

THIS WEEK:

- **Out-of-time Appeals; OCGA § 15-6-21 (c)**
- **Search & Seizure; BOLOs**
- **Cook; Notices of Appeal**
- **Insanity: Conditional Release of Defendants**
- **Juries; Juror Misconduct**
- **Special Demurrers; Description of Firearms**

Out-of-time Appeals; OCGA § 15-6-21 (c)

Graham v. State, A22A1698 (2/2/23)

Appellant was convicted in 2009 of statutory rape and incest. He thereafter filed a timely motion for new trial, as amended, which was denied in November 2021. In January 2022, appellant filed a motion for an out-of-time appeal, and on January 25, 2022, the trial court entered an order granting that motion. Appellant then filed the current appeal. However, during the pendency of the appeal, the Supreme Court of Georgia decided the cases of *Cook v. State*, 313 Ga. 471 (2022), and *Rutledge v. State*, 313 Ga. 460 (2022), in which it determined that trial courts lack jurisdiction to grant motions for an out-of-time appeal.

Appellant contended that *Cook* and *Rutledge* did not apply to his appeal because he did not receive notice of the trial court's ruling on his motion for new trial and the motion was denied by consent order. The Court noted that in the order granting the motion for an out-of-time appeal, the trial court stated that the motion for new trial was denied in November of 2021 and both appellant and the State were not aware of the ruling until January of 2022.

The Court noted that OCGA § 15-6-21 (c) provides: "When he or she has so decided, it shall be the duty of the judge to file his or her decision with the clerk of the court in which the cases are pending and to notify the attorney or attorneys of the losing party of his or her decision." While the failure to notify under OCGA § 15-6-21 (c) would not extend the time for filing a notice of appeal, it could furnish a basis for the grant of an out-of-time appeal in that the defendant was deprived of his right to appeal, which is of constitutional dimensions. In addition to pursuing an out-of-time appeal, where a convicted defendant does not receive timely notice under OCGA § 15-6-21 (c) of an order denying his motion for new trial, he can also move to set aside the order denying his motion for new trial. In that instance, the trial court should both set aside the previous order and enter a new order denying the motion for new trial.

The Court held that although appellant contended that the trial court did not provide him notice of the denial of his motion for new trial, per *Cook*, the trial court is without jurisdiction or legal authority to grant an out-of-time appeal. The Court also noted that appellant provided no authority, nor was it aware of any, that *Cook* provides for an exception when out-of-time appeals are granted pursuant to OCGA § 15-6-21 (c). Accordingly, the trial court's order granting appellant's motion for an out-of-time appeal was vacated, and the case was remanded for the entry of an order dismissing appellant's motion.

Nevertheless, the Court noted, appellant was not foreclosed from filing a motion to set aside the order denying his motion for new trial, after which, should the trial court grant the motion and re-enter the judgment, the 30-day appeal period would begin to run again.

Search & Seizure; BOLOs

State v. Glanton, A22A1381 (2/3/23)

Glanton was indicted with crossing the guard line with drugs, possession of marijuana (less than an ounce) and driving with a suspended license. The evidence, briefly stated, showed that at 5:00 p.m. on February 15, 2018, an officer was on patrol when dispatch sent out a BOLO from an anonymous caller. The BOLO described an aggressive driver in a small, gray passenger vehicle with “what appeared [to be an] orange out-of-state tag coming up on Mulberry Rock Road.” While traveling on Highway 101, the officer soon saw a dark gray passenger vehicle with a Florida tag drive past. The officer turned around to follow the vehicle to “observe any kinds of mannerisms that [were] stated through the [BOLO] call.” The vehicle then made a right-hand turn and pulled into a church parking lot. The officer testified that although he observed no traffic violations, he made the decision to initiate his “emergency equipment, [his] lights, to conduct [] the stop and basically conduct a check of the vehicle, the driver, to make sure there was no issues going on.” The officer asked Glanton if he was okay. Glanton replied yes and that he had been driving the vehicle to check it since it was making noise. The officer prolonged the stop to question Glanton about the BOLO he received for an aggressive driver in a car matching the one Glanton was driving. Glanton responded that he had come from a different direction and that it was not him. When asked for his driver's license, Glanton provided his Georgia ID card and explained that he did not have a driver's license and that he was driving his girlfriend's car at her request to investigate a noise she heard the car making. The girlfriend was in the front passenger seat of the car and provided her Florida driver's license to the officer. The officer then told Glanton that he would be arrested for driving without a license and advised him to disclose any contraband on his person because crossing the jail's guard lines with contraband would constitute a felony offense. Glanton denied that he had any contraband, and a subsequent search revealed none. Glanton was then transported to the County Detention Center where a booking officer found marijuana inside a pill bottle located in Glanton's pants.

