



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, January 20, 2015

10:00 A.M. Session

WELDON V. THE STATE (S14G1721)

A man is appealing a Georgia Court of Appeals decision that upheld his armed robbery convictions in **Gwinnett County**, arguing he was denied a fair trial because the judge made him wear an electronic shock belt to prevent him from escaping.

FACTS: According to the evidence at trial, between March 5 and March 26, 2007, Brian Eugene Weldon held up five Chinese restaurants and one store, where he robbed at gunpoint a number of Chinese employees. In all the robberies, Weldon was accompanied by at least one other man, and in the first robbery, by two others. The victims of each robbery identified Weldon either in photographic lineups or at trial as one of their assailants. When police obtained a warrant and arrested Weldon, he initially gave his brother's name. When police showed him the videotape of the robbery at the Georgia Cellular store, he admitted he'd been there, but claimed the other man in the video had forced him to participate. At trial, the State introduced "similar transaction evidence" of three other armed robberies during the same month of Chinese restaurants in DeKalb County involving co-defendants, one of whom pleaded guilty and testified he'd robbed one of the restaurants with Weldon.

On the first day of Weldon's trial, prior to the jury coming in, the judge addressed Weldon, telling him, "not only at previous hearings but also today, I see you looking around a

lot.” The judge said he’d observed Weldon looking at the door rather than paying attention to what was happening up front. The judge noted that Weldon faced a significant risk of a life prison sentence for any one of the 12 counts of armed robbery against him, plus a 40-year sentence from DeKalb County. As a result, the judge said, “the court finds that it is necessary in order to conduct a safe and orderly trial in this matter without you making a go for the door, which it appears to me that you may be considering based on your looking to the door more than you look up here, that I am going to have you with an electronic belt on....” The judge told him the belt would not be visible to jurors and Weldon could move around the courtroom without activating the device. Initially Weldon refused to wear the belt, but when the judge told him he would proceed with the trial without Weldon being present, Weldon agreed. Prior to placing the BAND-IT brand shock sleeve on him, a courtroom deputy read Weldon a notification form that explained the system contained 50,000 volts of electricity, and if activated, the device would immobilize him, cause him to fall to the ground and could cause him to defecate or urinate on himself. The deputy also told him that once the deputy pressed the button on the transmitter, the device would emit a one-second high-pitched beep before the shock, which could be prevented by releasing the button if the wearer complied with the deputy’s demands.

At the conclusion of his trial, Weldon was convicted of 12 counts of armed robbery, aggravated assault and giving a false name to a law enforcement officer. He appealed to the Georgia Court of Appeals, which upheld the trial court’s ruling, stating in its opinion that the Georgia Supreme Court “has held that a trial court has discretion to require a defendant to use a remote electronic security device worn under clothing and not visible to jurors if the use of the device is warranted and the defendant fails to show that he was harmed by its use.” Weldon now appeals to the state Supreme Court, which has agreed to review the case to determine what circumstances and procedures should govern the use of a non-visible shock device during a trial.

ARGUMENTS: Weldon’s attorney argues the trial court violated Weldon’s sixth amendment and due process rights when on its own, and without justification, it required him to wear the device. “The trial court abused its discretion and committed reversible error by failing to carefully address and balance the proper considerations before compelling [Weldon] to wear a shock or stun device in order to be present at, and to participate in, the trial of his case,” the attorney argues in briefs. At the hearing regarding his motion for a new trial, Weldon testified that he was unable to focus on jury selection or during witnesses’ testimony because he was worried about activating the device. As a result, he could not assist his attorney in making his case. His constitutional right to have legal representation, includes “not only the benefit of counsel, but the right to confer with that counsel, the right to be present at trial, and the right to participate in one’s own defense,” Weldon’s attorney argues. The attorney cites the 2002 decision in *United States v. Durham*, in which the U.S. Court of Appeals for the Eleventh Circuit said such devices pose constitutional concerns. The *Durham* court ruled that the decision to use an electronic device during trial must be subjected to close judicial scrutiny, and that trial courts must make factual findings about the devices, place the rationale for their use on the record, and consider less restrictive methods of restraint. Weldon’s attorney argues that based on the *Durham* decision and the facts of this case, the use of the device was harmful error, and he notes the trial attorney’s strong objection and his statements that Weldon had no intention of fleeing or disrupting proceedings. “When faced with the decision to compel a defendant to wear a shock or stun device during a criminal trial, a trial court is faced with a myriad of considerations, ranging

from constitutional protections afforded to every defendant, to arguably lesser concerns, such as the decorum of the courtroom,” the attorney states. Here, the trial judge mentioned only two concerns as the basis for requiring Weldon to wear the shock device: that Weldon was facing a possible lengthy prison sentence and that he was “looking around” the courtroom. “With that in mind, the trial court implied that [Weldon] may be a risk to escape, despite there being no evidence to otherwise support such contention,” the attorney argues.

The District Attorney, representing the State, argues that the safety of a criminal courtroom is a trial court’s primary consideration and a “compelling state interest.” “There is a long-standing history in Georgia, as well as [in] several states and federal circuits, that personal Constitutional rights must yield to issues of public safety and security,” the State argues. “Once it is determined that the safety of the court and public require a defendant wear a control device, the court should then weigh the need for such control against the defendant’s right to a fair trial.” The State notes, however, that the Georgia Supreme Court “has never required that the trial court make specific, on the record findings regarding the belt’s operation, consideration of alternative methods of restraint, and make further findings on the record that the use of the device is necessary in that particular case.” In its brief, the State lays out the considerations it believes should govern the decision of whether to require a defendant to wear an electronic shock device during trial. The State recommends a test that weighs: First, the safety and security of the courtroom, including the risk of flight of the defendant, the defendant’s prior criminal history, and the potential sentence in the present case. Another consideration would be the trial court’s right to try cases according to its docket, including attempts to delay trial by the defendant. A third consideration would be the right of the defendant to a fair trial, and considering whether the restraints are an impediment to a fair trial by virtue of being visible to the jury or restrictive of the defendant’s movement in the courtroom. The State points out that despite the *Durham* decision, unlike the use of visible shackles, the use of a stun or shock belt has been held to be less restrictive by a number of courts due to its invisibility during trial. “In reviewing the transcript and applying the facts to the stated test, it is clear that the trial court did not abuse its discretion in this case,” the State contends, urging this court to adopt its proposed test.

