unreasonable for Rico Bynum to let Theresa Scruggs walk off with

[Green]. My argument is perfectly reasonable because if you're the pimp you're watching the guy and the girl walk off together to the dark area what do you think is going to happen over there if you're the pimp.”

The Court stated that the wide latitude afforded to a prosecutor making a closing argument includes the leeway to draw reasonable inferences from the evidence. Here, the prosecutor's statement asked the jury to draw a reasonable inference—supported by the undisputed evidence that Scruggs was a prostitute and Bynum was a pimp—as to why Scruggs would have walked away with Green without any objection from Bynum. Therefore, the Court concluded, the trial court did not abuse its discretion in overruling appellant's objection to the prosecutor's statement.

Sufficiency of the Evidence; Affirmative Defenses

Brailsford v. State, A22A1155 (1/3/23)

Appellant was convicted of trafficking a person for sexual servitude and criminal attempt to commit aggravated child molestation. The evidence showed that appellant communicated online with a police officer who appellant assumed was a 14-year-old girl. Appellant was arrested when he showed up at the designated place to engage in vaginal intercourse and oral sex in exchange for money. He claimed that the State failed to disprove beyond a reasonable doubt his affirmative defenses of entrapment and abandonment during his trial testimony. The Court disagreed.

The Court stated that the defense of entrapment is established by showing that (1) the idea for the crime originated with the state agent; (2) the defendant was induced by the agent's undue persuasion, incitement, or deceit; and (3) the defendant was not predisposed to commit the crime. The determination of whether the defendant was entrapped is for the jury unless the uncontroverted evidence demands a finding of entrapment. And here, the Court found, the evidence did not demand such a finding. Rather, the jury's conclusion that entrapment did not occur was supported by the record evidence that appellant continued communicating with the purported child to arrange a sexual encounter after he learned that she was 14 years old and he drove to meet the purportedly 14-year-old girl in order to have sex with her.

As to the defense of abandonment, the Court stated that when a person's conduct would otherwise constitute an attempt to commit a crime under OCGA § 16-4-1, it is an affirmative defense that he abandoned his effort to commit the crime under circumstances manifesting a voluntary and complete renunciation of his criminal purpose. However, a renunciation is not voluntary and complete if it results from a belief that circumstances exist which increase the probability of detection or apprehension of the person or which render more difficult the accomplishment of the criminal purpose.

Appellant argued that he abandoned his criminal purpose to engage in a sexual encounter with a child when he attempted to leave the arranged meeting place without getting out of his vehicle. But, the Court found that at trial he testified that he decided to leave because he was unfamiliar with the area, the situation “didn't feel right,” and he had a flashback to a previous incident when he had been robbed and shot. Thus, the Court determined, appellant's own testimony authorized the jury to conclude that he did not voluntarily and completely renounce his criminal purpose, and that he instead merely believed that the circumstances increased the probability of apprehension or rendered the accomplishment of his criminal purpose more difficult. Accordingly, the Court found that the jury's determination that the State met its burden to disprove the affirmative defense of abandonment was supported by the evidence.

Search & Seizure; No-Knock Search Warrants

Hughes v. State, A22A1428 (1/4/23)

Appellant was charged with possession of methamphetamine with intent to distribute following the execution of a no-knock search warrant. Appellant moved to suppress arguing that the no-knock provision in the search warrant was invalid.

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

WEEK ENDING FEBRUARY 24, 2023

Issue 8-23

The trial court denied her motion but granted a certificate of immediate review. The Court then granted her application for an interlocutory appeal.

Briefly stated, the evidence showed that after a couple of controlled buys utilizing confidential informants, officers attempted to do a “knock and talk” but no one answered the door. An investigator then sought a “no-knock” search warrant. Specifically, the investigator averred: “Surveillance camera[s] are set up on the corners of the residence and [appellant] has been known to move the illegal narcotics on a daily basis. All of which said circumstances leads to a high risk of the contraband suspected of being located within the premises being destroyed or secreted away prior to apprehension if officers are required to knock and announce prior to entry.”

Appellant argued that the no-knock warrant provision in the search warrant was invalid. Specifically, she contended that the no-knock warrant consisted of the investigator's generalized experience, boilerplate language, and a statement that surveillance cameras were set up on the corners of the residence, which are insufficient to support a no-knock warrant. The Court agreed.

