



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Tuesday, September 15, 2015

10:00 A.M. Session

THE STATE V. LEWIS (S15G0666)

This appeal involves a Georgia Court of Appeals ruling that threw out the prison sentence given to former **DeKalb County** schools Superintendent Crawford Lewis after he agreed to testify against his co-defendants as part of a plea deal. In this unusual case, the State of Georgia agrees with Lewis that the trial court was obligated to impose on Lewis a sentence of probation, rather than confinement, which the parties had agreed to as part of the plea arrangement.

FACTS: Patricia Reid, Anthony Pope, and Lewis were indicted by a DeKalb County grand jury and charged with violating Georgia's Racketeer Influenced and Corrupt Organizations Act (RICO) and felony theft by taking related to some school construction projects. As part of a negotiated plea agreement, District Attorney Robert James agreed to dismiss the felony charges against Lewis in exchange for his guilty plea to one misdemeanor count of hindering and obstructing a law enforcement officer, conditioned upon Lewis testifying truthfully against his co-defendants. Lewis agreed, with the understanding that the State would recommend a sentence of 12 months probation, a \$500 fine, and 240 hours of community service. The record shows that the State and Lewis had a plea discussion with DeKalb County Superior Court Judge Cynthia Becker in chambers prior to the entry of Lewis' plea and that the judge "went along" with the State's

recommendation. After accepting Lewis' plea, the trial judge deferred sentencing him until the end of trial.

Lewis subsequently testified at trial, and his co-defendants were ultimately convicted. At Lewis' sentencing hearing, the District Attorney told the judge Lewis had complied with the plea terms by testifying truthfully and asked the judge to impose the agreed-upon sentence. Denying that she had agreed to impose the recommended sentence, the trial judge refused the State's recommendation and sentenced Lewis to 12 months imprisonment instead of probation. Lewis was taken into immediate custody and the trial judge refused to consider bond. Georgia law allows bond for such misdemeanor convictions.

Lewis' attorneys filed an emergency motion for an immediate hearing seeking reconsideration of Lewis' sentence in accordance with the negotiated plea agreement, asking for the recusal of the trial judge if reconsideration was denied and, in the alternative, asking to withdraw Lewis' guilty plea. The trial judge set an emergency hearing for one week later and refused to grant Lewis' request for an immediate bond. Three days later, in response to an emergency motion filed by Lewis in the Court of Appeals, that court issued an order directing the trial court to set a reasonable bond immediately, and Lewis was released. Subsequently, at the emergency hearing, the judge denied Lewis' request for reconsideration and warned him that his prior testimony would be used against him in future prosecution if he withdrew his plea. Furthermore, the judge stated that her decision regarding Lewis' sentence was based on "the credibility, the believability, the probability or the improbability of the testimony," implying that Lewis may have lied at the trial of his co-defendants. Lewis then appealed to the Court of Appeals, which agreed to hear the appeal. Both the State and Lewis filed briefs stating there was no dispute between the parties and asserting that the trial court was obligated to impose the negotiated sentence it had previously accepted.

In its October 2014 opinion, the Court of Appeals found that "the record shows that the State had made a negotiated plea recommendation and that the trial judge went along with this recommendation at the time she accepted the plea. Although Lewis' sentencing was deferred, the trial judge had, at the very least, implicitly agreed to sentence him according to the State's recommendation, provided that he testified truthfully at the trial of his co-defendants. Lewis relied on the trial court's acceptance of his negotiated plea when he later waived his Fifth Amendment rights and testified on behalf of the State at trial, wherein he provided testimony that incriminated himself." Under the circumstances here, the Court of Appeals ruled, "we find that the interests of justice require that Lewis be sentenced according to the State's recommendation pursuant to the negotiated plea, provided that he testified truthfully on behalf of the State at the trial of his co-defendants." However, the Court of Appeals determined that, even though both parties agreed Lewis had complied with the terms of the plea agreement and testified truthfully, the trial court retained the authority to decide whether the terms of the parties' plea bargain had been fulfilled. Based on this part of its ruling, the Court of Appeals vacated the judgment of the trial court and remanded the case for further proceedings consistent with its opinion. The State then appealed to the Georgia Supreme Court, which agreed to review the case to determine whether the Court of Appeals erred in its rulings.

