CASE LAW SUMMARIES

JUNE and JULY 2017

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Contents

- **ADMISSIONS AND CONFESSIONS**
  - **PRE-ARREST CUSTODY**
    - *Bailey v. State*, --- Ga. --- - S17A0364 – GA Supreme Court – (Decided June 19, 2017)
      - Judgment: (Affirmed)
      - Police came to defendant's apartment after being called to a murder scene in the apartment above his and finding blood on his apartment door handle. The police asked to come into the apartment and further asked did the defendant know why they were there, in which he replied yes. Defendant then made some additional statements. Defendant moved to suppress the statement pre-trial, but was denied. The Supreme Court agreed with the trial court that he was not in custody at the time of making the statements.
      - Holding: "A person is considered to be in custody and *Miranda* warnings are required when a person is (1) formally arrested or (2) restrained to the degree associate with a formal arrest." The Court determined that even if the Defendant was restrained he was not considered in custody. The Court went further to state that no reasonable person would have considered themselves in custody, because the Defendant was free to move around the apartment, was not in handcuffs or restrained in any other way.
  - **SIXTH AMENDMENT RIGHT TO COUNSEL CAN BE WAIVED**
    - *Bowman v. State*, --- Ga. App. --- - A17A0379 – GA Court of Appeals – (Decided June 19, 2017)
      - Judgment: (Affirmed)
      - Defendant was arrested and had attended his first appearance. After the first appearance, the police initiated an interrogation and properly Mirandized the Defendant. At no point during the interview did the Defendant request an attorney and explicitly waived his right to have an attorney present. Defendant filed an interlocutory appeal claiming that once a defendant's Sixth Amendment rights attached, that they cannot be waived with police initiated interviews. The Defendant relied upon Moran v. Burbine, 475 U.S. 412 (1986) and Michigan v. Jackson, 475 U.S. 625 (1986).
      - Holding: The United States Supreme Court in Montejo v. Louisiana, 556 U.S. 778 (2009) and followed by the Georgia Supreme Court in Stinski v. State, 286 Ga. 839 (2010) has overruled the cases relied upon by the Defendant. Thus, a defendant can waive his Sixth Amendment Rights upon police initiated interrogations even after the rights have attached.
      - Important Note**:** The COA did explain that even if the Defendant initially waived his rights, that waiver would have been invalid had it followed an unequivocal election of the right. However, in this case, the

Defendant at no point requested an attorney and voluntarily waived his rights.

- **WAIVER OF MIRANDA RIGHTS – MUST BE UNEQUIVOCAL**
  - *State v. Andrade*, --- Ga. App. --- - A15A0092 – GA Court of Appeals – (Decided June 30, 2017)
    - Judgment: (Reversed)
    - Defendant was brought to a police station voluntarily and made several statements after waiving *Miranda* pertaining to an alleged rape. Upon a consent search of Defendant's house, Defendant was questioned again. The interview was recorded but the quality of the recording was poor. The officers again explained his *Miranda* rights and asked Defendant he wanted to make a statement. Defendant's response was unintelligible due to the quality of the recording. The Officer states, "I am sorry?" in which the Defendant looks down and says something that could have been no or I do not know. The officer then states, "Alright. We need to talk about this…are you going to talk to me?" and the Defendant replies in the affirmative. The trial court denied the request to suppress the first interview but suppressed the second interview stating Defendant had unequivocal stated he did not wish to speak with the officers. The State appealed.
    - Holding: The COA stated that the record reveals nothing that would lead a reasonable police officer to understand that Defendant was exercising his right to remain silent. "Neither the video nor [Defendant's] testimony shows that he unambiguously invoked the right before making his incriminating statements. Instead, he signed a waiver of rights and when asked whether he would make a statement, gave several unintelligible response before stating, 'yeah'. Thus, [Defendant] did not unambiguously and unequivocally invoke his right to remain silent." COA states the trial court erred in suppressing the statements.
    - Judge Miller dissenting**:** Judge Miller states that the Court of Appeals is a court of review and lack jurisdiction to decide disputed issues of fact. He went on to state, "this Court cannot second-guess the trial court but rather must draw all reasonably permissible inferences from the evidence to support the trial court's ruling." Based upon the poor quality of the recording, it was the duty of the trial court to determine what occurred and make conclusions. Thus, Judge Miller would have affirmed the decision.

- **CHILD HEARSAY TESTIMONY**
  - **NO CORROBORATION REQUIRED**
    - *Morris v. State*, --- Ga. App. --- - A17A0615 – GA Court of Appeals – (Decided June 05, 2017)
      - Judgment: (Affirmed)
      - Defendant was found guilty of aggravated child molestation. At trial, the Defendant moved to limit the testimony of both the family therapist and the psychologist to only the statements that the complaining juvenile had previously testified. Defendant argued he would be prejudiced if the witnesses were allowed to provide greater details about the sexual abuse than what the complaining witness provided. The Trial Court refused to limit the testimony.
      - Holding: "Contrary to [Defendant's] contention, former OCGA § 24-3-16 does not require the child to corroborate the hearsay testimony." There is not prior authority that requires a child be compelled to testify in detail about the sexual abuse he/she has suffered.
      - IMPORTANT NOTE: This was based upon the pre-2013 child hearsay statute. I see nothing to lead me to believe that this holding does not also apply to the new statute. The new statute changed in regards to raising the age of the child to 16 and requiring pre-trial notice.