Attorney for Appellant (Weldon): G. Richard Stepp

Attorneys for Appellee (State): Daniel Porter, District Attorney, Christopher Quinn, Asst. D.A., Tom Williams, Asst. D.A

ALEXANDER V. THE STATE (S14G1762)

A man is appealing a lower court’s refusal to let him withdraw his guilty plea to aggravated child molestation charges, arguing that his trial attorney failed to tell him that under the law, he would be ineligible for parole.

FACTS: Calvin Alexander was indicted by a **Fulton County** grand jury on three counts each of aggravated child molestation, child molestation, statutory rape and enticing a child for indecent purposes. According to the indictment the offenses involving minors allegedly occurred between Jan. 1, 2005 and June 30, 2006. A jury trial began in March 2011, but before jury selection was completed, Alexander agreed to plead guilty. At the plea hearing, he stated he believed the plea was in his best interest, and he understood the sentence would be decided by the judge. After he pleaded, the judge sentenced Alexander to 30 years with 15 to be spent in prison and the other 15 on probation.

Under state law, aggravated child molestation is one of the offenses that is ineligible for parole. However, Alexander's attorney neglected to tell him before he pleaded guilty that he would have to spend every day of the 15 years in prison, with no chance he could get out early on parole. In April 2011, Alexander – representing himself (“pro se”) – filed a motion asking to withdraw his guilty plea. He argued he received “ineffective assistance of counsel” in violation of his constitutional rights because his attorney failed to advise him that his guilty plea would render him ineligible for parole. At the hearing on his motion, his trial attorney testified he did not remember telling his client that he would not be eligible for parole if he pleaded guilty. He had told Alexander he suspected his sentence would be longer than what the State initially had proposed, which Alexander had rejected. Alexander testified at the motion hearing that he would not have entered a guilty plea had he known he would be ineligible for parole. He also testified he had decided to plead guilty because he had doubts about whether his lawyer was prepared for trial and because the judge had told him she'd sentence him to 60 years if the jury found him guilty. At the end of the hearing, the trial court denied Alexander's motion to withdraw his appeal, finding that Alexander's plea “was knowingly, voluntarily, and intelligently entered with the competent advice of counsel.” Alexander then appealed to the Georgia Court of Appeals, which upheld the ruling, stating it was “constrained to apply” the Georgia Supreme Court's 1999 decision in *Williams v. Duffy*.

At issue in this case is the *Williams* decision, as well as a later 2010 decision by the U.S. Supreme Court, *Padilla v. Kentucky*, and the difference between “collateral consequences” and “direct consequences.” In *Williams*, the Georgia Supreme Court held that a trial attorney's failure to inform a defendant entering a guilty plea that he would be ineligible for parole does not constitute ineffective assistance of counsel because parole ineligibility is a “collateral consequence” as opposed to a “direct consequence.” Direct consequences are described as those within the authority of the trial court, such as sentencing a defendant, as opposed to the many collateral consequences over which the trial court has no control, such as parole eligibility – which is controlled by the legislature and the Georgia Board of Pardons and Paroles – sex offender registration, deportation, parental rights, the right to own a firearm, and others. In its 2010 decision in *Smith v. State*, the Georgia Supreme Court ruled that “before a defendant pleads guilty, the trial court must advise him of the ‘direct’ consequences of entering the plea, but not of all the potential ‘collateral’ consequences, in order for the guilty plea to be considered knowing and voluntary.”

Under *Padilla v. Kentucky*, the U.S. Supreme Court ruled that a trial attorney performs deficiently if he/she fails to advise a client that entering a plea would result in automatic *deportation*. In his appeal, Alexander argued that under *Padilla*, the Court of Appeals should have ruled that the failure of Alexander's trial attorney to inform him of the collateral consequence of parole ineligibility constitutes deficient performance. Specifically, Alexander argued that *Padilla* held that the collateral consequences doctrine applies only where a defendant's motion to withdraw his guilty plea is based on a claim that the plea had not been made knowingly or voluntarily, but it does not apply where such a motion is based on a claim of ineffective assistance of counsel, which is what Alexander is claiming. In upholding the trial court, the Court of Appeals nevertheless stated it found that “Alexander's argument as to the inapplicability of the collateral consequences doctrine to an ineffective assistance of counsel claim has significant support in the law.” But “we are constrained to apply *Williams* and find that

because parole ineligibility is a collateral consequence of a guilty plea, Alexander cannot prove that his trial counsel performed deficiently by failing to discuss that consequence with him.” Alexander now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether *Williams v. State* remains “good law” or should be overruled.

ARGUMENTS: Alexander’s attorneys urge the state Supreme Court to overrule *Williams* and reverse the lower court. “Cecil Alexander had a constitutional right to effective counsel who needed to inform him that pleading guilty to aggravated child molestation charges would render him ineligible for parole,” they argue in briefs. Quoting the *Padilla* decision, the attorneys argue, “It is our responsibility under the Constitution to ensure that no criminal defendant...is left to the mercies of incompetent counsel.” In its 2010 decision in *Smith*, the Georgia Supreme Court effectively overturned the reasoning in *Williams*, noting that in *Padilla*, the nation’s high court “specifically declined to rely on the direct versus collateral consequences doctrine in determining the ineffective assistance claim presented.” An attorney’s deficient performance “should be judged on whether counsel’s actions ‘fell below an objective standard of reasonableness’ – *not* on whether counsel advised the client about direct or collateral consequences,” Alexander’s attorneys argue. Here, “the record supports the assertion that plea counsel’s performance was deficient and a reasonable probability exists that but for the deficiency, Mr. Alexander would have proceeded to trial instead of pleading guilty.” Alexander’s attorney argues that the collateral consequences doctrine applies only where a defendant’s motion to withdraw his guilty plea is based on a due process claim that the plea was not knowing or voluntary and that it cannot apply where such a motion is based on a claim of ineffective assistance of counsel. The Court of Appeals failed to make the distinction. Because *Williams* incorrectly merges due process analysis with ineffective assistance of counsel analysis, “it is no longer good law,” the attorneys argue.