In its appeal to this Court, both the State and Lewis claim the Court of Appeals was wrong to rule that the trial court on its own was authorized to challenge and

invalidate the parties' negotiated plea agreement which the trial court had previously accepted and which both parties agreed had been satisfied. Given the parties' non-adversarial posture, their arguments have been combined.

ARGUMENTS: Both the State and Lewis argue the Court of Appeals correctly found that the trial court had accepted the State's sentence recommendation based on the negotiated guilty plea agreement, and that Lewis was entitled to enforcement of the agreed upon terms of the plea. Once a trial court voluntarily gives up its sentencing discretion by telling a defendant that it will impose an agreed-upon sentence and the defendant relies on that representation to his detriment by waiving his constitutional rights, the trial court cannot then refuse to abide by the agreement, both parties argue. While all plea bargains are subject to the trial court's approval, and the court is not bound to accept a plea agreement between the State and the defense, there are mandatory steps a trial court must take in rejecting a negotiated plea agreement. Specifically, trial judges must "tell defendants explicitly that they have the right to withdraw their plea because the court intends to reject the negotiated plea." Here, when the plea was entered, the judge did not inform Lewis she intended to reject any part of the agreement. Rather, the trial court "went along" with it.

The parties argue that under its 2013 decision in *Simmons v. State*, the state Supreme Court ruled that a "plea agreement is, in essence, a contract between a defendant and the State." Here, Lewis relied to his detriment on the trial judge's acceptance of the negotiated plea agreement when he waved his constitutional rights and gave incriminating testimony. Lewis was unquestionably harmed by his reliance on the negotiated plea agreement and simply withdrawing his guilty plea cannot fix that, the State and Lewis' attorneys argue. Rather, Lewis would face prosecution after being induced to incriminate himself by promises ratified by the trial court.

Both the State and Lewis' attorneys argue the Court of Appeals erred, however, in authorizing the trial court to challenge and invalidate a plea agreement the trial court had previously accepted, when neither party claimed the terms of the agreement had been breached. After accepting a plea as given, the trial court has no independent role in determining whether the bargain between the parties has been satisfied, the State's and Lewis' attorneys argue. The trial court is a neutral arbitrator of disputes and, in the absence of a dispute between the parties, has no authority to create a dispute of its own making with respect to the parties' plea bargain. By authorizing the trial judge to challenge whether the plea bargain's terms were fulfilled, the Court of Appeals' opinion disregards fundamental contract principles. In this case, the State and Lewis had to join forces against the trial court which relinquished its neutrality and became an adversary to their joint position that Lewis had testified truthfully at trial. In addition, by refusing to accept the parties' non-adversarial posture, the Court of Appeals opinion undermines the future ability of the State and defendants to enter into plea agreements. In negotiating a plea, the State and defendants typically engage in lengthy back and forth discussions regarding the relevant facts – a process that cannot include the trial court. Because the State was in a better position to assess Lewis' truthfulness, the trial court should have accepted the State's conclusion. And because the Court of Appeals ruling on this issue is legally incorrect, its order remanding the case was also improper, both the State and Lewis contend.

In an amicus brief requested by the Supreme Court of Georgia, attorney Sarah Gerwig-

Moore of the Mercer Habeas Project and attorney J. Scott Key make the following argument: “Because trial courts – not the parties themselves – are vested with the discretion in sentencing, a trial court may [on its own] invalidate a plea agreement. This is especially true where a trial court bases its decision on a finding that a Defendant has breached the terms of his guilty plea.” In this case, “the trial court rejected a recommendation made after the Respondent testified because the court did not find his trial testimony to be credible,” the amicus attorneys argue. “While the rules of contract law apply to plea agreements, plea agreements cannot abrogate the right of the trial judge to exercise the sentencing function of the court.”

Attorneys for Appellant (State): Robert James, District Attorney, Anna Cross, Dep. Chief Asst. D.A.

Attorneys for Appellee (Lewis): Michael Brown, Bernard Taylor, Kacy Brake

ROY AND BETTY STRICKLAND V. LEA STRICKLAND (S15G1011)

Grandparents who raised their daughter’s three young children for most of their lives are appealing a decision by the Georgia Court of Appeals after that court reversed a **Cobb County** judge’s ruling that it was in the children’s best interests to remain with their grandparents.