- **CONFRONTATION CLAUSE**
  - **SECOND LAB ANALYST TESTIFIES TO THE RESULTS FOUND BY ANOTHER LAB ANALYST**
    - *Thomas v. State*, --- Ga. App. --- - A17A0820 – GA Court of Appeals – (Decided July 10, 2017)
      - Judgment: (Affirmed)
      - Defendant was found guilty of trafficking methamphetamine. At trial, the GBI lab analyst who performed the test to determine the weight and chemical makeup of the substance was on paid leave, not related to her performance at work. The State called a second GBI analyst who testified that he reviewed the work of the first analyst. The second analyst stated the first was very careful in her work, that the machines were working properly and if there were any errors then the machines would have noted them. The second testified that the weight was 37.24 grams and contained methamphetamine. Defendant objected at trial and on appeal that he was precluded from confronting the first analyst who performed the test.
      - Holding: Georgia courts "have consistently held that the Confrontation Clause does not require the analyst who actually completed the forensic testifying used against a defendant to testify at trial. (Citations omitted)" The COA stated this is a different scenario from what was held in

Bullcoming v. New Mexico, 564 U.S. 647 (2011), which held a surrogate testimony was incapable of testifying about another analyst when the first analyst was precluded from testifying based upon being fired for job performance. In the current situation the first analyst was not precluded from testifying based upon job performance. The second analyst did review the work and checked the machines, thus, his testimony was not the sort of "surrogate testimony" forbidden by Bullcoming.

- **CORROBORATION**
  - **CORROBORATION OF A SINGLE WITNESS NOT REQUIRED IN MISDEMEANOR**
    - *Heatherly v. State*, --- Ga. --- - S16G1498 – GA Supreme Court– (Decided June 19, 2017)
      - Judgment: (Affirmed)
      - Defendant was indicted and charged with felony grade theft by taking. The jury eventually found the Defendant guilty of the lesser included misdemeanor grade theft by taking. Defendant appealed his guilty conviction claiming that since he was originally charged with felony grade theft by taking, then the State must also prove corroboration of an accomplice. The Court of Appeals rejected this argument in Heatherly v. State, 336 Ga. App. 875 (2016). The Supreme Court offered cert and now affirms the Court of Appeals decision
      - Holding: Even though the Defendant was charged with felony grade theft by taking, "he was ultimately convicted of, and sentenced for, theft that carried misdemeanor punishment, and as OCGA 24-14-8 does not require corroboration of accomplice testimony for a misdemeanor level conviction such as [Defendant's], any argument built on a characterization of his appeal as involving a 'felony case' was misplaced."

- **CORROBORATION OF A SINGLE WITNESS**
  - **STATUTORY RAPE**
    - *Atkins v. State*, --- Ga. App. --- - A17A0240 – GA Court of Appeals – (Decided June 30, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged and convicted of statutory rape. At trial, Defendant requested a directed verdict claiming the evidence was insufficient to corroborate the alleged victim's allegations. At trial the State argued that Defendant corroborated the alleged victim's statements when he told two people that she was going to say she was pregnant and the child was his. Defendant told both people that she was

lying. The alleged victim did make consistent statements to the police and SANE nurse, which was also consistent with her testimony at trial.

- Holding: First, the COA stated that the trial prosecutor's assertion were insufficient that Defendant corroborated the statements when he told two different people that the alleged victim was pregnant with his child. In both instances, the Defendant denied he did anything and nothing he stated were inculpatory in nature. However, the COA still affirmed stating that the alleged victim's original statements were consistent with her in trial statements, thus sufficient corroboration existed. "This Court's decisions hold that a victim's own prior statements to police, if found to be consistent with her later trial testimony, satisfy the corroboration requirement. Brown v. State, 318 Ga. App. 334, 336 (2012) and Patterson v. State, 233 Ga. App. 776, 776 (1998)."

DOUBLE JEOPARDY

APPELLATE COURT DISMISSED ONE COUNT BUT SUSTAINED ONE COUNT

Goodwin v. State, --- Ga. App. --- - A17A0066 – GA Court of Appeals – (Decided June 05, 2017)

- Judgment: (Reversed)
- This is the second appeal in regards to this case. Client was originally charged with two different counts: 1) Felony, obtaining controlled substance by theft and 2) misdemeanor theft by taking. After a bench trial the defendant was found guilty of both counts and Defendant appealed. The original appeal resulted in the Court of Appeals reversing Count 1 – felony obtaining controlled substance by theft, because the State accused the case instead of presenting the case to a Grand Jury for indictment. (note the Defendant did not waive presentment). The Court of Appeals affirmed Count 2 – the misdemeanor charge of theft. Upon the appellate decision the State re-presented the case to a Grand Jury, which returned an indictment to the Felony charge. Defendant filed a plea in bar as to double jeopardy and the trial court denied the request. Defendant now appeals.
- Holding: "It is indisputable that the two offenses…arose from the same conduct and were known to the prosecuting officer at the time the previous prosecution was commenced. The offenses were within the jurisdiction of a single court, in that they could both be tried in the Superior Court of Hall County…[Defendant] was placed in jeopardy as to Count 2 and her trial resulted in a conviction on that count." Constitutional jeopardy did attach to the misdemeanor charge in Count 2, and thus procedural double jeopardy prevents a subsequent prosecution of offenses arising from the same transaction.

- **DRIVING UNDER THE INFLUENCE**
  - **ROMBERG FIELD SOBRIETY TEST – HARPER CHALLENGE**
    - *Mitchell v. State*, --- Ga. --- - S17A0459 – GA Supreme Court– (Decided June 26, 2017)
      - Judgment: (Reversed)
      - Defendant was pulled over for driving under the influence. He initially refused to get out of the car and take a field sobriety test, but he eventually relented when he was told that if did not take the test he would be taken to jail. Pre-trial, Defendant moved to suppress the field sobriety test. The officer who testified stated in relation to the Romberg Test (where the suspect is asked to close his eyes and estimate a time lapse of 30 seconds – if within 5 seconds on either side, the person passes) that he is not aware of pier journals or other statistics of why 5 seconds off is scientifically proven or why it scientifically shows impairment. The officer further stated he was just aware of this because this is what they taught in training. There was no other testimony in regards to this test. The trial court ruled in favor of admitting all the field sobriety test but granted cert of immediate review.
      - Holding: Supreme Court determines that the standards outlined in *Harper* were not introduced at the trial court and a proper *Harper* analysis was not conducted, thus it was error for the trial to allow the Romberg test. The other field sobriety test were allowed. "[I]n determining the applicability of the *Harper* analysis to field sobriety tests, the Court of Appeals has considered whether the principles or techniques in question are properly a subject of scientific analysis under *Harper*, or are merely well known consequences of intoxication, as obvious to the layperson as to the expert…The significance of eyelid tremors or an individual's 'internal clock,' how they may be affected by the consumption of alcohol, and particularly whether a range of five seconds above or below the actual passage of 30 seconds establishes impairment, are not matters of common sense or experience, nor are they obvious to the average lay observer." The trial court therefore erred in failing to conduct a proper *Harper* analysis, "whether through the evaluation of expert testimony or through the examination of exhibits, treatises, or the law of other jurisdictions.