The State argues that if *Padilla* continues to be misinterpreted, “we place upon our attorneys the exact same burden deemed ‘unrealistic’ for our trial courts ‘of having to determine, before accepting each guilty plea, all of the potential important consequences of the plea to the particular defendant appearing before the court.’” The state Supreme Court should “appropriately narrow” the impact of *Padilla*. “The *Padilla* court expressly crafted a narrow holding only pertaining to deportation, recognizing that ‘deportation is a particularly severe ‘penalty’” which is ‘most difficult to divorce’ from the conviction,” the State argues. “Alexander fails to recognize that the *Padilla* court went to great pains to emphasize that deportation was uniquely difficult to classify as either a direct or collateral consequence.” Parole eligibility clearly differs from deportation consequences. “As a starting point, it cannot be said that the inability to be considered for early release is a ‘severe penalty’ in the same way that deportation is,” the State argues. “In contrast, the eligibility to be considered for parole is not a consequence which extends beyond the sentence, but one that may merely shorten it.” Deportation, on the other hand, is a consequence over and above the sentence imposed by the court. Parole ineligibility does not lengthen a sentence “but is merely a legislatively imposed collateral effect on a sentence, and there is no requirement that a defendant be informed of such a collateral consequence.” Even if the state Supreme Court overrules *Williams*, Alexander still does not have a legitimate claim that he received ineffective assistance of counsel as he must show not only that his attorney was deficient, but that were it not for the deficiency, there likely would have been a different outcome in his case. The facts against Alexander were very strong. Had the case

gone to trial, multiple victims would have testified about how Alexander had victimized them. “This demonstrates that Alexander would not have insisted on continuing with his trial,” the State argues. “Therefore, he has not been prejudiced.”

Attorneys for Appellant (Alexander): Kenneth Kondritzer, T. Natasha Crawford

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Lenny Krick, Sr. Asst. D.A.

ESHLEMAN V. KEY (S14G1173)

A **DeKalb County** police officer is appealing a Georgia Court of Appeals ruling that the lawsuit against her can proceed to trial. She argues she cannot be held liable for injuries suffered by a neighbor’s son when her police dog bit him because she is protected by official immunity.

FACTS: In November 2011, 11-year-old Chandler Key was playing football in the front yard of his neighbor’s home when he was bitten by a police dog. The dog, a “suspect-apprehension canine,” was owned by the DeKalb County Police Department and assigned to Officer Lynn Eshleman after she completed canine handler school. Under department policy, canine handlers were responsible for the care and maintenance of the dogs. Eshleman, who lived in Key’s neighborhood, began taking the dog, named Andor, home with her. After noticing that neighborhood children were peering over the fence into her yard, Eshleman spoke with them and their parents, cautioning them not to look over the fence because the act antagonized Andor. She also warned them that if they “ever...see him out, he happens to escape the fence or something, to just stand still.” When she was later asked what it was about the children’s actions that could put them in danger, Eshleman replied, “Well, when you run, you become prey to a dog.”

On Nov. 6, 2011 Eshleman, who was off-duty, was preparing to take Andor with her to visit a friend. She placed the dog in a kennel in the back of the truck, swung the door of the kennel shut and “assumed” it was closed. But she had neglected to secure the crate’s door. When she stepped away to retrieve a water bottle, Andor jumped from the truck and ran into the yard where the boys were playing. As Key tried to run away, the dog chased him, latched onto his arm and dragged him to the ground.

Key’s father sued Eshleman, alleging she was liable for negligence because she had failed to properly restrain the canine. According to Chandler’s father, the boy suffered a gaping laceration and puncture wound and had to be treated at the hospital with injections and stitches. Scars remain clearly visible. The boy has also suffered mental trauma, his father claims. In response, Eshleman argued she was entitled to official immunity because in caring for the canine, she had been performing her duties as a police officer. Eshleman admitted she had not securely closed the door of the kennel and that the canine had gotten out of her truck. She did not deny that the dog then bit Key. However, she argued Key could not recover damages because of the official immunity. Eshleman filed a motion for “summary judgment,” which a trial judge grants upon concluding there is no need for a jury trial because the facts are undisputed and the law clearly falls on the side of one of the parties. The trial court, however, denied her motion. Eshleman then appealed to the Court of Appeals, which upheld the trial court’s ruling.

At issue in this case is the difference between “discretionary” and “ministerial” duties. Discretionary acts are those requiring personal deliberation, decision-making, and judgment. Ministerial duties, on the other hand, are absolute and involve merely the execution of a specific task or direction. Under the doctrine of public official immunity, officials are afforded greater

protection when they are faced with a situation that requires them to make a judgment call, so that they can make that decision without fear of being sued. They are offered less protection when they are performing simple, automatic tasks governed by clear rules. Under the Georgia Supreme Court's 2013 decision in *Roper v. Greenway*, county law enforcement officers such as Eshleman are entitled to official immunity for the negligent performance of discretionary acts within the scope of their authority, but they may be personally liable if they negligently perform a ministerial act.

While the Court of Appeals agreed with Eshleman that her actions at the time of the incident in caring for and maintaining Andor were within the scope of her official authority, "she has not shown that the act from which the alleged liability arose – proper restraint of the canine by securely closing the kennel door – was discretionary." Furthermore, the Court of Appeals found, there was some evidence that Eshleman's duty to properly restrain the dog was ministerial. The appellate court held that a ministerial duty may be established by a statute, and under Georgia Code § 51-2-7, a person may be liable for failing to properly restrain a "vicious or dangerous" animal. "Because Andor was a police canine, specially trained to apprehend suspects, there was some evidence that 'the animal had a propensity to do the act which caused the injury and that the defendant knew of it,'" the Court of Appeals opinion says. "Where the relevant facts pertaining to official immunity are in dispute, resolution of the factual issues is for the jury." Eshleman now appeals to the state Supreme Court, which has agreed to review the case to determine whether the Court of Appeals was wrong in ruling that § 51-2-7 creates a ministerial duty in this case.

