

THIS WEEK:

- **Verdicts; Degrees of Culpability**
- **State's Right to Appeal; Motions to Suppress**
- **Search & Seizure; Plain Error Review**
- **Indictments; Special Demurrers**
- **Sentencing; Juveniles**
- **Recusal; Judicial Impartiality**

Verdicts; Degrees of Culpability

Rutland v. State, S22A0916 (2/7/23)

Appellant was convicted of felony murder and other offenses resulting from a vehicular collision following a high-speed police chase. He contended that the trial court erred when it accepted the jury's guilty verdicts on felony murder and homicide by vehicle in the first degree because they were "inconsistent verdicts." Specifically, he argued that these verdicts were "inconsistent" because the felony murder convictions required a finding that he "acted with criminal intent" and the homicide by vehicle convictions required a finding that he "acted . . . [with] criminal negligence." The Court disagreed.

The Court stated that generally, inconsistent verdicts occur when a jury in a criminal case renders seemingly incompatible verdicts of guilty on one charge and not guilty on another. An example of inconsistent verdicts is when a defendant is convicted of possession of a firearm during the commission of the crime of aggravated assault but found not guilty of aggravated assault. Although once viewed as impermissible, inconsistent verdicts are allowed to stand because it is not generally within the court's power to make inquiries into the jury's deliberations, or to speculate about the reasons for any inconsistency between guilty and not guilty verdicts. However, "repugnant verdicts" require reversal. "Repugnant verdicts" occur when, in order to find the defendant not guilty on one count and guilty on another, the jury must make affirmative findings shown on the record that cannot logically or legally exist at the same time. An example of "repugnant verdicts" is when a defendant is found guilty but mentally ill of felony murder and aggravated assault and not guilty of malice murder by reason of insanity.

And here, the Court noted, appellant contended that, although inconsistent verdicts necessarily do not require reversal, the verdicts in this case should nonetheless be reversed. However, the Court found, the guilty verdicts on felony murder and homicide by vehicle in the first degree cannot be classified as "inconsistent verdicts" or "repugnant verdicts" because the felony murder and homicide by vehicle verdicts consist only of guilty verdicts, rather than a guilty verdict and a not guilty verdict. Thus, appellant's claim had no merit.

Although two or more guilty verdicts cannot be "inconsistent verdicts" or "repugnant verdicts" as those terms have been defined, they could be "mutually exclusive." But guilty verdicts are not mutually exclusive with one another unless they cannot legally exist simultaneously. An example of "mutually exclusive" verdicts is when a defendant is convicted of malice murder, an offense requiring a showing of the presence of malice aforethought, and vehicular homicide, an offense requiring a showing of the absence of malice aforethought.

And here, the Court found, the guilty verdicts on felony murder and homicide by vehicle involve levels of mental culpability that are different in degree but not ones that cannot legally exist simultaneously. Multiple guilty verdicts for the same conduct that are based on varying levels of mens rea are not mutually exclusive. Thus, the Court concluded, the verdicts in this case were neither inconsistent nor mutually exclusive, and thus, appellant's claim also failed for this reason.

State's Right to Appeal; Motions to Suppress

State v. Arroyo, S22G0593 (2/7/23)

Arroyo, who was charged with trafficking in cocaine, filed a pretrial motion to suppress. The trial court reserved ruling on the motion pretrial but denied the motion after the jury was impaneled and sworn. Then, after the State rested its case, the court sua sponte changed course, granting the motion to suppress, and ordering a mistrial without prejudice.

Relying on OCGA § 5-7-1 (a) (4), which permits the State to appeal from certain orders "suppressing or excluding evidence illegally seized" in criminal cases, the State appealed the trial court's ruling, and the Court of Appeals affirmed. See *State v. Arroyo*, 362 Ga. App. 207 (2022). The Court granted certiorari, asking the parties to address (1) whether the Court of Appeals had jurisdiction to hear the merits of the State's appeal, and (2) if so, whether the Court of Appeals erred in affirming the trial court's ruling on the motion to suppress.