- **GRAND JURY TESTIMONY**
  - **POLICE OFFICER ABILITY TO TESTIFY DOES NOT EXTEND WHEN NOT ACTING WITHIN HIS/HER OFFICIAL DUTIES**
    - *State v. Dorsey*, --- Ga. App. --- - A17A0108 – GA Court of Appeals – (Decided June 14, 2017)
      - Judgment: (Reversed)
      - Defendant was a deputy at the courthouse and he restrained a couple of females against their will when their phones went off in Court. These offenses occurred on separate dates. He placed the females in another office in the courtroom, but not in the custody of the State. He eventually exposed his private parts to the females and attempted to touch them on their breast and butts. The State presented the case to the Grand Jury, but never allowed the Defendant to be present or give testimony. It was stipulated to by both parties that Defendant was a post-certified officer, who was working during the time the offenses took place. The trial court granted the motion to quash the indictment for failure to allow him to give testimony. The State appealed and now claims that even though the Defendant was working, he was not working within his official duties by escorting the females to different offices and exposing himself. The COA agrees with the state.
      - Holding: "OCGA § 17-7-52 (a) was intended to afford police officers the same procedural protection afforded to other public officials as to accusations arising from the performance or non-performance of their official duties." This statute however is narrowly written to only apply to "performance or non-performance of their official duties." "Dorsey stepped aside from the performance of his official duties when he allegedly engaged in acts of restraining women against their will, groping their breasts and buttocks, and exposing his genitalia." Thus, OCGA §17-7-52 does not apply to his case.
    - *Yancey v. State*, --- Ga. App. --- - A17A0264– GA Court of Appeals – (Decided June 16, 2017)
      - Judgment: (Reversed)
      - Defendant worked as an investigator for the Montgomery County Sheriff's Department. On the night when Sheriff O'Connor died due to a high speed chase, Sheriff O'Connor's office was entered and items taken from a safe. Defendant was charged with Burglary in the second degree, when the DA presented the case to the Grand Jury without giving the Defendant notice or an opportunity to testify. Defendant asserts he entered the Sheriff's office to retrieve a file in order to help with the investigation of the high speed trial, which led to the death of Sheriff O'Connor. The State and the trial court determined that committing the offense of burglary is not "an official police duty" and

denied his motion to quash the indictment. The Trial Court did grant an application for immediate review.

- Holding: The COA determined that even though the Defendant was not working during his regular scheduled office hours, the circumstances surrounding the death of Sheriff O'Connor required numerous officers to report to duty outside their normal working hours. Further there was substantial evidence that the Defendant was providing assistance to the investigation of the whereabouts of the person fleeing the scene, which led to the death of the Sheriff, which would have been in his official duties. Therefore, the provisions of OCGA §§17-7-52 and 45-11-4 should have been afforded to the Defendant. The COA further explained that, yes it is possible that he as well as the other co-defendants committed a burglary on that night, but "that is not the relevant inquiry when determining whether an individual is entitled to the protections of OCGA §§ 17-7-52 and 45-11-4."

➢ HEARSAY

FAILURE TO MAKE A PROFER AND PRESERVE THE ISSUE

✪ *Walker v. State*, --- Ga. --- - S17A0385 – GA Supreme Court – (Decided June 19, 2017)

- Judgment: (Affirmed)
- Defendant was on trial for murder. During direct examination of Defendant's father, the father attempted to explain what the Defendant told him in his driveway during the day of the incident. The State objected immediately after the father stated, "he began to tell me that…" Counsel for the Defendant replied to the objection that it was the defendant's statement and any statement attributed to him are admissible. Counsel did not give any proffer to what the father was expected to say or make a more particularized response to the objection. The trial court sustained the State's objection and the defense counsel merely asked the witness to not say what the defendant had told him.
- Holding: "In this case, the lack of a proper offer of proof makes it impossible to determine that the out-of-court statements that [Defendant's] father supposedly would have recounted would have been admissible at trial, much less that their admissibility was so "'clear or obvious'" as to be beyond 'reasonable dispute...' Likewise, without informing us what the alleged out-of-court statements were, [Defendant] cannot meet his burden to show that there is a reasonable probability that, but for their exclusion at trial, the outcome would have been more favorable to him." In essence, because the defense counsel failed to make a proffer of what the testimony would have been it is impossible for appellate review to determine the prejudice to the Defendant.

- **TESTIMONIAL NATURE OF 911 CALLS**
  - *Gregory v. State*, --- Ga. App. --- - A17A0209 – GA Court of Appeals – (Decided June 28, 2017)
    - Judgment: (Affirmed)
    - Defendant was found guilty of aggravated battery. Defendant now appeals claiming the trial court erred in admitting the 911 call because it violated his right to confrontation and the statements were testimonial in nature. The 911 call in question came from a neighbor of the alleged victim who witnessed the altercation but did not testify at trial. The neighbor told the 911 operator a description of the Defendant as well as what he was driving and the injuries to the alleged victim. The trial court denied the Defendant's motion to suppress.
    - Holding: The COA relied upon several court cases in affirming their decision: Thomas v. State, 284 Ga. 540 (2008) and Hatley v. State, 290 Ga. 480 (2012). The COA stated, similar to Thomas, the 911 call in this case was made several minutes after the Defendant fled the premises, but the statements made by the 911 caller "were not testimonial because they were made while [Defendant] remained at large and because they provided information that could aide authorities in his capture."