ARGUMENTS: Attorneys for Eshleman argue the statute does not create a ministerial duty that directed her to secure her canine in any specified way. Rather the duty is (1) not to engage in "careless management of the dog;" and (2) not to allow the animal "to go at liberty." "That is the extent of the duty," the attorneys argue. The statute does not "specifically direct" how a canine police officer, or any individual, is to secure a dog in her personal vehicle, official vehicle, or any vehicle, the attorneys argue. "It does not state how kennel doors are to be secured. It does not state the type of kennel that is to be used. This statute does not create a 'specific duty' as to how one is to secure a dog in a kennel in their private vehicle. This statute does not create a specific duty; it creates a cause of action in negligence. And immunity exists for the very purpose of preventing an officer from undergoing suit to defend a case in negligence, unless the negligent act is contrary to a *specific mandate about the execution of a specific act.*" In other words, the statute "does not create a ministerial act." Because it does not create a clear duty as to how Officer Eshleman was to secure the dog, she had discretion in how the dog was to be secured. Eshleman also argues that the Court of Appeals decision is inconsistent with the state Supreme Court's 2013 ruling in *Roper v. Greenway*, and if the opinion is allowed to stand, officers in similar cases will not be protected by immunity. "By holding that the larger, broader duty – not to allow a dog to roam loose – creates a more specific statutory duty to latch the kennel door in a specified manner, the Court of Appeals has placed any action where there is a general statutory duty beyond the scope of immunity," her attorneys argue.

"Because this statute, in concert with local ordinances, has a clear directive and creates a specific duty to properly restrain one's dog, the conclusion drawn by the Court of Appeals is correct and should be upheld," Key's attorneys argue in briefs. "Official immunity is meant to provide public employees with the opportunity to do their job without fearing that choices

requiring substantial thought, deliberation, and judgment will later be scrutinized and result in a civil action against them.” A number of local ordinances require owners to keep their animals under control and under restraint, “especially animals with the vicious propensities of a trained attack dog.” “There is no proverbial grey area,” the attorneys argue. “There is no wiggle room.” The statutes “create a simple, absolute, and definite duty to secure Andor which Eshleman did not fulfill. As a result, the trial court and the Court of Appeals correctly rejected her assertion of official immunity, and their decisions should be upheld.” The Court of Appeals ruling is also consistent with prior rulings, including *Roper*, the attorneys argue.

Attorneys for Appellant (Eshleman): Duane Pritchett, Kendrice Smith

Attorneys for Appellee (Key): Andrew Jones, M. Chase Swanson

THE STATE V. EASTER (S14G1628)

The State is appealing a Georgia Court of Appeals decision that reversed a man's conviction for the aggravated assault of his girlfriend. The appellate court ruled that the trial judge erroneously instructed the jury that the crime could be committed in a manner that was not alleged in the indictment.

FACTS: Andra Easter and DeShawn Coatney lived in her trailer in **Richmond County** for about 18 months until the couple broke up in January 2006. Evidence at trial showed that after Easter moved out, she called police at least three times because Easter showed up uninvited and refused to leave. She changed the locks several times after he tried getting inside. An officer with the Richmond County Sheriff's Department testified that he responded to a call in February 2006 in which Coatney said Easter had broken the screen door to get in. The officer noted the door had been damaged. Another officer testified that on Feb. 17, 2006, he too responded to a call in which Coatney reported Easter had followed her home from work, rammed her car with his, then tried to break her car window with a crowbar. That officer also observed damage to the car. The same night, someone broke a front window at Coatney's home. Before she left for work the following night, Coatney covered the break with the curtains. When she later returned in the early morning hours of Feb. 19, she noticed the curtains had been disturbed. Afraid Easter was in the home, she grabbed her gun and began to search for him, eventually finding him hiding under a bed. When he came out, she noticed he was wearing rubber gloves and holding a crowbar. She said that as she backed out of the room, he moved toward her, holding up the crowbar. Fearing he was about to attack her with the crowbar, Coatney shot at him twice. Wounded, Easter fled and Coatney called police. Officers found Easter in the woods nearby and arrested him. He was later charged with burglary and aggravated assault.

Easter testified in his own defense that he'd entered Coatney's home through the broken window but had gone to the home after hearing of the break-in, saying he had property there and was afraid the burglars would return. After hearing a noise, he said he retrieved a crowbar from his car for protection. He decided to stay there until Coatney returned to protect her and their property. Easter said he chose to stay in the bedroom so he wouldn't startle her.

At issue in this appeal is the instructions the judge gave jurors about the law before they went out to deliberate. When charging the jury on both burglary and aggravated assault, the judge read the relevant Georgia Code sections in their entirety. Regarding aggravated assault, he told the jury that a "person commits...aggravated assault when that person assaults another person with a deadly weapon or with any object, device or instrument which, when used

offensively against a person, is likely to or actually does result in serious bodily injury." The indictment, however, charged Easter with committing an aggravated assault on Coatney "with a crowbar, an object which when used offensively against another person is likely to result in serious bodily injury." The indictment did not mention a "deadly weapon." After reading the statute to jurors, the judge went on to instruct them that the crowbar "is not a deadly weapon per se, but may or may not be used as a deadly weapon depending upon the manner in which it is used." The judge said it was for the jury to decide whether the crowbar in this case "did in fact constitute a deadly weapon or a weapon likely to cause serious bodily injury." The judge also instructed the jury that the State had the burden of proving every allegation in the indictment beyond a reasonable doubt. Easter's defense attorney did not object to the judge's instructions. However, when the jury asked for a copy of the law defining aggravated assault and burglary, the defense attorney noted for the first time that the indictment had not charged Easter with committing aggravated assault by use of a deadly weapon. Noting that the jury had already been deliberating for an hour, the judge said he could not "unring the bell" and feared confusing the jury if he pointed this out. He subsequently recharged the jury using the original instructions but noted the defense attorney's objections for the record.

The jury found Easter guilty of burglary and aggravated assault and he was sentenced to 13 years on each count for a total of 26 years, with the first eight to be spent in confinement and the remainder on probation. Easter appealed, and while the Court of Appeals upheld his burglary conviction, it reversed his aggravated assault conviction and threw out that sentence, finding that the jury charge violated his due process rights because it resulted in a "reasonable probability" that the jury convicted Easter of committing aggravated assault in a manner not charged in the indictment. The State now appeals to the state Supreme Court.