The Court stated that OCGA § 17-5-27 requires a law enforcement officer entering an occupied residence for the purpose of executing a search warrant to give or attempt to give verbal notice of his authority and purpose, and it permits a forceful entry if the person inside either refuses to admit him or refuses to acknowledge and answer the verbal notice. The notice requirement of OCGA § 17-5-27 may be dispensed with, however, by a no-knock provision in the warrant or by the presence of exigent circumstances. A search warrant with a no-knock provision may be issued where the facts set out in the affidavit demonstrate exigent circumstances, which exist where the police have reasonable grounds to believe that forewarning would either greatly increase their peril or lead to the immediate destruction of the evidence. In other words, a warrant can authorize a “no-knock” entry where police seeking the warrant demonstrate a reasonable suspicion that knocking and announcing their presence, under the particular circumstances, would be dangerous or futile, or that it would inhibit the effective investigation of the crime by, for example, allowing the destruction of evidence. But a no-knock provision is permissible only when based on a neutral evaluation of each case's particular facts and circumstances, not on blanket provisions based on generalized experience. The fact that the warrant is issued in a felony drug investigation, standing alone, is insufficient to support a “no-knock” provision. And an affidavit based on the general ease of destruction of drug evidence and an officer's prior experience is insufficient to support a no-knock provision. Nonetheless, the Court noted, the standard for establishing the reasonable suspicion necessary to justify a no-knock entry, as opposed to the standard for establishing probable cause, is not high.

Relying on *Poole v. State*, 266 Ga. App. 113, 113-115 (2004), the Court found that the existence of surveillance cameras does not support police entry without a warrant. Moreover, there was no evidence that appellant had a history of violence or had packaged or located the drugs in her residence for quick disposal. An alleged drug dealer inside a location with surveillance cameras, without more, does not show that the defendant is likely to harm police or destroy evidence. In other words, the notice requirement was not excused by the mere fact that someone in the residence may have discovered the presence of officers approaching to execute the search warrant.

Additionally, the Court stated, the mere fact that a “knock and talk” had unsuccessfully been attempted at the residence at some point does not establish that knocking and announcing during the execution of the search warrant would be dangerous or futile or would result in the destruction of evidence. Thus, in seeking the warrant, the investigator did not demonstrate a reasonable suspicion to justify a no-knock warrant.

Nevertheless, the State argued, the presence of the no-knock provision in the search warrant was irrelevant because appellant did not claim that there was an actual no-knock entry, and she was standing outside her residence and officers gave visual and verbal notice of their purpose and authority prior to entering. However, the Court found, nothing in the

record indicated that the State raised this argument below or that the superior court considered it. Further, the State conceded that “the record” did not reflect that appellant was standing in her front yard when officers arrived to execute the search warrant. And the Court noted, the sole evidence provided at the hearing on the suppression motion was the search warrant. Accordingly, based its de novo review of the undisputed evidence, the Court concluded that the trial court erred in denying appellant's motion to suppress.

Jury Charges; Affirmative Defenses

Perry v. State, A22A1301 (1/5/23)

Appellant was convicted of one count each of aggravated assault and aggravated battery. Very briefly stated, the evidence showed on that December 1, 2017, friends and neighbors gathered at a home to drink and socialize. Attendees, including the victim, gathered outside around a “very hot” 55-gallon fire barrel to keep warm. The top of the barrel was cut off and it was stacked on cinder blocks to keep the bottom from burning out. Appellant and her brother got into an argument. Thereafter, words were had between appellant and the victim. Appellant pushed the victim into the fire barrel which severely burned her. At trial, appellant claimed that the victim was the aggressor and that the victim fell onto the fire barrel as a result of appellant trying to defend herself from appellant attacking her with a beer bottle and kicking her.

Appellant argued that the trial court committed plain error by failing to instruct the jury that the State had the burden of disproving her affirmative defenses beyond a reasonable doubt. The Court agreed.

The Court found that the trial court instructed the jury on appellant's defense of justification but omitted the portion of the pattern jury charge, which reads: “The State has the burden of proving beyond a reasonable doubt that the Defendant's actions were not justified. If you decide the Defendant's actions were justified, then it would be your duty to find the Defendant not guilty.” Suggested Pattern Jury Instructions, Vol. II: Criminal Cases, § 3.10.10.

The State acknowledged that the first two prongs of the plain-error test were satisfied. As to the third and fourth prongs, appellant argued the absence of the instruction regarding the State's burden affected her substantial rights because the evidence was close, pitting appellant's version of events against the victim's, and therefore the jury could have found appellant not guilty had the trial court properly instructed the jury. The State countered that because the instructions, taken as a whole, properly informed the jury on the State's burden of proof and that appellant had a right to use force in a reasonable manner to defend herself, she failed to establish plain error.

The Court found that justification based on self-defense was the critically disputed issue at trial. The victim testified that she and appellant had argued, but appellant pushed her into the fire barrel without provocation. Conversely, appellant testified that the victim was very intoxicated, charged at appellant with a beer bottle, and that appellant inadvertently pushed her into the barrel only to avoid serious injury. The only three other witnesses who were present on the night in question did not observe the start of the physical altercation or know what precipitated the fight. Under these circumstances, the Court concluded, the trial court's failure to instruct the jury on the State's burden to disprove appellant's defense of justification constituted plain error. Accordingly, the Court reversed the trial court's denial of appellant's motion for new trial.