IDENTIFICATION

- **SHOW UP IDENTIFICATION**
  - *Porter v. State*, --- Ga. App. --- - A17A0046 – GA Court of Appeals – (Decided June 08, 2017)
    - Judgment: (Affirmed)
    - Defendant was charged and eventually convicted of armed robbery. Defendant had previously met the victim along with her co-defendants to sell some drugs. Afterwards, the co-defendants came back to victim's house robbed the house, whereby someone eventually took out a gun. The victim called the police afterwards and gave a license plate. When the officer's pulled over the suspected vehicle, they relayed this information to the officer at the victim's house, who transported him to the side of road where the defendants were located. On the way to the defendants the officer told the victim that he had a couple of suspects in custody and wanted to see if he could identify them. The officer testified that he made it clear that the witness should make his own determination and he was not required to identify anyone. The victim said he was 100% sure of the identification because the Defendant is the one who kissed him. Defendant objected based upon the statements, "we have some suspects in custody".
    - Holding: "Generally, this Court first determines whether the identification procedure was impermissibly suggestive. If the answer to

that inquiry is negative, we need not consider the second question — whether there was a substantial likelihood of irreparable misidentification. Conversely, we may immediately proceed to the second question and, if the answer thereto is negative, we may entirely pretermit the first question. Thus, even if the circumstances surrounding the Appellant's identification "rendered the show-up impermissibly suggestive, the evidence is inadmissible only if[,] under the totality of the circumstances, there was a substantial likelihood of irreparable misidentification." The COA determined based upon the victims 100% certainty as the defendant being the one who kissed him, that she had on the same clothing and the fact he got a good look at her when she kissed him, that even if procedures were impermissibly suggestive, there was not a substantial likelihood of irreparable misidentification.

- **INDEPENDENT CRIMES AND ACTS**
  - **COMMON PLAN OR SCHEME**
    - *Hughes v. State*, --- Ga. App. --- - A17A0868 – Georgia Court of Appeals – (Decided June 06, 2017)
      - Judgment: (Affirmed)
      - Defendant was found guilty of child molestation and statutory rape. At trial, the State introduced evidence of a prior statutory rape in order to show intent and common plan or scheme. The trial court found prior to introduction of the evidence, that the prior conviction was probative to show the Defendant engaged in a common scheme by: (a) befriending young girls from families he knew; (b) by giving them rides and; (c) engaging in sexual relations with them in his vehicles.
      - Holding: "Guided by the liberal standard applicable in cases involving sexual offenses against children," Kirkland v. State, 334 Ga. App. 26, 30 (2015), we conclude that, on the facts of this case, the trial court was authorized to find that the risk of unfair prejudice did not bar the admission of the other acts evidence."
      - Important Note: The COA points out that the appellate attorney misquoted the law on several instances in the appellate brief. The brief stated "the court must determine whether the probative worth of the evidence outweighs its potential for undue prejudice." This is not the law. The law mandates exclusion of otherwise probative similar transaction evidence only if the risk of unfair prejudice substantially outweighs its probative value. In other words, exclusion is not required if the risk of unfair prejudice equals or even slightly outweighs the probative value.

- **DRIVING UNDER THE INFLUENCE – LESS SAFE**
  - ✪ *Jones v. State*, --- Ga. --- - S17A0890 – GA Supreme Court – (Decided June 26, 2017)
    - Judgment: (Affirmed for harmless error)
    - This is the second time this case has come to the Supreme Court under appeal. At trial, the court allowed a prior DUI – less safe conviction in which the Defendant had previously pled guilty. In the current case, the Defendant again was charged with DUI – less safe and the trial court allowed the prior conviction under OCGA §24-4-403 and 404(b). The first appeal the Supreme Court determined the Court of Appeals did not properly weigh the first prong of the Bradshaw test, which is whether the prior DUI was being admitted for a proper purpose. Upon the Court of Appeals finding there was a proper purpose the Supreme Court again granted cert to determine if the Court of Appeals properly weighed the second prong, balancing test under 403. The Supreme Court ultimately determines the Court of Appeals did not properly weigh the probative and prejudicial effects of the prior DUI but finds it to be harmless.
    - Holding: "The trial court, in exercising its discretion, is required to make 'a common sense assessment of all the circumstances surrounding the extrinsic offense, including prosecutorial need, overall similarity between the extrinsic act and the charged offense, as well as temporal remoteness." Both DUI – less safe and DUI – per se are general intent crimes. Even though Defendant placed his intent at issue by pleading guilty, the probative value of the prior DUI to show intent, as to DUI – less safe or DUI – per se, was very low. "Here, because the probative value of [Defendant's] prior DUI was minimal given all the attendant circumstances, the danger of interjecting unfair prejudice at trial was a greater risk." The Court also emphasized the fact that the prosecutor actually used the prior DUI to also show the credibility of the Defendant and not just for intent purposes, so it is equally prejudicial. HOWEVER, the Court explained the direct evidence of Defendant's guilt was overwhelming due to he admitted to consuming alcohol and had a blood alcohol test in excess of 0.08 grams.

- **SEXUAL OFFENSES UNDER OCGA §24-4-413**
  - ✪ *Latta v. State*, --- Ga. App. --- - A17A0562 – GA Court of Appeals – (Decided June 13, 2017)
    - Judgment: (Affirmed)
    - Defendant was charged with child molestation for touching the vagina of the complaining witness. The State introduced evidence that Defendant had previously touched another female on her buttocks, when he was fixing a refrigerator line at chick-fil-a. The State originally

introduced it under 404(b) and 413. Defendant objected on the basis that he was never charged with that offense and based under 403 balancing test.

- Holding: The COA determined that OCGA §404-4-413 is controlling because both acts concerned an offense of sexual assault, which includes touching the private parts of complaining witness and in the other prior act included sexual battery for touching the buttocks without consent. The COA explained that criminal charges are not required for introduction of prior criminal acts. Lastly, the COA determined that the balancing test under 403 weighs in favor of admission because it helped to rebut the Defendant's theory that this was accident, so as to show that this was not the first time that this has occurred.