ARGUMENTS: The District Attorney, representing the State, argues the Court of Appeals should not have reversed Easter's aggravated assault conviction. "The Court of Appeals decision focused on the fact that under the trial court's instructions, the jury could have convicted (Easter) of using an *offensive* weapon, as indicted, or a *deadly* weapon, which was not indicted," the State argues in briefs. "This reasoning ignores the precedent set in *Green v. State* (2012)," a case involving a man convicted of strangling two women while raping them. In *Green*, the trial court instructed the jury that "although hands are not deadly weapons per se," they "may or may not be deadly weapons depending upon the manner in which they are used and the circumstances of the case." In that case, just as in this one, the defendant argued that the jury instruction set forth an alternative method of committing aggravated assault. But the state Supreme Court rejected the argument, finding that in charging the jury that Green strangled the victims "with his hands, instrumentalities which, when used offensively against a person, are likely to result in serious bodily injury," the "indictment thus alleged that (Green) used his hands as deadly weapons. We therefore find no error in the jury charge." "The language used in the indictments and jury instructions in *Green* and (Easter's) case is almost identical," the State argues. Easter is "splitting hairs by emphasizing a false distinction between aggravated assault with a 'deadly weapon' and aggravated assault with a weapon 'likely to result in serious bodily injury.'"

Easter's attorney argues the Court of Appeals correctly held that the trial judge's jury instruction was in error. The Fifth Amendment of the U.S. Constitution states that, "No person shall be held to answer for a capital, or otherwise infamous, crime unless on a presentment or indictment of a grand jury." "If a jury charge recites the entire definition of a crime and the

indictment does not, the expansion of the indictment violates the defendant's due process rights by putting him at risk for conviction of a criminal act that was not properly alleged in the indictment," Easter's attorney argues in briefs. In its 1999 decision in *Harwell v. State*, the Georgia Supreme Court ruled that a trial court commits error when the judge defines the crime as an act which may be committed in a manner other than the manner alleged in the indictment. "Because Easter was never indicted for committing aggravated assault with a 'deadly weapon,' the jury should not have been instructed to determine whether the crowbar was a 'deadly weapon' to begin with," Easter's attorney argues. "And, because the trial court's instruction on that inquiry provided a different analysis, it thus provided an alternative method for convicting Easter of aggravated assault." The error is "compounded by the fact that Easter brought the issue to the court's attention, and *after recognizing that the charges were flawed*, the trial court nevertheless recharged the jury with the erroneous instructions," Easter's attorney contends.

Attorneys for Appellant (State): R. Ashley Wright, District Attorney, Amanda Heath, Asst. D.A., Madonna Little, Asst. D.A.

Attorney for Appellee (Easter): Christopher Geel

2:00 P.M. Session

NEUMAN V. THE STATE (S15A0011)

In this high-profile **DeKalb County** case, Hemy Neuman is appealing his murder conviction and sentence to life without parole, arguing in part that his conviction should be reversed because his lover, Andrea Sneiderman, lied about their affair on the stand.

FACTS: According to the State's case at trial, on Nov. 18, 2010, shortly after 9 a.m., Russell "Rusty" Sneiderman dropped off his 3-year-old son at the Dunwoody Prep Daycare. Before he got back to his car, Neuman, donning a bearded disguise, approached Sneiderman in the parking lot and with a recently purchased .40 caliber handgun shot Sneiderman four to five times in the neck and torso. Despite the efforts of bystanders and ambulance personnel to save Sneiderman, several of the gunshot wounds were fatal to the 36-year-old father of two. Witnesses described a middle-aged man with a fake beard as the gunman, and a silver or grey Kia Sedona minivan as the getaway car. Investigators discovered that Neuman had rented a silver Kia Sedona the day before the murder and returned it only hours later. Fibers consistent with a costume wig were found in the van. Once police learned of the rental car connection, and found Neuman had worked closely with the victim's wife, Andrea Sneiderman, at General Electric, they began taking a close look at Neuman as a suspect. Investigators found evidence of an ongoing affair between Neuman, a married man with children, and Andrea Sneiderman. Specifically, law enforcement discovered that the two shared a hotel room together while out of town, were seen kissing at a nightclub on a separate out of town trip, and had exchanged emails of a very personal and romantic nature. Neuman had declared his love for Sneiderman, and repeatedly asked her to marry him. In the months before the murder, Neuman moved out of the house he had shared with his wife of 22 years, and confided in friends that he was having an affair with a married woman named Andrea but that she would not leave her husband.

Investigators also discovered that a few weeks before the shooting, Neuman had bought a gun and a box of hollow point bullets from a private seller he found on the Internet. He had gone

to a firing range to practice shooting. After the murder, Neuman contacted the young man who had sold him the gun and told him “something bad” had happened with the gun, and he had tossed it into Lake Lanier where no one could find it. He offered the young man money to lie if approached by police and advised him to never get a mistress. When questioned by police, Neuman said he was at work at the time of the murder, and he denied having a sexual relationship with Andrea Sneiderman or owning a gun. However, surveillance video from his office showed he had arrived very early the morning of the shooting in the rented minivan, left shortly after and returned to the employee garage after the time Sneiderman was shot.

While Neuman initially pleaded not guilty, shortly before trial, he changed his plea to not guilty by reason of insanity. Two medical experts testified on his behalf, and both concluded that at the time of the murder, Neuman was unable to distinguish between right and wrong due to a mental illness diagnosed as Bipolar disorder with psychosis. But two medical experts who testified for the State – Dr. Pamela Crawford and Dr. William Brickhouse – concluded that Neuman had been able to distinguish between right and wrong at the time he shot Sneiderman and that the symptoms and behaviors he reported were inconsistent with mental illness. In Crawford’s opinion, Neuman was “malingering,” or faking symptoms of mental illness.

In March 2012, the jury found Neuman guilty but mentally ill of Malice Murder and Possession of a Firearm During the Commission of a Felony, and he was sentenced to life in prison with no chance of parole. He now appeals to the state Supreme Court.