FACTS: Lea Strickland gave birth to three children – a girl, C.S., in 1998, a boy, L.T., in 2000, and a second girl, I.S., in 2006. The children have three different fathers, none of whom is involved in this custody dispute. In 2006, while Lea was pregnant with I.S., police raided her home for drugs, and her parents, Roy and Betty Strickland, obtained temporary emergency custody of the children. In 2008, after the Department of Family and Children Services investigated Lea for drug use and child neglect, the Paulding County Juvenile Court found the children were deprived in their mother’s care and, with the mother’s consent, extended the grandparents’ temporary custody, with supervised visitation for the mother. In mid-2010, the grandparents filed a petition for permanent custody of the children. In 2011, while their petition was pending, the case was transferred to Cobb County Superior Court. Throughout, the grandparents continued to have custody. During a five-day trial in 2013, two doctors testified as expert witnesses that the children would suffer harm if returned to their mother. The guardian ad litem also testified that the children would suffer long-term and physical harm if returned to Lea. Following the trial, which involved testimony from multiple witnesses, the judge issued a 30-page order, granting permanent custody to the grandparents and finding that the children would suffer long-term emotional harm if their mother was granted custody. The trial court found that the mother had no income or stable residence; that the children had bonded with the grandparents with whom they had lived exclusively since 2006 (I.S., who is almost 9 years old, has lived with no one other than her grandparents); that their mother’s interest in her children since 2006 had been sporadic at best; and that the children had psychological issues that only the grandparents had addressed. On appeal, however, the Court of Appeals reversed the grant of permanent custody to the grandparents, stating that “the evidence showed that the mother has rectified those issues that led to her temporary loss of custody of her children,” that she had a stable home and job, that she was clear of drug use, and that she was successfully being treated for her bipolar mental health issues. “After a thorough review, we find that the grandparents have not proven by clear and convincing evidence that the children will suffer either physical or significant, long-term emotional harm if they are placed in the mother’s custody,” the appellate court ruled. The grandparents now appeal to the Georgia Supreme Court, which has agreed to review the case to

determine whether the Court of Appeals properly applied the standard of review in its analysis of the trial court's award of permanent custody to the maternal grandparents.

ARGUMENTS: The Court of Appeals states in its opinion: "When reviewing a superior court's custody ruling, we view the evidence in the light most favorable to the trial court's decision." Yet clearly the appellate court failed to do so in this case, the attorneys for the grandparents argue in briefs. Unless the trial court was clearly erroneous or failed to act as a "rational trier of fact," the appellate court is required to defer to the trial court's factual findings and view the evidence in a light most favorable to upholding the trial court's ruling. "In the present case, the Court of Appeals did the exact opposite in that it completely substituted its factual findings in place of the trial court's and did not view the evidence in a light most favorable to Petitioners." For instance, the appellate court states in its opinion that the mother's living situation has been stable for four years. "This statement completely flies in the face of the evidence in the case below," the attorneys argue. While the case was pending, the evidence showed the mother in 2012 was living at different hotels and at a number of homes with friends and different men. The appellate court's opinion states her problems with drugs had been rectified – another statement in direct conflict with the evidence, which included a photo showing the mother smoking marijuana by a swimming pool. Later that day, she was arrested and charged with driving under the influence. "The Court of Appeals completely and utterly failed to review the trial court's order in a light most favorable to the Petitioners and failed to use the rational trier of fact standard of review," the attorneys argue. "The vast evidence presented at the trial showed that Respondent was not interested in having a meaningful and healthy relationship with her children. It is therefore inconceivable that the Court of Appeals found that Respondent was a 'loving, caring, attentive and interested parent.'" "The Court of Appeals opinion in this case shows precisely why the public policy in this state is to not have appellate courts sit as a second trier of fact (except in limited and specified circumstances) because the trial court is in a much better position and is best suited to make factual determinations and to judge the credibility of each witness and piece of evidence at the time of the trial," the attorneys argue. "It is dangerous to have an appellate court completely substitute its factual findings and judgment of the evidence in place of the trial court's particularly when the record in the trial court is ignored in the process." "The Court of Appeals' absolute refusal to acknowledge the evidence and record below and its willingness to substitute its factual findings in place of a trial court who heard five days of testimony from over 15 witnesses, including a guardian ad litem and expert witnesses, and who received approximately 100 exhibits sets a very dangerous precedent as to the role of the appellate courts in this state."