The Court found that under the plain language of OCGA § 5-7-1 (a) (4), the State may appeal "[f]rom an order . . . suppressing or excluding evidence illegally seized" only if certain conditions are satisfied. Specifically, the State may only appeal such an order if the motion to suppress or exclude evidence illegally seized was both "made *and* ruled upon *prior to*" the sooner of two events, either "[1] the impaneling of a jury or [2] the defendant being put in jeopardy." OCGA § 5-7-1 (a) (4) (emphasis supplied). Here, Arroyo "made" his motion to suppress evidence illegally seized before "the impaneling of a jury" and before he was "put in jeopardy." OCGA § 5-7-1 (a) (4). But his motion was not "ruled upon" before either of those two events. Rather, it was only after the jury was impaneled and after jeopardy had attached that the court ruled on the motion to suppress. Accordingly, the Court held, OCGA § 5-7-1 (a) (4) did not authorize the State to appeal the trial court's order granting Arroyo's motion to suppress evidence seized from his apartment, and the Court of Appeals lacked jurisdiction to rule on the merits of the State's appeal.

Nevertheless, the State contended, although the trial court did not rule on the motion to suppress until after the jury was impaneled and Arroyo was put in jeopardy, its appeal nevertheless fell within the scope of OCGA § 5-7-1 (a) (4) because the court granted a mistrial, thereby returning the case to a pretrial status. However, the Court found, this argument finds no support in the language of OCGA § 5-7-1 (a) (4). The court "ruled upon" the motion after the jury was impaneled and Arroyo was put in jeopardy, and even if the subsequent grant of a mistrial returned the case to pretrial status, the case was not in pretrial status when the court "ruled upon" the motion. OCGA § 5-7-1 (a) (4).

Finally, the State argued that the Court should create an exception to OCGA § 5-7-1 (a) (4) "when the trial court grants a motion to suppress midtrial" to "ensure that the intent of the legislature authorizing the State to appeal specific rulings is upheld." However, the Court stated, it lacks authority to create a judicial exception to the statutory requirements for appellate review. Moreover, the Court presumes that the legislature said what it meant, and it is not for the Court to second-guess the General Assembly's policy determinations as embodied in the statutory language it enacted. Thus, because OCGA § 5-7-1 (a) (4) did not authorize the Court of Appeals to address the merits of the State's appeal, the Court vacated the judgment of the Court of Appeals and remanded the case to the Court of Appeals to return the case to the trial court.

Search & Seizure; Plain Error Review

Williams v. State, S22A0836 (2/7/23)

Appellant was convicted of felony murder and possession of a firearm during the commission of a felony. He contended that the trial court plainly erred by admitting cell site location information (CSLI) related to his cell phone because the search warrant authorizing the seizure of his phone records lacked sufficient particularity as to the location to be searched. The Court disagreed.

The evidence showed that the warrant was obtained by law enforcement officials for Verizon Wireless's data related to appellant's cell phone number from February 27, 2015, through March 9, 2015. Law enforcement officials did not conduct a physical search of any property under the authority of the warrant. Instead, they accessed Verizon's online portal designed to facilitate execution of warrants of this sort and provided Verizon with the parameters of the search authorized by the warrant via the portal. Verizon, in turn, provided the responsive data pursuant to the request in an email, which included the CSLI for appellant's cell phone. Appellant argued that because the warrant only specified "Verizon Wir[e]less, 07921, Bedminster, NJ" as the location to be searched, it authorized a search of any Verizon building within that zip code in Bedminster, New Jersey, and therefore allowed law enforcement "significant discretion." The Court noted that appellant did not file a motion to suppress this evidence or object to it at trial.