INNEFECTIVE ASSISTANCE OF COUNSEL

FAILURE TO COMMUNICATE ACTUAL POTENTIAL SENTENCES

Walker v. State, --- Ga. App. --- - A17A0437 – GA Court of Appeals – (Decided June 14, 2017)

- Judgment: (Affirmed and Remanded)
- Defendant was charged with Rape in a 1990 cold case that resulted from a DNA test in 2010. The prosecutor offered the Defendant a 20 year prison sentence plea offer, which the Defendant rejected. Both the prosecutor and the Defense attorney incorrectly believed the maximum sentence that Defendant could receive was 20 years prison. During trial, the prosecutor learned that Defendant could actually be sentenced to life in prison and relayed this information to the defense attorney. There was no indication on whether the prosecutor then offered the Defendant the 20 year offer again or whether the Defendant would even still reject the 20 year offer. Defendant was found guilty and sentenced to life in prison. Defendant now appeals, claiming ineffective assistance of counsel for failing to properly notify of the potential sentence he could have faced
- Holding: COA determined as previously held that a defendant has the right to effective assistance of counsel during plea negotiations. By being misinformed of the maximum sentences, the first prong of Strickland is met. The COA then looked at the second prong: prejudice. The COA determined that the trial court misapplied the prejudice prong, because there is nothing in the record that indicates the Defendant was aware of the maximum sentence or that he would have accepted the 20 year plea offer had he been properly notified. The COA remanded the case back to the trial court to make a proper analysis of the prejudice prong. The COA instructed the trial court that even if the prejudice prong is met, the remedy is not a new trial. The remedy would be to

resentence the Defendant to the original plea offer of 20 years prison or something in between of 20 years prison and life.

- **FAILURE TO CONSULT A MENTAL HEALTH EXPERT**
  - *Scott v. State*, --- Ga. --- - S17A0524 – GA Supreme Court – (Decided June 26, 2017)
    - Judgment: (Affirmed for harmless error)
    - Defendant was tried for murder. At the time of her arrest, she asked the arriving police to "shoot her, shoot her." Based upon these statements, defense counsel initially requested a mental evaluation. During the time leading up to the trial, the Defendant's family provided defense with hospital records showing a prior history of mental health. The day of trial, the prosecutor brought up the issue of competency evaluation. Defense counsel explained his reasoning for initially requesting the evaluation (her statement to the police to shoot her), but based upon his conversations with his client, he now waives the competency request and proceeded to trial and did not raise competency or mental health at trial. Defendant was found guilty and sentenced to life. During the motion for new trial, the same trial court ordered a mental health evaluation and both defense expert and state's expert testified concerning competency. Trial court relied upon the State's expert and denied the motion for new based upon competency.
    - Holding: Strickland has two prongs: 1) ineffectiveness of counsel and 2) prejudice. Under the first prong, the Supreme Court found it was deficient to not raise the issue of competency given her mental state at the time of arrest and the fact that the family provided him with hospital records showing prior mental illness. "[Defendant's] trial counsel could not reasonably decide to forgo seeking the assistance of a mental health expert" based upon these facts and the fact that defense counsel did not even contact any of the Defendant's prior treatment providers. "Under these circumstances, trial counsel 'could not reasonably conclude that further investigation would have been fruitless.'" HOWEVER, "[Defendant] has not met her burden to demonstrate a reasonable probability that a mental evaluation would have resulted in [Defendant's] being found incompetent to stand trial or being found not guilty reason of insanity or guilty but mentally ill." In short the trial court determined these issues at the motion for new trial and relied upon the State's doctors to determine she was competent, which likely would have been the same doctors had the issue been raised pre-trial.

- **JURY INSTRUCTION**
  - **CORROBORATION OF SINGLE WITNESS REQUIRED – COCONSPIRATOR'S STATEMENT TO A THIRD PARTY**
    - *Lawrence v. State*, --- Ga. App. --- - A17A0117 – GA Court of Appeals – (Decided June 23, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged and convicted of armed robbery and rape. Prior to the arrest, the Defendant's co-conspirator went to his girlfriend's house and explained what occurred to the girlfriend. The co-conspirator attempted to pass the blame to the Defendant and minimalize the co-conspirator's role in the crime. (Side note: COA determined because he attempted to minimalize his role, the co-conspirator's statement to his girlfriend was for furtherance of the conspiracy). Defendant originally objected prior to the jury instruction that corroboration of a single witness is required if the only evidence was by way of a co-conspirator, however, the Defendant failed to object after the instructions were read and thus has waived the request. The COA now only determines the issue based upon plain error.
      - Holding: Defendant "correctly points out that our Supreme Court has specifically determined that the failure to [give corroboration when an acoompllice is the only witness testifying about an inculpatory fact] may under certain circumstances contiute plain error necessitating a retrial." However, the COA went further and stated there is no direct authority and the Defendant has provided none, "in which our appellate courts have held that an acoomplice corroboration charge must be given when, as here, [co-conspirator's] statement is introduced by another witness and he does not testify at trial." Because OCGA 24-14-8 states, "the only witness is an accomplice" it is no beyond reasonable dispute that corroboration instruction is not applicable when the co-conspirator does not testify. Thus plain error was not committed.
      - Important Note*:* The COA only determined the issue of plain error, because the instruction request was waived when the Defendant failed to object after the jury instructions were given. I believe if properly preserved for appellate review, then if the court finds the only evidence presented was the co-conspirator's statements by way of his girlfriend, it would have been error for the trial court to not give the corroboration jury instruction.