Attorneys for the mother argue the Court of Appeals was right to reverse the trial court's ruling because the grandparents failed to meet the high burden of proof sufficient to strip the mother of the custodial right to her children. "Throughout this litigation, Grandparents have urged the appellate courts to affirm the trial court's order under an improper standard of review, all while ignoring Mother's constitutional rights in the care, custody and companionship of her children," the attorneys argue. "Neither party in this case is perfect, but only one of them possesses constitutional rights. The law prohibits stripping Mother of the custody of her children without proof – of a clear and convincing nature – that harm would come to the children's placement in her custody. Following the guidelines imposed by Georgia law, the evidence produced at trial by Grandparents does not lead a rational trier of fact to conclude that the

standard has been met.” The mother’s present fitness is the only standard upon which she may be judged. “In a custody case such as this, the evidence is limited to a parent’s present fitness, and the parent’s ability to raise a child cannot be compared to that of a third person,” the attorneys argue. Here, despite a “volatile childhood” in which Lea was “repeatedly and regularly abused by her parents,” she “has made great strides in turning her life around. Today, she is engaged to be married and lives with her fiancé, “an established and respected member of the Bar.” She has undergone drug counseling and regularly sees a psychiatrist who treats her successfully for bipolar disorder. Despite the grandparents’ contention that the children have flourished under their care, the evidence says otherwise. The boy, now 15, continues to suffer from depression and an inability to control his bladder and bowels. His grandparents have reported to a therapist that he is defiant, aggressive and disrespectful, and his grandfather has reported “beating and whipping” the boy over his behavior. At one point, the boy had to be removed from his grandparents’ home after police found an injury on his arm allegedly caused by his grandfather after the boy wet his pants and failed to put his laundry in the right place.

Attorneys for Appellants (Roy and Betty): Hylton Dupree, Jr., Blake Carl

Attorneys for Appellees (Lea): Roy Barnes, Allison Barnes Salter

AMES ET AL. V. J.P. MORGAN CHASE BANK, N.A., ET AL. (S15G1007)

A couple is appealing a Georgia Court of Appeals decision that upheld the dismissal of a lawsuit they filed to stop the foreclosure sale of their multi-million dollar home.

FACTS: In March 2007, Cindy and David Ames took out a \$4.65 million loan from Washington Mutual Bank, FA to refinance a prior loan they had secured for their home in Alpharetta, GA in the Country Club of the South Subdivision. In connection with the loan, the Ameses delivered to Washington Mutual Bank a deed to secure debt, which was recorded in the **Fulton County** property records. In September 2008, Washington Mutual was declared insolvent, and the Federal Deposit Insurance Corporation (FDIC) was appointed “receiver” for the bank. (A receiver is a neutral party appointed by the court for the protection or collection of property that is the subject of diverse claims due to bankruptcy or litigation.) In September 2008, the FDIC transferred certain assets of Washington Mutual Bank to J.P. Morgan Chase Bank, including “all loans and loan commitments of Washington Mutual Bank,” as stipulated in a Purchase and Assumption Agreement with the FDIC. In September 2012, an assignment of Washington Mutual’s interest in the Ameses’ security deed to Chase was also recorded in the Fulton County property records. When the Ameses defaulted on their loan, Morgan Chase Bank hired Aldridge Pite law firm, which was then known as Aldridge Connors, LLP, to initiate nonjudicial foreclosure procedures against the Ameses’ property. In April 2013, the Ameses filed a “verified emergency petition for temporary restraining order and/or preliminary injunction” against Morgan Chase to halt the foreclosure sale, which was scheduled for May 7, 2013. The law firm filed a motion to dismiss the emergency petition, and the Ameses filed a “First Amended Complaint.” Among their assertions, they claimed the assignment of the security deed to Chase was invalid because it was executed by Chase on behalf of the FDIC, but there was no power of attorney authorizing Chase to do so. The trial court dismissed their complaint and subsequently denied their motion to reconsider the decision. On appeal, the Court of Appeals upheld the trial court’s decision, ruling that the Ameses lacked “standing,” or the authority, to contest the validity of the assignment of the security deed to Chase. The appellate court cited its