Initially, the Court addressed the District Attorney's contention that plain error review is inapplicable under OCGA § 24-1-103 because Title 24 does not apply to motions to suppress, which are codified under Title 17 concerning Criminal Procedure. The Court noted that although Title 17 provides the procedure for motions to suppress filed in criminal proceedings, those motions clearly lead to "a ruling which admits or excludes evidence," which is in turn subject to review under OCGA § 24-1-103. And subsection (d) of that Code section indicates that plain-error review applies to such rulings when "such errors are not brought to the attention of the [trial] court." OCGA § 24-1-103 (d). Accordingly, the Court stated that plain error applies under OCGA § 24-1-103 (d) to a Fourth Amendment challenge to the admission of evidence, even when the defendant has not objected to or moved to suppress that evidence at trial.

Nevertheless, the DA argued, under Georgia law, the failure to raise a Fourth Amendment claim before the trial court constitutes a waiver that precludes plain-error review. But, the Court noted, the cases cited by the DA were decided under the old Evidence Code, which did not include an equivalent to the current OCGA § 24-1-103 (d). While a party may still affirmatively waive review of an unraised Fourth Amendment challenge, the claim is not waived simply by the party's failure to raise the challenge before the trial court. Accordingly, the Court held that plain error applies here where there is no indication in the record that appellant affirmatively waived this Fourth Amendment challenge.

The Court then turned to the merits of appellant's contention. The Court stated that it did not need to analyze all four prongs of the plain review test because appellant failed to establish that the trial court clearly or obviously erred by admitting the CSLI evidence. An error cannot be plain where there is no controlling authority on point and where the most closely analogous precedent leads to conflicting results. And here, the Court noted, appellant did not offer any controlling authority, and the Court found none, requiring that a warrant particularly describe the physical location of data in a search warrant seeking electronic records housed in a cell service provider's database that is accessed through an online portal. Therefore, the trial court did not plainly error in admitting the evidence.

Indictments; Special Demurrers

Wilson v. State, S22A0885 (2/7/23)

Appellant was convicted of felony murder predicated on conspiracy to violate the Georgia Controlled Substances Act (Count 4) and conspiracy to violate the Georgia Controlled Substances Act (Count 7). The record showed that Count 4

charged appellant, and his two co-conspirators, Cayo, and Lewis, with felony murder predicated on conspiracy to violate the Georgia Controlled Substances Act. Count 7, in turn, charged that all three “unlawfully conspired with each other to commit the offense of Purchase of Marijuana, in violation of code section 16-13-30 of the Georgia Controlled Substances Act, and in furtherance of said conspiracy, did do the following overt acts to effect the object of the conspiracy: contacted [the victim] to arrange the purchase of marijuana, secured a method of transportation to the residence of [the victim], traveled to the residence of [the victim], and met in person with [the victim].” No other count charged any defendant with any violation of the Georgia Controlled Substances Act.

Appellant contended that the trial court erred by denying his special demurrer to quash Count 4 of the indictment. Specifically, he argued the count was not sufficient as a matter of due process because it did not adequately describe the predicate felony. The Court noted that the purpose of an indictment is to allow the defendant to prepare his defense intelligently and to protect him from double jeopardy. To satisfy due process, the indictment must contain all the essential elements of the crime and must notify the accused of what factual allegations he must defend in court. The test for determining the constitutional sufficiency of an indictment is not whether it could be made more certain and definite, but whether it puts the defendant on notice of the crimes with which he is charged and sufficiently apprises him of what he must be prepared to meet. When applying this test, the indictment is read as a whole.

Here, Count 4 charged appellant with felony murder for causing the victim's death while committing conspiracy to violate the Georgia Controlled Substances Act; Count 7, in turn, charged him with conspiracy to purchase marijuana in violation of the Georgia Controlled Substances Act, and laid out specific factual allegations supporting that charge. Read as a whole, the indictment put appellant on notice of the crimes charged and the factual allegations he had to defend against. And the Court stated, contrary to appellant's contention, the details of the predicate felony did not have to be specified in the felony murder count. It was enough that they were specified in the count charging the predicate felony. Therefore, the Court concluded, the indictment satisfied the requirements of due process, and so the trial court did not err in denying appellant's special demurrer.