- **VOLUNTARY MANSLAUGHTER – ABSENT PROVOCATION**
  - *Bailey v. State*, --- Ga. --- - S17A0364 – GA Supreme Court – (Decided June 19, 2017)
    - Judgment: (Affirmed)
    - Defendant was charged with murder. The facts allege that Defendant heard a loud noise above his apartment and went upstairs to determine what it was. A confrontation broke out when the residents of the upstairs apartment denied making any noises. The Defendant then stabbed the male and female adults with a knife he brought with him. A child in the apartment called 911. Defendant requested a jury charge on voluntary manslaughter claiming there was some evidence that he was provoked. The trial court denied to give such an instruction.
    - Holding: "When instructing the jury in a murder case, a trial court is required to grant the defendant's request for a charge on the lesser included offense of voluntary manslaughter if there is any evidence, however slight, to support such a charge…And the necessary support for that charge is any evidence that the defendant acted solely as the result of a sudden, violent, and irresistible passion resulting from serious provocation sufficient to excite such passion in a reasonable person." To put it simply, words alone are not sufficient provocation to excite the passion necessary to give rise to voluntary manslaughter. The Court determined that at most the victims had a verbal altercation prior to their stabbing and thus there was not sufficient provocation.

JUVENILE SENTENCING

- **CLASS (B) FELONIES – POSSESSION OF FIREARM IN SCHOOL ZONE**
  - *In the Interest of D.B. a Child*, --- Ga. App. --- - A17A0587 – GA Court of Appeals – (Decided June 05, 2017)
    - Judgment: (Reversed)
    - Defendant is a juvenile and his school administrators located a gun in his locker. He eventually stipulated to bringing the gun to the school and was adjudicated delinquent. The Court designated his crime as a Class (B) felony and sentenced him accordingly. The Defendant later moved to modify his sentence claiming his crimes were not considered a Class (B) felony and the juvenile court should correct this void sentence, which the juvenile court eventually agreed to modify. The State appealed this decision first claiming the juvenile court did not have standing to modify the sentence after the defendant was committed to the custody of the Department of Juvenile Justice. (This was affirmed). The State also appealed claiming that possession of firearm in school zone was actually a Class (B) felony and the trial court properly sentenced him to begin with.

- Holding: "It is clear from the plain language of the relevant statutes that, for purposes of the Juvenile Code, the General Assembly has included within the category of Class-B designated felonies the act of carrying or possessing a firearm in a school safety zone and has further directed that "firearm" includes 'handguns' by making specific reference to the definition of "firearm" in OCGA § 16-11-131." The fact that the statute references OCGA §16-11-131 has no bearing on whether possession of a firearm in a school zone is a Class (B) felony, which is a reference to possession of a firearm by a convicted felon.

- **COURT RETAINS JURISDICTION TO MODIFY A SENENCE OR CORRECT A VOID SENTENCE**
  - *In the Interest of D.B. a Child*, --- Ga. App. --- - A17A0587 – GA Court of Appeals – (Decided June 05, 2017)
    - Judgment: (Affirmed)
    - Defendant is a juvenile and his school administrators located a gun in his locker. He eventually stipulated to bringing the gun to the school and was adjudicated delinquent. The Court designated his crime as a Class (b) felony and sentenced him accordingly. The Defendant later moved to modify his sentence claiming his crimes were not considered a Class (b) felony and the juvenile court should correct this void sentence. The State appealed this decision first claiming the juvenile court did not have standing to modify the sentence after the defendant was committed to the custody of the Department of Juvenile Justice.
    - Holding: The State relied upon several cases that held their position, but those cases were decided under the pre-2013 statute, OCGA 15-11-40(b). That statute no longer apples. The new code, OCGA 15-11-32 replaced the old code and allows modification under certain circumstances. "Under our new Juvenile Code, notwithstanding the fact that a child has been committed to the Department of Juvenile Justice's custody, under OCGA §15-11-602, the juvenile court retains jurisdiction to consider a motion to modify its order when such motion is filed by either the Department or any party under OCGA §15-11-602. That said, OCGA §15-11-602(f) further provides that 'all motions filed under this paragraph shall be accompanied by a written recommendation for release, modification, or termination from a child's DJJ counselor or placement supervisor, filed in the court that committed such child to DJJ, and served on the prosecuting attorney for such jurisdiction."
    - Second Holding: That said, Defendant was not asking for modification, but to correct a void sentence. Void sentences usually pertain to conviction and a delinquency adjudication is not a conviction. However, the COA emphasized that due process must always be adhered to, even

in juvenile proceedings. "[N]ot withstanding the distinction between an adjudication of delinquency and a sentence imposed upon a convicted defendant, it would be an affront to a juvenile's due process rights if a juvenile court could improperly commit a juvenile to restrictive custody but fail to retain jurisdiction to correct what amounts to a void disposition." Thus, juvenile court has the ability to correct a void sentence

- **MENTAL HEALTH**
  - **DEFENSE EXPERT AVAILABLE TO INDIGENT DEFENDANT**
    - *McWilliams v. Dunn, Commissioner*, --- U.S. --- - No. 16-5294 – U.S. Supreme Court by Eleventh Circuit – (Decided June 19, 2017)
      - Judgment: (Reversed)
      - Defendant was charged with Rape and Murder. Prior to trial, Defendant requested a psychiatric evaluation to determine competency and the evaluator found him competent to stand trial. Defendant was found guilty of Murder and the jury recommended death. During the sentencing phase, Defendant requested another neuropsychological evaluation and an expert to help with the defense. The trial court granted the motion and the Defendant was examined by Dr. Goff, who determined that the Defendant had some neuropsychological issues, but was likely exaggerating his systems. Defendant was sentenced to Death. On appeal Defendant argued that he was denied meaningful expert assistance guaranteed to him by Ake v. Oklahoma, 470 U.S. 68 (1985).
      - Holding: "*Ake* clearly established that when certain threshed criteria are met, the state must provide a defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively 'conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.'" Thus in order to provide meaningful expert assistance the State is required to provide the defense with "access to a competent psychiatrist who will conduct an appropriate (1) examination and assist in (2) evaluation, (3) preparation, and (4) presentation of the defense." The expert provided to the defendant merely did an examination and did not help in the preparation or presentation of the defense. "Unless a defendant is 'assured the assistance of someone who can effectively perform these functions, he has not received the minimum to which *Ake* entitles him."