2014 decision in *Jurden v. HSBC Mortgage Corporation* and its 2013 decision in *Montgomery v. Bank of America*. The Court of Appeals also rejected the Ameses' argument that the trial court erred in concluding that their complaint failed to state a quiet title claim and that the trial court was required to appoint a "special master" to hear their claim that they held title to the property. (A special master is a disinterested lawyer appointed to assist a judge with a particular case by hearing testimony, conducting hearings, handling pretrial matters, and making a recommendation to the court.) The Ameses now appeal to the state Supreme Court, which has agreed to review the case to determine whether the appellate court erred in concluding that the Ameses lacked standing to challenge the validity of the assignment of the security deed to JP Morgan Chase.

ARGUMENTS: The Ameses' attorney argues the Court of Appeals erred in determining that the couple lacks standing under *Montgomery* and *Jurden*, given the facts of this case. *Jurden* does not apply in this case because the application of the doctrine announced in *Montgomery* should be limited to those cases in which there's an alleged "technical" defect in the assignment. In this case, there was never any assignment made by any party with authority to make it. The "power of attorney granted to Chase *expired by its explicit terms* two years after it was executed, nearly two years *before* the date the purported Chase assignment in this case was executed," the attorney argues in briefs. "Without the authority granted by an effective power of attorney, Chase has no power to take any action..." The assignment filed in the deed records was therefore void. The "illegal instrument" filed by Aldridge Connors on behalf of Chase "acts as a direct cloud on the title to the property," the attorney argues. Furthermore, *Montgomery* was wrongly decided and should be overruled by the Georgia Supreme Court.

Attorneys for J.P. Morgan Chase Bank and Aldridge Pite point out that at issue in this case is a lender's ability to non-judicially foreclose on a property based on a power of sale in a security deed granted by a borrower. They argue that in this case, the Ameses have taken numerous steps to prevent Chase from exercising that power of sale and prevent the foreclosure, including filing two civil actions in Fulton County Superior Court, and one in the U.S. District Court, Middle District of Florida. "The record shows that the Ameses seek to avoid responsibility for their multi-million dollar indebtedness by asking the trial court to invalidate not only the assignment, but the security deed based on absurd and self-contradictory reasoning," they argue in briefs. "The record shows that the Ameses have sought to delay, since 2012, a nonjudicial foreclosure sale of the property by filing a frivolous, 'shotgun' complaint which suggests a ridiculous conspiracy by Appellee Chase and Appellee Aldridge Pite. The amended complaint asserts that Appellee Chase is not the owner or assignee of the security deed but fails to identify any entity which is entitled to enforce the note or security deed against the Ameses. The Court of Appeals was correct in deciding that the Ameses lack standing to challenge the assignment under basic contract principles." Georgia courts and others "consistently have held that borrowers who are not parties to an assignment have no standing to challenge the assignment in an effort to prevent a non-judicial foreclosure." The Ameses are not parties to, or third party beneficiaries of, the assignment and do not have standing under Georgia law to challenge its terms. The Court of Appeals "correctly applied *Montgomery* and *Jurden* to the instant action," the attorneys contend. "The facts and alleged claims for relief in *Montgomery* are virtually identical to those alleged by the Ameses in the amended complaint." Under Georgia law, "it is clear that there is no requirement for a lender to record a power of attorney in order to effect an assignment of a security deed." "Allowing defaulting debtors, such as the Ameses,

standing to challenge the sufficiency of assignments: 1) is contrary to Georgia contract law; and, 2) is counterintuitive to Georgia's *nonjudicial* foreclosure process by encouraging defaulting debtors to file frivolous litigation," the bank's attorneys argue. "The potential flood of litigation brought by defaulting debtors who frivolously assert challenges to the signing authority of the corporate officers executing assignments would effect a fundamental change to Georgia's *nonjudicial* foreclosure process."

Attorney for Appellants (Ameses): Jon McPhail

Attorney for Appellee (Bank): Kimberly Weber, Dallas Ivey

THE STATE V. ANDRADE (S15G0866)

A South Georgia district attorney is appealing a ruling by the Georgia Court of Appeals, saying the decision will have a "devastating effect" on prosecutions throughout the state if it is allowed to stand.