ARGUMENTS: Neuman’s attorney argues the trial court made four errors, including its failure to void the State’s subpoenas of Dr. Peter Thomas and Dr. Julie Rand Dorney, defense consultants whose work was covered by attorney-client privilege. The State subpoenaed the records after learning the two mental health professionals had visited Neuman at the DeKalb County Jail. And in spite of the fact that the defense had no plans to call them as witnesses, “the State and the lower court took the unprecedented step of requiring defense consultants to turn over their files” for the judge to inspect their contents before the judge ultimately turned them over to the State. “Because the assertion of an insanity defense does not carry a blanket waiver of all privilege with respect to mental health records, particularly those used by counsel in the preparation of a defense to a murder charge, the lower court erred in its refusal to quash the State’s subpoena,” the attorney argues. The records hurt Neuman’s case because the State used them to attack Dorney for his failure to test Neuman to rule out whether Neuman was faking mental illness or “malingering.” Dorney’s notes were also used to question the credibility of Neuman’s claims that he had visions and hallucinations, including believing he was the father of Sneiderman’s children. The attorney also argues the lower court erred by refusing the defense attorney’s request to further question a witness after Andrea Sneiderman embraced the woman in the courtroom following testimony that was damaging to Sneiderman. Yet later in the hallway, out of the jury’s earshot, Sneiderman issued a veiled threat to the witness that prompted the woman to call her children’s school out of concern for their safety. The attorney called for a mistrial, arguing the court prevented the defense from showing that Sneiderman had manipulated this witness, just as she had Neuman.

The lower court also erred in refusing to grant a new trial based on Andrea Sneiderman’s untruthful testimony, for which she was later convicted in a separate trial for perjury. Neuman’s defense was that the affair triggered his psychotic spiral to murder. But Sneiderman testified there was no affair, that Neuman stalked and sexually harassed her and ultimately killed her

husband to eliminate what he perceived was an obstacle to his unrequited feelings for her. “A conviction obtained by the knowing use of perjured testimony is fundamentally unfair, and must be set aside if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury,” Neuman’s attorney argues. At Sneiderman’s perjury trial, the State prosecutor said her lies were key to Neuman’s trial: “Andrea Sneiderman comes in and lies at the same trial about whether or not they had a relationship,” the prosecutor said. “How is that not relevant? My God...if she lied about that relationship, it is the most material issue in the trial.” Neuman pleaded *not* guilty by reason of insanity, “and presented the issue of his mental health as his sole defense,” his attorney for this appeal argues. “That defense relied upon Mr. Neuman’s affair with Andrea Sneiderman as the catalyst for his descent into psychosis.” Her denial of the affair and her characterization of Neuman not as her lover but as her stalker “cut straight to the heart of his sole defense. Defense Counsel argued that Ms. Sneiderman set out to manipulate a man whom she knew was sick.” Finally, the trial court erred by not allowing the defense attorney to reference disclosures Neuman had made to a family therapist he and his wife had seen, which included the therapist’s records as stating Neuman was suicidal and suffering from a mood disorder.

The District Attorney and Attorney General argue for the State that the trial court properly denied Neuman’s motion to quash the subpoenas for the mental health evaluations done by Dr. Peter Thomas and Dr. Julie Rand Dorney. “Once [Neuman] raised the issue of his mental health, he waived any psychiatric privilege in testing done in connection with the pending charges,” the State argues. “If a defendant places his mental capacity in issue, he waives all privileges with regard to his medical records which are relevant to the medical condition placed in issue. The attorney-client privilege does not afford [Neuman] any greater protection in these circumstances.” Furthermore, Neuman signed a standard form stating that anything discussed during the exam and any written reports could be disclosed in court. And the trial court did not abuse its discretion in excluding irrelevant evidence of an encounter between two witnesses outside the presence of the jury. “To the contrary, neither the inconsequential hug between these two witnesses in the presence of the jury, nor the irrelevant out-of-court exchange between the two impacted the jury or any issue in the case,” the State contends. Neuman also has not established that there was a violation of state law or his due process rights due to the perjury conviction of Andrea Sneiderman. Contrary to his claims, her testimony was not essential to his conviction. A verdict must be set aside as a result of perjury “only when the judgment could not have been obtained without the perjured evidence and the perjurer has been duly convicted.” In this case, the trial court correctly ruled that, “there was more than sufficient evidence to convict [Neuman] without Ms. Sneiderman’s testimony,” the state contends. Finally, the trial court did not err in denying hearsay evidence concerning family therapy sessions conducted by a non-testifying therapist who documented statements made by Neuman’s wife, who also did not testify and who did not waive her patient privilege to testify.

Attorney for Appellant (Neuman): J. Scott Key

Attorneys for Appellee (State): Robert James, District Attorney, Anna Cross, Dep. Chief Asst. D.A., Deborah Wellborn, Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Clint Malcolm, Asst. A.G.

DAVIS V. VCP SOUTH, LLC ET AL. (S15A0142)
VCP SOUTH, LLC ET AL. V. DAVIS (S15X1043)

In this dispute over who owns the trademarks of a plastic surgery business owned by two doctors, the widow of one of the physicians is appealing several **Columbia County** court rulings against her, including one holding her in contempt for failing to reinstate the business's Facebook page which she had taken down.

FACTS: This highly litigated dispute began with the sudden death in January 2010 of Dr. Keith L. Davis, a plastic surgeon in Augusta. Prior to his death, he and Dr. Steven M. Roth formed Vein Care Pavilion of the South, or VCP South, LLC, to provide treatment of varicose veins. Under an Operating Agreement, they each owned 50 percent of the membership units of the business. The Agreement stated that upon the death of one of the doctors, the surviving member had a first option to purchase all the membership units owned by the deceased, and that option existed for 90 days following the date a representative was appointed to handle the deceased doctor's estate. The Agreement also provided that if there was disagreement over the value of the units owned by the deceased, a certified public accountant would determine the value. On Oct. 1, 2010, Roth began to pursue his option to purchase the Davis membership units when Davis's wife, Lori Davis, was appointed representative of her husband's estate. After their negotiations failed, Steve Staley, the CPA who had handled the medical practice, performed the valuation. Davis and her attorney objected to Staley performing the valuation, stating he was biased because he now worked solely for Roth and therefore had a conflict of interest. In December 2010, Roth sued to get Staley approved to perform the valuation. At the same time, Roth sought a ruling by the court that the various trademarks used by the medical practice and its entities, including *The Vein Guys*, were owned by VCP South. Roth learned only after Davis's death that while all expenses with regard to the trademarks had been borne by VCP South, the trademarks had been registered in Davis's name. The trial court has not yet determined the issue of trademark ownership, but it did authorize Staley to issue his decision of a fair market value of Davis's interest. Staley subsequently set the value of Davis's membership units in VCP South, LLC at \$2,578,693. Davis and her attorney appealed, but the Georgia Court of Appeals upheld the lower court's ruling. However, a number of other delays occurred in closing the sale of the membership units based on Staley's valuation. As a result, the closing of the sale of Davis's membership units to Roth was not finally accomplished until Dec. 13, 2013. By then, Roth himself was dead, having been killed 10 months earlier in a crash of his recently purchased jet. His widow, Mary Anne Roth, was appointed to handle his estate.