- **MERGER**
  - **POSSESSION OF FIREARM BY CONVICTED FELON – NO MERGER FOR MULTIPLE OFFENSES**
    - *Coates v. State*, --- Ga. App. --- - A17A1098 – GA Court of Appeals – (Decided June 15, 2017)
      - Judgment: (Affirmed)
      - Defendant had a prior felony conviction. A search of Defendant's home located four separate firearms. Defendant was charged with each firearm and upon a guilty conviction, the trial court sentenced him to consecutive terms for each firearm count. Defendant appeals claiming the charges should have been merged because there is some ambiguity in the statute, with the language of "any firearm". COA disagrees.
      - Holding: "We conclude that when the phrase "any firearm" found in OCGA §16-11-131(b) is read in conjunction with the words surrounding it, the phrase clearly was intended to refer to a single firearm rather than multiple firearms." The COA went on to state, "It follows that the unit of prosecution under OCGA §16-11-131(b) is possession of a single firearm, and [Defendant] could be separately punished for his possession of each of the firearms seized from his house."

- **RETROACTIVE FIRST OFFENDER**
  - **NOT AVAILABLE TO CONVICTIONS PRIOR TO JULY 01, 2015**
    - *Bishop v. State*, --- Ga. App. --- - A17A0569 – GA Court of Appeals – (Decided June 06, 2017)
      - Judgment: (Affirmed)
      - Defendant was found guilty of drug possession in 2000. She has subsequently completed her probation. She later learned the conviction was still showing up on her background check and requested that First Offender be retroactively applied pursuant to the new statute, OCGA §42-8-66. The State challenged the request, stating because the conviction occurred prior to July 01, 2015, OCGA §42-8-66 does not apply due to the enacting language in the H.B. 310 states the statute shall apply to sentences entered on or after such date.
      - Holding: "Here, the General Assembly instructed that the Act, including §42-8-66(d), 'shall apply to sentences entered on or after' July 01, 2015, and so we conclude that the petition authorized by OCGA §42-8-66(d) is not available to defendants whose sentences were, like [Defendant's], imposed before that date.
      - Concurring Opinion Judge McFadden: Judge McFadden agrees the enacting language is unambiguous, but writes separately to draw the General Assembly's attention to this issue. He sees "no constitutional

impediment to extending the relief afforded by OCGA §42-8-66 to persons sentenced before July 01, 2015.

- Concurring Opinion Judge Bethel: Judge Bethel also writes separately to draw attention to the General Assembly to this issue. "Any responsible and engaged citizen of Georgia over the last seven years has seen the dramatic transformation of our criminal justice laws and systems. {Defendant] believes she is in the class of people this transformation was intended to positively affect. If so, the General Assembly has work left on this front.

SEARCH AND SEIZURE

THIRD PARTY CONSENT TO SEARCH

- *State v. Holtzclaw*, --- Ga. App. --- - A17A0148 – GA Court of Appeals – (Decided June 08, 2017)
  - Judgment: (Affirmed)
  - Defendant was charged with possession of drugs based upon a search of her house. At the time the original officers came to the house, they did not have a search warrant, but knew the owner of the house was the Defendant. When they knocked on the door, a man came to door claiming to be the cousin of the Defendant opened the door. The cousin told the police that he did not live there, he did not have any keys to the house and the owner would soon be home. The police asked if they could come in to see if anyone else was there, and the man stated, sure but he is not the owner of the house. The police eventually came in, found another person and located a pipe that had marijuana in it. When the Defendant arrived, her cousin was not on the property and the only people on the scene were officers who were coming and going out of her house. They asked Defendant if they could search the house, and she originally said no. They eventually told her that they found a pipe and they would eventually get a search warrant and they would search it soon enough and the second way would not be good for her. She eventually consented to the search. Trial court eventually suppressed the evidence and the State appealed.
  - Holding: "In a case such as this involving a third party's consent to search, the State has the burden to prove not only that consent was voluntary but that the third party had authority over, and other sufficient relationship to, the premises sought to be inspected. To resolve the issue of third party consent, we must determine whether the objective facts available to the officer at the time would warrant a person of reasonable caution to conclude that the third party had authority over the premises. The officer's belief that the third party has authority over another person's property to consent to the search thereof should be

based on information previously obtained in his investigation as well as facts and circumstances existent at the time of the search." In this case, it was clear that the officers were aware prior to arriving that the man who opened the door was not the owner of the home. He explained he does not have any keys to the property and he was not the owner. Thus, the cousin lacked authority to consent to entry of the home. Further, the COA determined the Defendant's eventual consent did not cure anything, because it was involuntary. The officers leveraged, "finding a pipe" that was discovered during the improper search to achieve the Defendant's consent.

- **SPEEDY TRIAL DEMAND**
  - **STATUTORY DEMAND – DEFENDANT WAS INCARCERATED IN ANOTHER STATE**
    - *Gosline v. State*, --- Ga. App. --- - A17A0618 – GA Court of Appeals– (Decided June 13, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged with aggravated battery/assault. Prior to the return of the indictment, Defendant was incarcerated in Michigan on unrelated charges. Defendant filed a speedy trial demand based upon OCGA § 17-7-170, however, he was incarcerated in Michigan for the both the current term of court and the proceeding term of court. After the two terms of court passed, Defendant filed a plea in bar for discharge of the charges, but the trial court denied the request and this appeal results. In regards to his being available for trial, Defendant asserts he would have waived his presence at trial if only given the opportunity to make the assertion.
      - Holding: There is no dispute that Defendant was incarcerated in Michigan during both terms of court. "Under the [speedy trial] statute, two circumstances must coexist before discharge occurs: two terms of juries impaneled and qualified to try defendant, and the availability of defendant…Where the accused is in the custody of a different sovereign and the Interstate Agreement on Detainers Act does not apply, the accused is not available for trial 'because [t]here is no inherent authority in a court of this state to compel an accused's presence or in-court attendance where such defendant is incarcerated by or in the control of a different sovereign.'"
      - Important notes: There are a couple of other issues: (1) The Defendant never asserted in his original filing that he was waiving his presence at trial. Thus the COA determined, since he never asserted this originally that he cannot come back later and claim he would have done something. So it appears he could have waived his presence, but needed to take

affirmative steps to make his assertions know to the court. (2) The COA states in the last paragraph, "Under the circumstances, we conclude that [Defendant's] incarceration in Michigan **extended the time** for his speedy trial demand." (emphasis added) The COA cited McIver v. State, 205 Ga. App. 648 (1992). In McIver, the court explains that the terms of court does not begin to run until after the incarceration in another state concludes and the Defendant is then "available" for trial.