FACTS: In 2014, Aram Andrade, 17, was indicted in **Atkinson County** for three counts of rape and one count of burglary in the first degree. Prior to trial, his lawyer filed a motion seeking to suppress incriminating statements Andrade made to Pearson police officers in two separate interviews during the investigation. Following a pre-trial hearing on the motion, the judge granted the motion to suppress as to the second recorded interview, finding that the police officer should have ended the interview when Andrade said he did not want to speak to him. However, the judge found that Andrade's statements in the first interview were admissible and denied his motion to suppress regarding those statements. The superior court entered its order on June 6, 2014. On June 23, 2014 – 17 days later – the State filed a Notice of Appeal, stating it intended to appeal the ruling suppressing Andrade's statements. But the Court of Appeals promptly dismissed the State's appeal, finding the State had missed its deadline for filing the appeal as required under state law, Georgia Code § 5-7-1 (a) (5). At issue in this case is whether § 5-7-1 (a) (5), which the legislature recently added as an amendment to the law, applies in this case, or whether the provision before it, § 5-7-1 (a) (4), applies. Under § 5-7-1 (a) (4), the State has the right to appeal any judgment "suppressing or excluding **evidence illegally seized**," and it has 30 days from the time the order was entered to file an appeal. Under § 5-7-1 (a) (5), which became effective in July 2013, the State is given the right to appeal any judgment "excluding **any other evidence** to be used by the state at trial," and it has only two days to file its appeal. The Court of Appeals determined the newer provision of the law applied and therefore the State had only two days from the date of the order to file its notice of appeal. As a result, the State was late, and the appellate court dismissed the appeal on procedural grounds. The State now appeals to the Georgia Supreme Court, which has agreed to review the case to determine whether the appellate court was wrong in ruling that § 5-7-1 (a) (5), rather than § 5-7-1 (a) (4), applies to a motion to suppress statements.

ARGUMENTS: The district attorney argues for the State that the Court of Appeals erred in ruling that § 5-7-1 (a) (5) applies to an appeal of the granting of a motion to suppress statements. "By granting Appellee's [i.e. Andrade's] motion to suppress, the trial court ruled that the statements were illegally obtained," the State argues in briefs. "If a defendant's statement was not voluntary, then it was obtained in violation of defendant's constitutional rights and was illegally obtained." "Thus, the State did properly and timely file its notice of appeal of suppression of defendant's statements to law enforcement under § 5-7-1 (a) (4) and the Court of

Appeals erred in dismissing the appeal.” The 2013 amendment to Georgia Code § 5-7-1 has no effect on the State’s right to appeal the suppression of a defendant’s statement under § 5-7-1 (a) (4), the State argues, because the amendment did not change the language of that section. “The legislature only added a new right of appeal at § 5-7-1 (a) (5), which governs the right to appeal ‘other evidence,’” the State argues. “‘Other evidence’ indicates evidence not covered in the remainder of the statute.” The legislature merely shortened the window for filing a notice of appeal regarding this type of evidence. By ruling that an involuntary statement to police is “other evidence” rather than “illegally seized” evidence, the Court of Appeals required the notice of appeal be filed within two days of the trial court’s order. “This is a much more stringent requirement than the 30-day requirement that has long been recognized by the courts of the state of Georgia,” the State argues. “The Court of Appeals misapplied controlling authority from this Court and this misapplication has a devastating effect on prosecutions throughout the state of Georgia with regard to appellate rights regarding defendants’ statements which a trial court suppresses.”

Andrade’s attorney argues the Court of Appeals was correct to dismiss the State’s appeal because the State failed to file its notice of appeal within the time required under § 5-7-1 (a) (5). Andrade’s involuntary statements were “other evidence” and not “illegally seized evidence” as provided in § 5-7-1 (a) (4). “The Appellant [i.e. the State] would like to proceed under paragraph 4 of the statute but [Andrade] contends that involuntary statements do not fall under the paragraph,” his attorney argues in briefs.

Attorneys for Appellant (State): Dick Perryman, District Attorney, Rebekah Ditto, Asst. D.A.

Attorney for Appellee (Andrade): John Strickland, Jr.