Glanton filed a motion to suppress any evidence obtained as a result of the traffic stop. After a hearing, the trial court granted the motion to suppress, and the State appealed.

The Court stated that Georgia law provides that a police officer must have particularized information to justify a police stop, or else the stop is an unreasonable government intrusion. Insufficiently particularized descriptions of vehicles believed to be related to criminal activity do not justify a traffic stop. And here, the Court found, the BOLO for an aggressive driver in a gray passenger vehicle traveling on Mulberry Rock Road with an orange out-of-state tag was, without more information, too generalized to warrant a traffic stop because “[t]his description would cover a staggering number of vehicles and drivers in the State of Georgia” and could not create a reasonable suspicion to stop the vehicle.

Furthermore, the Court noted, the State failed to point to other factors that would support a finding that the officer had a reasonable suspicion that Glanton's vehicle was the subject of the BOLO. The Court stated that it has identified the following factors “to be considered when assessing whether reasonable suspicion to conduct an investigatory detention” existed at the time of the stop: (1) the particularity of the description of the offender or the vehicle in which he fled; (2) the size of the area in which the offender might be found, as indicated by such facts as the elapsed time since the crime occurred; (3) the number of persons about in that area; (4) the known or probable direction of the offender's flight; (5) observed activity by the particular person stopped; and (6) knowledge or suspicion that the person or vehicle stopped has been involved in other criminality of the type presently under investigation.

In considering these factors, the Court found (1) that the description of the vehicle was inadequate; (2) it had no idea of the size of the area in which the offender might be found because it only knew that the officer stopped Glanton “soon” after he heard the BOLO but had no information about the time elapsed between the crime and the stop; (3) no information was provided about the number of persons in the area; (4) the known of probable direction of the offender's flight was provided; (5) Glanton was not engaged in any activity which would have otherwise authorized a traffic stop; and (6) the officer had no knowledge that the person stopped had been involved in other criminality of the type presently under investigation.

Therefore, the Court concluded, the trial court did not err by granting the motion to suppress because it could reasonably conclude that no reasonable suspicion existed to warrant the officer's stop and investigatory detention of Glanton.

Cook; Notices of Appeal

Spears v. State, A22A1399 (2/6/23)

Appellant was convicted of criminal attempt to commit armed robbery, armed robbery, false imprisonment, aggravated assault, and conspiracy to commit armed robbery. The State contended that the Court lacked jurisdiction over the appeal. The Court disagreed.

Briefly stated, the record showed that on November 21, 2017, the trial court issued a judgment of conviction on the five counts of which appellant was found guilty, while placing on the dead docket the three counts on which the jury deadlocked. Appellant filed a timely motion for new trial, which the trial court denied on December 8, 2020. On December 21, 2020, appellant filed a notice of appeal referencing his judgment of conviction and the denial of his motion for new trial. The Court dismissed the appeal, explaining that under *Seals v. State*, 311 Ga. 739 (2021), appellant's case was not final because of the dead-docketed counts. *Spears v. State*, 360 Ga. App. 776 (2021).

In August 2021, the trial court nolle prossed the dead-docketed counts with an amended judgment nunc pro tunc to November 21, 2017. Appellant did not file a new notice of appeal. Instead, he filed a motion for out-of-time appeal which the trial court granted. However, based on *Cook v. State*, 313 Ga. 471, 505-506 (5) (2022), the Court remanded the case to the trial court with instructions to dismiss the appeal. Appellant then filed an “amended notice of appeal and request to transmit record to Georgia Court of Appeals.”

The Court stated that the concept of a notice of appeal ripening is well established in the context of appeals from criminal convictions and motions for new trial. Where an initial judgment of conviction is not final, in that it does not include a written sentence on each count of which the defendant was found guilty, and the defendant files a notice of appeal, the notice ripens upon entry of an amended judgment of conviction disposing of all counts.

And here, the Court found, appellant's initial notice of appeal ripened upon entry of the amended judgment of conviction. Significantly, appellant's initial notice of appeal clearly referenced his convictions and the denial of his motion for new trial. Because appellant sought appellate review of these matters in this appeal, and because he made his intent to seek such review clear for years, the State will not be prejudiced by the Court's consideration of the case. Finally, the Court noted that with the elimination of the out-of-time appeal procedure, appellant would lose any right to a direct appeal if it dismissed this case.