At issue in this appeal is what transpired next. On March 6, 2014, Lori Davis's attorney, Timothy Moses, filed a "Trademark Notification Complaint" with Facebook stating that the estate of Keith L. Davis, M.D. had ownership of the trademark, *The Vein Guys*, and requesting that the Facebook page of *The Vein Guys* be disabled and taken down. In the report to Facebook, Moses stated that, "As Executor of the Estate of Keith L. Davis, M.D., Lori Davis has sole authority and control over the federally-registered trademark *The Vein Guys*." Mrs. Roth and VCP South then filed a Motion for Emergency Injunctive Relief, and the day of the hearing, the court entered the injunction against Mrs. Davis, finding that Roth would likely prevail on the trademark ownership issue and ordering Davis to instruct her attorney to contact Facebook and restore the Facebook page. The order stated that if the page was not restored by April 4, 2014, Mrs. Davis would be assessed a penalty of \$1,000 per day until the page's restoration. The

deadline was not met, and in a Second Order of Interlocutory Injunction and Contempt, the trial judge found Davis “in civil contempt of court by a preponderance of the evidence and criminal contempt of court beyond a reasonable doubt for failing to strictly comply with the court’s instructions in the April 1, 2014 order which required that the page be reactivated by April 4, 2014.” The order restrained her or her attorney from contacting Facebook without the court’s approval, restrained her from using any of the trademarks, and ordered her to turn over all documents related to the creation of the trademarks. In the third order, the trial judge stated he was directing a “Special Master” to “determine whether Keith L. Davis owned the trademarks or was holding same as a constructive trustee for VCP South.” Lori Davis now appeals to the Georgia Supreme Court. And in a cross appeal, Mary Anne Roth and VCP South appeal the trial court’s ruling allowing the Davis Estate to receive distributions of profits through Sept. 30, 2011, arguing they should have ceased at the end of the month of Davis’s death.

ARGUMENTS (S15A0142): Davis’s attorney argues the trial court made a number of mistakes. Among them, the judge was wrong to enter three “interlocutory,” or pre-trial, injunctions. “Neither the complaint nor the amendment to the complaint were verified,” her attorney argues in briefs, nor were they accompanied by appropriate affidavits. “No evidence was submitted that supports a conclusion that Ms. Davis had the power to force Facebook to repost *The Vein Guys* Facebook page,” the attorney argues. The court was wrong to deny Davis’s motion asking the court to dismiss the injunction. And there was no evidence supporting the imposition of daily fines against Davis. “This was an abuse of discretion given the lack of any evidence showing that Ms. Davis or her lawyers had the power to make the Facebook company do what the trial judge wanted it to do.” The trial court also erred in holding Davis in contempt. “The record is devoid of any evidence that Ms. Davis did anything to intentionally disobey any of the three orders at issue,” her attorney argues. “Everything done between March 7th and April 14th was being done by her lawyers, and they believed that they were fully complying with the trial court’s orders.” Among other errors, the trial court was also wrong in concluding that the purchase of the Davis membership units by Roth occurred Sept. 30, 2011 when in fact it was not finalized until Dec. 2013, during which time Davis was entitled to distributions of the business’s profits, the attorney argues. “As of Roth’s death on Feb. 20, 2013, Dr. Roth had not purchased the membership units owned by the Davis Estate,” Davis’s attorney argues. “The Davis Estate therefore continued to have the financial rights and all other rights of a ceased member as the owner of 50 percent of the membership units in VCP South, LLC, and of the other entities.”

Roth’s attorneys argue the trial court did not err as Roth was entitled to injunctive relief as a result of the action of Davis’s attorney, which resulted in Facebook taking down *The Vein Guys* page. Facebook made it clear from the beginning that it would only restore the page with the written consent of the complaining party, who was Timothy Moses, Davis’s attorney. “The record is undisputed and beyond any reasonable doubt that Ms. Davis, in blatant and willful violation of the court’s order, failed to take the steps within the time limit established by the court to have *The Vein Guys* Facebook page reinstated in the manner in which Facebook required for reinstatement,” the attorneys argue. “It was not until after the purchase of the membership units in December 2013 that Davis sought to impose damages upon the Roth Estate by having the Facebook page...taken down.” The trial court also did not err in holding Davis in contempt. And it did not err in setting the purchase date of the Davis membership units no later than Sept. 30, 2011. “[I]f not for the inappropriate efforts by Mrs. Davis in contravention of the Operating

Agreement to delay the transfer of the Davis membership units to Dr. Roth, the transfer would have taken place in calendar year 2010 and the Davis Estate would not have benefitted from distributions through Sept. 30, 2011, almost 21 months after Davis's death," Roth's attorneys argue. "There has been no forfeiture of any interests of the Davis estate. To the contrary, through these delay tactics, the Davis Estate has been enriched."