2:00 P.M. Session

GEBREKIDAN V. CITY OF CLARKSTON (S15A1442)

A woman is appealing her conviction in **DeKalb County** under a local ordinance she says is unconstitutional because it outlaws her operation of coin-operated machines at a store where she also sells alcoholic beverages, yet state law permits her to do so.

FACTS: Aster Zeru Gebrekidan operates a convenience store in Clarkston, GA on East Ponce de Leon Avenue where she also has several “coin-operated amusement machines,” as defined in the Georgia Amusement Machine Law (Georgia Code § 50-27-70 (b) (2).) In addition to selling food and other products, Gebrekidan also has sold packaged beer and wine for consumption elsewhere. In June 2014, Gebrekidan was served with a court summons to appear at the City of Clarkston Municipal Court to answer the charge of, “operating coin-operated amusement machines in retail store selling packaged beer, malt beverages or wine,” in violation of Clarkston City Code Section 3-57. That particular Code Section states: “No retail dealer in packaged beer, malt beverages or wine shall permit on his premises any slot machines or mechanical music boxes or pinball machines or any form of electronic or mechanical game machine or coin-operated device which might be used for entertainment or amusement purposes.” Following a hearing, the judge found Gebrekidan guilty of violating the city ordinance, which is a misdemeanor, and ordered her to pay a fine of \$250. The DeKalb County

Superior Court upheld the conviction and the ordinance's constitutionality, and Gebrekidan now appeals to the state Supreme Court.

ARGUMENTS: Gebrekidan's attorneys argue the local ordinance is unconstitutional because it is pre-empted by Georgia state law and is therefore void. The Georgia Legislature has already enacted a detailed regulatory scheme which governs the operation of coin-operated amusement machines with Georgia Code § 50-27-70 and § 16-12-35. Under the Georgia Amusement Machine Law, local governments are permitted to pass ordinances that provide for the "suspension or revocation of a license granted by such local governing authority to manufacture, distribute, or sell alcoholic beverages or for the suspension or revocation of any other license granted by such local governing authority *as a penalty for conviction* of the location owner or location operator of a violation of subsection (e), (f), or (g) of Code Section 16-12-35, or both." Subsections (e), (f), and (g), however, all have to do with the exchange of money involving the machines, and Gebrekidan has never been accused of any such offense. Gebrekidan is licensed by the State to operate the machines in the store where she has them. Her license has never been denied, revoked or suspended, and she has never been charged or convicted of any violation of the Amusement Machine Law. She also pays an annual licensing fee and an annual location license fee in compliance with the state law. The Georgia Legislature has specifically limited local regulation of the machines, and Clarkston's Ordinance Section 3-57 exceeds its state permitted authority. "The Georgia Constitution grants local municipalities the power to enact regulations in certain areas," Gebrekidan's attorneys argue. "It also expressly provides, however, that any local law that conflicts with state law is unlawful." "The Clarkston ordinance clearly regulates coin-operated amusement machines and it does so in a very significant way that is inconsistent with the comprehensive scheme set forth in the Georgia Amusement Machine Law and specifically in the local government exemption which allows only limited regulation relating solely to entities which have been convicted of a crime involving the payment of cash for the successful play on a coin-operated amusement machine," Gebrekidan's attorneys contend.

The Clarkston City Attorney argues that Clarkston Code Section 3-57 "is a regulation of alcohol that only incidentally touches upon coin-operated amusement machines." "The challenged ordinance is not preempted by State law regarding [the machines] because the local regulation neither conflicts with nor duplicates and hinders State law." Rather the Code Section prohibits packaged alcohol retailers from offering games to their customers and is one of many provisions in Chapter 3 of the City Code regulating alcohol. "City Code § 3-57 is primarily aimed at preventing loitering and illegal public consumption of packaged alcoholic beverages," the attorney argues in briefs. It is a legitimate police power regulation of alcohol. State law (Georgia Code § 3-3-2), which is entitled "Regulation of Alcoholic Beverages Generally," gives local governments "discretionary powers within the guidelines of due process" to grant, refuse, suspend or revoke the licenses required to sell alcohol. That law "is an important expression of local autonomy over the sale of alcohol and a general law authorizing local governments to use their police power to place limitations on alcohol licenses," the city's attorney argues. "Clarkston's prohibition of games at package alcohol retail locations was also enacted pursuant to its police power to protect the general welfare." The State laws cited by Gebrekidan do not explicitly preempt local alcohol regulations that touch upon the game machines. "Likewise, the State laws regarding coin-operated amusement machines do not address whether [the machines']