Sentencing; Juveniles

Sillah v. State, S22A0939, S22A1175 (2/7/23)

Sillah and Murray, Sillah's uncle, were convicted of malice murder and various other crimes. At the time of the crimes, Sillah was 15 years old and was a member and leader of the Young Wavy Goons (YWG), a gang affiliated with the Bloods gang and whose members were mostly high school students. The gang committed several robberies, burglaries, and car thefts.

Sillah argued that the trial court did not adequately consider his “youth and attendant circumstances” before sentencing him to life without parole (LWOP) on the malice murder count. He contended that because no evidence about his history, prior behavior, or attendant circumstances was presented at sentencing, the trial court could not have taken such factors into account. The Court disagreed.

The Court noted that based on statements in *Miller v. Alabama*, 567 U.S. 460 (132 SCt 2455, 183 LE2d 407) (2012) and *Montgomery v. Louisiana*, 577 U.S. 190 (136 SCt 718, 193 LE2d 599) (2016), it had determined that LWOP sentences are not permitted for the vast majority of juvenile offenders and are allowed only for the rarest of juvenile offenders whose crimes reflect permanent incorrigibility. The Court further found that in *Veal v. State*, 298 Ga. 691, 702-703 (5) (d) (2016), it concluded that a sentencing court must do more than simply consider generally a juvenile offender's “youth and attendant characteristics”; it also had to make a “distinct determination on the record” that the juvenile offender is “irreparably corrupt or permanently incorrigible[.]”

But the Court found, the United State Supreme Court's subsequent decision in *Jones v. Mississippi*, ___ U.S. ___ (141 S Ct 1307, 209 LE2d 390) (2021), clarified that such an explicit factual finding of permanent incorrigibility is not required before imposing a discretionary LWOP sentence and that a sentencing court also need not explain its reasons for imposing an LWOP sentence. *Jones* concluded that both *Miller* and *Montgomery* "squarely rejected" a formal fact-finding requirement and explained that youth was akin to a mitigating circumstance and that sentencing courts have wide discretion in determining the weight to give relevant mitigating evidence without having to make particular factual findings about those mitigating circumstances. The *Jones* Court also explained that an on-the-record explanation is not necessary to ensure that a sentencing court considers a defendant's youth, because if that court has discretion to consider youth in imposing a sentence, it necessarily will consider the defendant's youth, especially if defense counsel advances an argument based on the defendant's youth. Therefore, the Court held, to the extent that *Veal* suggested a requirement that sentencers provide explicit, on-the-record explanations regarding determinations of permanent incorrigibility and the characteristics of children, *Jones* has explained that the *Veal* Court was mistaken.

And in this framework, the Court determined that Sillah's claim could not succeed. Sillah argued that because of the limited presentation of evidence at sentencing, the trial court could not have adequately considered his youth and attendant circumstances. But, the Court found, there was no evidence that the trial court was unaware it had the discretion not to impose an LWOP sentence. And Sillah's youth was made plain throughout the entirety of his trial. His youth was also cited at sentencing — both by Sillah directly and through counsel — as a reason for imposing something less than an LWOP sentence. Thus, it was all but impossible for the trial court to avoid considering his youth.

Nevertheless, Sillah argued, the trial court "received the bare minimum of evidence" of his circumstances. The Court stated that it was true that there was limited discussion at the sentencing hearing about Sillah's background, but his complaint that not enough mitigating evidence was submitted about his background could not be blamed on the trial court. There was no indication that the trial court limited Sillah from presenting mitigating evidence, and Sillah pointed to nothing in the record to suggest the court did. By arguing that the court "should look at ... attendant characteristics," Sillah suggested the trial court was required to do more than it did, but he pointed to no precedent imposing an affirmative duty on the trial court to, on its own, seek out and review mitigating evidence before exercising its discretion. Nor did Sillah cite any authority requiring a court to receive a certain quantum of evidence or spend a certain amount of time reflecting upon that evidence before imposing a discretionary LWOP sentence. Furthermore, the Court found, under *Jones*, unless the record affirmatively reflects otherwise, the trial court will be deemed to have considered the relevant criteria, such as mitigating circumstances, enumerated in the sentencing rules. And, since there was no evidence that the trial court failed to understand its discretion or failed to consider the evidence presented to it, Sillah's claim failed.