(S15X0143): In their cross appeal, Roth and VCP South argue the trial court erred in allowing Davis to receive distributions of profits through Sept. 30, 2011. "The intent of the parties to the LLC Operating Agreement was that the estate of a deceased member would receive the value of the decedent's interest in the entities as of the end of the month in which he died," the attorneys argue. "Accordingly, the Davis Estate should have received distributions only through Jan. 31, 2010." "It is not the policy of this State, just as it was not the intent of the parties to the Operating Agreement, for a non-professional successor-in-interest to be able to retain an indefinite financial stake in a medical practice by aggressively litigating and refusing to follow an agreed upon, legally mandated procedure for selling a decedent's interest in a medical practice to authorized purchasers." The trial court also erred in allowing the Davis Estate to have an ownership in *The Vein Guys* professional practices. Under Georgia statutory law, "Shares in a professional corporation held by a deceased or retired shareholder shall, within six months after the date of death or retirement of such shareholder, be either redeemed or canceled by the corporation or transferred to a person or persons authorized to hold the shares." Furthermore, "It is the clear policy of the State of Georgia that ownership of a professional practice is, to the extent possible, to be limited to licensed professionals," the attorneys argue.

Davis's attorney argues that the state Supreme Court should reverse the lower court's order "that 'deemed' a sale of membership units to have occurred over two years before the sale in fact closed." It was not until Dec. 18, 2013 that the Roth Estate delivered to Davis a check for \$515,738.60 and a note for \$2,062,954.40 that the sale occurred. It was error for the trial court to rule that the financial rights of the Davis Estate ended prior to that. As to Roth's arguments related to the corporate practice of medicine, these were not raised at the trial court level, and under court procedure, are prohibited from being raised for the first time when the case is on appeal.

Attorney for Appellant (Davis): John Bell, Jr.

Attorneys for Appellees (Roth): James Wall, James Ellison

LUE, MAYOR V. EADY ET AL. (S15A0117)

In this locally high-profile case, the Mayor of Gordon is appealing a **Wilkinson County** judge's ruling in favor of City Council members who sued the mayor and sought her removal from office.

FACTS: The Gordon City Charter states that the government's authority "shall be vested in a city council to be composed of a mayor and six council members." It also states that "four councilmembers shall constitute a quorum and shall be authorized to transact the business of the city council." The charter defines the powers of the mayor as including the authority to "appoint and remove, for cause, with confirmation of appointment or removal by the council, all officers, department heads, and employees of the city except as otherwise provided by this charter." And the mayor is to "participate in the discussion of all matters brought before the city council and vote on such matters only in the case of a tie vote, except that the mayor may vote in all elections

for officers who are elected by the city council and impeachment or removal proceedings whether there is a tie or not.” Since taking office in January 2014, Mayor Mary Ann Whipple Lue has had several run-ins with the City Council and citizens, including her attempt to fire the city attorney. In March 2014, councilmen Terry Eady and Freddie Densley, along with five residents calling themselves Concerned Citizens of Gordon, sued Lue seeking her ouster and claiming she violated the state’s Open Meetings Act and other laws that govern her conduct as a public official. She filed motions to dismiss the suit, arguing that she was protected by official immunity and that the plaintiffs failed to state a claim under the Open Meetings Act. The judge denied her motions. In June 2014, Eady and the others filed an application for a Temporary Restraining Order and an “Interlocutory,” or pretrial, Injunction. The judge granted the application for a TRO and suspended Lue from office pending trial. In July, the trial court entered an order ending the mayor’s suspension but imposing certain restrictions on her, including prohibiting her from meeting privately with three or more councilmembers to discuss city business and requiring such meetings be open to the public. She was also prohibited from voting unless there was a three-to-three tie and from terminating any city employee without full due process and the court’s approval. Mayor Lue now appeals to the state Supreme Court.

ARGUMENTS: The mayor’s attorney argues the trial court made several mistakes, including by interpreting the City Charter to mean it could limit the powers of the mayor as it has in the injunction. Under the City Charter, the mayor plus three councilmembers could never constitute a quorum because the charter states four *councilmembers* are required for a quorum. Furthermore, under the charter, the mayor can vote in the case of “all elections for officers who are elected by the city council...” “The city attorney is one such officer,” her attorney argues in briefs. By prohibiting the mayor from voting to remove the city attorney, the injunction violates the rule that an Interlocutory Injunction is to do no more than to preserve the status quo, the attorney argues. The trial court also erred by failing to grant the mayor’s motion to dismiss the lawsuit. The plaintiffs have failed to state a claim under the Open Meetings Act as the mayor is not an “agency” under the law. “The Open Meetings Act places a duty on affected *agencies* to hold open meetings and to adhere to certain procedural requirements as to notice, minutes, recording of meetings and other procedures as defined under the Act,” the mayor’s attorney argues. “By definition a single elected office holder cannot be an agency.” The attorney argues that “we have found no cases in this state where the Open Meetings Act has been applied to a single office holder, as opposed to the governing body of a city, county or state agency or department.” The mayor “is not an entity capable of being sued,” her attorney contends. “The mayor is simply the administrative head of the municipal corporation.” “The defect in the manner in which the parties are named is that the City of Gordon, as a legally constituted municipal corporation, is not named in the lawsuit.” The judge in the case also violated state law and the Georgia Code of Judicial Conduct in the manner in which he denied her motion asking him to recuse himself because he showed he could not be impartial.

Attorneys for the two city councilmen and the citizens argue the trial court did not err in its interpretation of the Gordon City Charter. The mayor “fails to recognize that the doctrine of sovereign immunity is entirely inapplicable to this case,” the attorneys argue. “Sovereign immunity functions to deprive a superior court of subject matter jurisdiction over certain claims brought against public agencies and officers sued in their official capacity.” But the Open Meetings Act “explicitly provides the superior courts of Georgia with the grant of authority to

hear claims arising under the Act.” The Act is “clear and unambiguous. The statute’s plain text authorizes civil suits against any person who violates the terms of the Act, and it grants the superior courts of Georgia exclusive jurisdiction to hear such claims.” The mayor is both subject to the lawsuit under the Open Meetings Act, and she is an “entity capable of being sued,” the attorneys argue. The mayor “seemingly contends that she has the authority to violate the Open Meetings Act without ever being held accountable for her conduct,” the attorneys argue. “The Georgia Supreme Court recently reaffirmed its view that ‘it is a fundamental principle of our constitutional tradition that no public officer – whether constitutional or only statutory – is above the law.’” Finally, the trial judge did not err in deciding his recusal was not warranted in this case. Here, “the record is void of any improper, impartial, or bias actions by the trial judge.”

Attorney for Appellant (Lue): Wayne Kendall

Attorneys for Appellees (Eady): M. Devlin Cooper, Anna Bullington