Insanity: Conditional Release of Defendants

Delaney v. State, A22A1350 (2/8/23)

In 2008, the trial court accepted appellant's plea of not guilty by reason of insanity after she stabbed someone to death in 2005. Very briefly stated, the record showed that she was confined in a state mental hospital until she was conditionally released on February 19, 2009, at the request of her treatment team. The 2009 conditional release order stated that appellant “does not meet the criteria for involuntary inpatient commitment as set forth in OCGA § 37-3[-1]” and ordered that she be placed in a “supervised living arrangement” for her to “demonstrate that she can enter and stay with a formal outpatient treatment program and live with supervision as mandated by her care plan.” Her conditional release was extended numerous times between 2009 and 2018. The orders typically found that she “currently [met] the criteria for outpatient involuntary treatment” and specified a one-year time period for continued conditional release. None of these orders specifically addressed whether she had successfully completed the requirements of the prior conditional release orders.

In 2018, a hearing was held. A forensic psychologist with the Georgia Department of Behavioral Health and Development Disabilities and the Director of the Department's Community Forensic Outpatient Services testified as to her diagnoses and recommended that she be fully released, because “[s]he has done absolutely beautifully in the community since 2009,” but acknowledged that appellant needed to stay on her medications. Six weeks later, the trial court issued an “Order for Unsupervised Conditional Release” denying appellant's request for a full release, finding that she “will require outpatient treatment in order to avoid predictable decompensation and the need to return to inpatient treatment” if she were to stop taking her medications.

Three years later, appellant filed another petition for release, asserting that she no longer met the criteria for civil commitment. Apparently without holding a hearing, the trial court denied her petition. The trial court continued appellant's “unsupervised conditional release” based on its conclusion that she “will require outpatient treatment in order to avoid predictable decompensation and the need to return to inpatient treatment.” The court did not, however, impose a time period for her conditional release. It also failed to address whether she had successfully completed her conditional release program.

Citing OCGA § 17-7-131 (e) (5) (B), appellant contended that the trial court erred by denying her petition because she successfully completed all the requirements of her conditional release plan, and the trial court did not rule on whether she successfully completed the requirements of her conditional release plan. The State argued that the trial court was authorized to continue her conditional release if she continued to meet the criteria for outpatient involuntary treatment.

Citing *Sikes v. State*, 268 Ga. 19 (1997), the Court found that neither party correctly interpreted OCGA § 17-7-131 (e) (5), the conditional release statute. The Court found that like the trial court's order in *Sikes*, the trial court's order failed to specify whether a defendant successfully completed the requirements of conditional release. Thus, the Court vacated the trial court's order and remanded the case to the trial court to make the same determinations outlined in *Sikes*. The Court further instructed the trial court to appropriately rule on appellant's request for a hearing on her petition.

Juries; Juror Misconduct

Bell v. State, A23A0218 (2/10/23)

Appellant was convicted of aggravated assault, rape, and kidnapping. The record showed that after closing arguments, but before deliberations had begun, the State informed the trial court that an issue had arisen during a jailhouse telephone call between appellant and his mother. A recording of the call was played in court, outside of the jury's presence. During the

call, appellant told his mother that a juror had been “flirting” with him and talking to him “with her lips” during the trial. Appellant added that the juror told him, “I ain't gonna prosecute you,” because she knew “it was a bunch of lies.”

The trial court conferred with the parties about how to proceed, and appellant's counsel responded that the defense would defer to “the sound discretion of the Court” regarding how best to address the situation. The court ultimately dismissed the juror to protect the “integrity of [the] trial,” and an alternate took her place during deliberations.

Appellant contended that the trial court erred by failing to hold a hearing to determine whether there was a basis for the juror's removal. The Court disagreed.

The Court noted that OCGA § 15-12-172 provides, in relevant part: “If at any time, whether before or after final submission of the case to the jury, a juror dies, becomes ill, upon other good cause shown to the court is found to be unable to perform his duty, or is discharged for other legal cause, the first alternate juror shall take the place of the first juror becoming incapacitated.” The trial court must exercise its discretion in removing a juror, and it may affect such a removal even after deliberations have begun. There must be some sound basis upon which the trial judge exercises his discretion to remove the juror. A sound basis may be one which serves the legally relevant purpose of preserving public respect for the integrity of the judicial process. Where the basis for the juror's incapacity is not certain or obvious, some hearing or inquiry into the situation is appropriate to the proper exercise of judicial discretion. Dismissal of a juror without any factual support or for a legally irrelevant reason is prejudicial.