Recusal; Judicial Impartiality

Jackson v. State, S22A1223 (2/7/23)

Appellant was convicted of felony murder and other offenses. He contended that the trial judge erred by not recusing himself, alleging that certain of the trial judge's comments and conduct during trial demonstrated a lack of impartiality and a bias in favor of the State. First, appellant argued that after the State rested its case, the trial judge interjected during trial counsel's direct examination of witnesses—often without any objection from the State—but did not interject when the State was examining witnesses on direct or cross. Appellant contended that the trial judge's interjections during only the defense portion of the case could have made his witnesses look less credible in the eyes of the jury.

Second, appellant contended that the trial court demonstrated bias in favor of the State. Specifically, during the charge conference outside the presence of the jury, appellant asked the court to give his definition on "forcible felony." The court

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declined, explaining that in the context of the evidence presented at trial, it was not clear which offense should be included and defined in the requested instruction. The trial judge stated, “There was a threat of fight, that’s the most I feel you could say, counsel. I know what you’re arguing. Lucky for you I’m not on this jury, I don’t buy it, and what they buy is on them.”

Appellant alleged another alleged instance of demonstrated bias, which took place when the jury returned the verdicts, and the trial judge reviewed the verdict form. The trial judge observed that the jury failed to render a verdict on one of the gun possession counts, so the trial court returned the verdict form to the foreperson, stating, “You’ve got a count you did not complete. It’s just the third page back there, and sign it for me. Probably won’t take but a second[.]”

The Court stated that generally, when a party learns of grounds for the potential disqualification of the judge, he must promptly move for the recusal of the judge, and if he does not, the question of disqualification is not preserved for appellate review. Here, however, appellant waited until after he had been tried, convicted, and sentenced to raise the recusal issue, which he first asserted in his amended motion for new trial. Accordingly, the Court concluded, appellant failed to preserve any claim of error about the partiality of the trial judge for appellate review.

Nevertheless, the Court stated, even if a trial judge’s failure to recuse could in a rare instance constitute reversible error where the parties knew of the grounds for recusal but did not make a motion, there was no reversible error here. First, the Court found, as to appellant’s contention that the trial judge improperly interjected himself during trial counsel’s questioning of witnesses, the record reflected that, throughout the trial and during both parties’ questioning of witnesses, the trial judge interjected only when necessary to prevent the solicitation of hearsay testimony or the leading of witnesses, among other things. Furthermore, appellant failed to show that the trial judge’s interjections were anything other than the use of the trial court’s discretion to ensure that the proceedings were orderly and fair and that the rules of evidence and procedure were followed.

Next, the Court found that the trial judge’s denial of appellant’s request to charge the jury on the definition of forcible felony occurred during the charge conference outside the presence of the jury. And the record did not reflect, and appellant did not show that this ruling demonstrated any partiality on the part of the judge or any bias on his part in favor of the State. Rather, judicial rulings alone almost never constitute a valid basis for a bias or partiality motion.

Finally, with respect to the trial judge’s statement when he advised the jury that it needed to complete a count on the verdict form—i.e., that it “[p]robably won’t take but a second”—the Court stated that the most reasonable way to construe this statement, when read in context, was that the trial judge was instructing the jury to complete an administrative task—i.e., to finish filling out the verdict form that the jury had already discussed one way or another. Appellant failed to offer any evidence supporting an alternate reading, and he did not show—and the record did not demonstrate—that this statement was in any way motivated by any alleged bias in favor of the State or was a violation of the trial judge’s duty to maintain his impartiality.

And as to any allegation that appellant was “denied a trial before a fair and impartial judge in violation of the constitutional guarantee of due process,” the record disclosed no actual bias and involved no circumstance that has been recognized as presenting an intolerably high probability of actual bias. The law presumes honesty and integrity on the part of those serving as adjudicators, and, the Court concluded, appellant failed to overcome the presumption in this case.