- **STATUTE OF LIMITATIONS**
  - **ANNIVERSARY IS TOO LATE**
    - *State v. Dorsey*, --- Ga. App. --- - A17A0108 – GA Court of Appeals – (Decided June 14, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged with several misdemeanors pertaining to offenses that occurred on May 30, 2012. Defendant was a deputy at the courthouse and he restrained a couple of females against their will when their phones went off in an adjoining office and eventually exposed himself and tried to touch them on their butt and breast. The State filed an indictment charging Defendant with the crimes on May 30, 2014, exactly two years to the day on the anniversary of when the alleged crimes took place. Defendant filed a plea in bar claiming the statute of limitation had run. The trial court granted the plea in bar and the State appealed.
      - Holding: The Defense and the COA relied upon McClendon v. State, 14 Ga. App. 274 (2014). When determining the statute of limitations, if the statute is compiled in days, then the first or the last day will not be counted. However, when the statute is compiled in months or years, then the first and last day is counted. Thus, as *McClendon* held, the statute of limitations for misdemeanors and felonies are compiled in years, and the accusation filed on the second anniversary for misdemeanors is one day too late. The COA went on to explain that OCGA §1-3-1 does not apply to the statute of limitations.

- **STREET GANG TERRORISM ACT**
  - **ADMISSIBLE EVEN IF NOT CHARGED**
    - *Davis v. State*, --- Ga. --- - S17A0176 – GA Supreme Court – (Decided June 19, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged with Murder and Armed Robbery. Defendant was not charged with violating the street gang terrorism act. During trial, the State introduced evidence of Defendant's affiliation with a street

gang (ABT) by way of tattoos and a text message stating his street name is "ABT Stunna".

- Holding: "There is no requirement that the State charge a defendant with violating the prohibition of participation in criminal street gang activity in OCGA 16-15-4 in order to admit otherwise relevant evidence of gang activity." Further all relevant evidence shall be admissible pursuant to OCGA 24-4-402 and as the Court has previously held, "exclusion of relevant evidence under Rule 403 'is an extraordinary remedy that should be used only sparingly.' Davis v. State, 299 Ga. 180, 189 (2016); Olds v. State, 299 Ga. 65, 70 (2016)." The Court found it relevant for purposes of identification.

- **NEXUS – LACK THEREOF**
  - *In the Interest of W.B.*, --- Ga. App. --- - A17A0441 – GA Court of Appeals – (Decided June 05, 2017)
    - Judgment: (Reversed)
    - Defendant along with two co-defendants were arrested for a prior burglary and they were eventually also charged with violating Georgia's Street Gang Terrorism Act. Defendant along with his co-defendants stipulated they committed the burglary, but denied violating the street gang terrorism act. Juvenile Court adjudicated all three delinquent on both charges and Defendant appeals. During the court hearing, the State presented evidence that Defendant's facebook photos shows him holding guns, cash, and gang signs; that he had previously admitted to a school disciplinary committee that he was a gang member; and that they were wearing similar clothing of the gangster disciples. The State did not introduce any testimony on how the crime of burglary furthered the gang.
    - Holding: "To sustain [Defendant's] conviction under OCGA §16-15-4(a), the State was required to prove 'something more than the mere commission of a crime by gang members.' Instead, the State had to prove the existence of a nexus between the burglary and an intent to further street gang activity…Put another way, to prove a violation of OCGA §16-15-4(a), it is 'essential' that the State demonstrate that the commission of the predicate act was intended to further the interest of the gang." Even though the State potentially showed the Defendant was a gang member, they failed to show a nexus between the crime of burglary and how it related to further a gang interest.
    - IMPORTANT NOTE**:** The opinion sets out several ways with cites of how the State could have showed a nexus between the crime and the gang: (1) gang received a benefit or commission from the crime; (2) crime was done in retaliation for some act or insult, (3) crime was

committed in a highly visible manner to allow witnesses to know which gang committed the crime; (4) evidence that the purpose of the crime was to establish, reinforce, or enhance the gang's reputation; (5) gang members referenced a particular incident on social media so as to establish that gang was responsible for a specific crime to enhance the gang's reputation; or (6) evidence of social media posts that a gang member perpetrated the crimes so as to promote himself within the gang hierarchy.

- **THEFT BY TAKING**
  - **AGGREGATE AMOUNT TAKEN FROM THREE OR MORE STORES WITHIN SEVEN DAYS**
    - *Wallace v. State*, --- Ga. App. --- - A17A0051 – GA Court of Appeals – (Decided June 06, 2017)
      - Judgment: (Affirmed)
      - Defendant was charged with theft by shoplifting for taking items from three or more stores with an aggregate value of greater than $500. The indictment did not allege the thefts occurred within a 7 day period. At trial he was found guilty and sentenced to 10 years prison as a recidivist. He now appeals claiming that the indictment was defective, because it failed to allege the material fact that "the offenses occurred within a 7 day period." The indictment did allege the offenses occurred "on or about the day of May 27, 2014", which all the offenses occurred.
      - Holding: "Even assuming without deciding that the date was a material averment of Count 3 of the indictment and the State had to prove that the aggregate shoplifting offenses happened within a seven-day period or less, that period of time was sufficiently alleged in the indictment here by saying that the crimes occurred 'on or about' May 27, 2014." The COA went further and explained *Apprendi* does not apply, because the sentence was not extend punishment beyond the range supported by the jury's verdict.

INDEX OF CASES SUMMARIZED