Premitting whether appellant waived any claim to the contrary by deferring to the trial court's discretion on this issue, the Court found that the juror's dismissal served the legally relevant purpose of preserving public respect for the integrity of the judicial process given the allegation — made by appellant himself — that the juror had been commiserating with him during his trial. And on the particular facts of this case, the Court determined that no hearing was required, as the reason for the juror's removal was evident on the face of the existing record. Consequently, the Court concluded, appellant did not establish that the trial court abused its discretion by excusing the juror and replacing her with an alternate before deliberations began.

Special Demurrers; Description of Firearms

Thomas v. State, A22A1677 (2/10/23)

Appellant was indicted on nine different counts, including five weapon-related counts. He filed a special demurrer, challenging Counts Two and Three. Count Two alleged a violation of OCGA § 16-11-123 in that, “on or about the 25th day of November, 2021, [appellant] did knowingly have in his possession a sawed-off rifle having a barrel length of less than 16 inches and an overall length of less than 26 inches, the acts in this count being separate and distinct from any other count in this indictment ...” Likewise, in Count Three, appellant was charged with another violation of OCGA § 16-11-123, in that, “on or about the 25th of November, 2021, [he] did knowingly have in his possession a sawed-off shotgun having a barrel length of less than 18 inches and an overall length of less than 26 inches, the acts in this count being separate and distinct from any other count of this indictment ...” The trial court denied the demurrer but gave appellant a certificate of immediate review. The Court granted appellant an interlocutory appeal.

The Court stated that in order to withstand a special demurrer, an indictment need not contain every detail of the crime; but it must state the essential elements of the charged offense and allege the underlying facts in enough detail to sufficiently apprise the defendant of what he or she must be prepared to defend against at trial. The purpose of the indictment is to allow the defendant to prepare his defense intelligently and to protect him from double jeopardy. It is generally sufficient that an indictment set forth the offense in the words of the statute itself, as long as those words of themselves fully,

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directly, and expressly, without any uncertainty or ambiguity, set forth all the elements necessary to constitute the offence intended to be punished. Nevertheless, this recitation must be accompanied with such a statement of the facts and circumstances as will inform the accused of the specific offense, coming under the general description, with which he is charged.

Here, the Court noted, the State's inclusion of "separate and distinct from any other count of this indictment" suggested the weapons at issue in Counts Two and Three are different from the weapons referenced in the other weapon-related counts of the indictment that do provide additional details by which to identify the firearm, such as the make and model. In fact, Counts Two and Three merely track the language of OCGA § 16-11-123 by referring to each weapon as a "sawed-off shotgun" and a "sawed-off rifle" and providing an approximate measurement of each weapon's barrel and overall length in conformity with OCGA § 16-11-121.

Appellant contended the State had not done enough to inform him of the specific offenses for which he is charged, and urged the Court to apply to these unlawful-possession-of-a-weapon counts the same standard applied to indictments for the unlawful possession of other items (e.g., stolen property)—thus requiring the unlawfully possessed weapons to be described with particularity. The Court agreed that the reasoning of those cases should apply in this (similar) context, and, as a result, that such particularity is required in this case. Thus, the Court held, in order to intelligently prepare a defense and protect against double jeopardy, the weapons referred to in Counts Two and Three must be described with greater particularity—such as their appearance (e.g., color), make, model, caliber, exact barrel measurement, serial number, and any other distinguishing characteristics.

In so holding, the Court disagreed with the State's contention that appellant need only look to the pretrial discovery to learn additional details about the firearms referenced in Counts Two and Three. The Court noted that the State described firearms with greater particularity elsewhere in the indictment, and then curiously noted in Counts Two and Three that the generally described firearms referenced in those counts were "separate and distinct" from the other counts. Likewise, the Court was unpersuaded by the State's reliance on *Blockburger v. United States*, 284 U.S. 299 (52 SCt 180, 76 LE 306) (1932) to assert that—because it was charging appellant with offenses related to only two firearms (something that was not at all clear from the indictment)—subsequent prosecution would be barred.

Therefore, the Court concluded, the indictment failed this sufficiency test because it does not apprise appellant of what he must be prepared to defend against as to Counts Two and Three—i.e., it failed to describe with particularity the firearms he allegedly unlawfully possessed and thus did not show with accuracy to what extent he may plead a former acquittal or conviction should other proceedings be taken against him for a similar offense. Accordingly, the Court reversed the trial court's denial of appellant's special demurrer as to Counts Two and Three of the indictment.