operators must be permitted to sell packaged alcohol and thus said State laws do not directly conflict with the challenged City ordinance.” The State law that regulates the machines “sets up detailed rules regarding the types of machines allowed, rules about gambling, permitting and fees, the number of machines per location, etc.,” the attorney argues. “Clarkston Code § 3-57 regulates none of these things. Instead, the challenged ordinance is a regulation of businesses selling packaged beer, malt beverages or wine for consumption off-premises. This [state Supreme] Court has held that a local ordinance regulating alcohol is not preempted where the local ordinance does not detract from or hinder the operation of the general law.” “The General Assembly has long delegated control over alcohol sales to local governments. This Court should uphold the Clarkston Municipal Court’s conviction of [Gebrekidan] and reaffirm the Superior Court’s affirmation of same.”

Attorneys for Appellant (Gebrekidan): Paul Oliver, Jonathan Gaul, Les Schneider

Attorney for Appellee (City): Stephen Quinn

WETZEL V. THE STATE (S15A0650)

A former teacher’s aide is appealing his convictions in **Oconee County** for electronically sending nude pictures of his genitals to a 15-year-old girl, arguing the indictment was flawed and the statute used to convict him is unconstitutional.

FACTS: According to the facts at trial, in the fall of 2011, S.B.J. was a 15-year-old sophomore at Oconee High School where Jeremy Michael Wetzel, 24, worked as a paraprofessional in the special needs classroom and was a member of the baseball coaching staff. S.B.J. had previously met Wetzel when she was in eighth grade and he was assisting the boys’ baseball team. She later worked with the HERO Club, a student organization in which students worked with special education students. Wetzel assisted the club. Wetzel and S.B.J. began making contact outside school via Facebook. In November 2011, they began communicating via text messages on her cell phone and through messages on her sister’s iPod Touch to and from his cell phone. Around Nov. 16, Wetzel sent a text to S.B.J. asking her what size penises she had seen, and his messages became more sexual in nature. He then attempted to send her photos of an erect penis via his cell phone, but after running into difficulty, he sent two emails to her from his own Hotmail address to her Gmail address. S.B.J. testified that a couple of days later, he sent her more pictures and asked via text message, “What do I get in return.” S.B.J. testified she then took two pictures of herself topless and sent them electronically to Wetzel. The communication between them continued for a few more days, ending when Wetzel indicated he wanted to resume his relationship with a former girlfriend. In December 2011, S.B.J. showed the photos of Wetzel to two of her friends, who reported them to a teacher. After school administrators interviewed Wetzel and the girl, and she showed the principal the emails with the nude photos, school officials fired Wetzel, called police, and Wetzel was arrested later that day. Two days later, the police obtained a search warrant for Wetzel’s house and identified his bathroom as the background of the pictures. At trial, S.B.J. testified that she and Wetzel never had any inappropriate physical contact.

Following the four-day trial in May 2013, Wetzel was convicted of violating the Computer or Electronic Pornography and Child Exploitation Prevention Act of 2007 (Georgia Code § 16-12-100.2 (d)) for using a cell phone to solicit a child under 16 to send and receive nude photos, and for electronically furnishing obscene material to a minor. He was acquitted of

child molestation stemming from the sending of electronic images of a sexual nature. Wetzel appealed to the Georgia Court of Appeals, which issued an opinion upholding the trial court's verdicts. But it later vacated its opinion and transferred the case to the state Supreme Court after determining upon reconsidering that Wetzel had raised constitutional issues. At issue in this case is § 16-12-100.2 (d). At the time of Wetzel's alleged violation in 2011, the version of that law which applied in this case, stated: "It shall be unlawful for any person intentionally or willfully to utilize a computer on-line service or Internet service...to seduce, solicit, lure, or entice, or attempt to seduce, solicit, lure or entice a child...to commit any illegal act described in Code Section 16-6-2, relating to the offense of sodomy or aggravated sodomy; Code Section 16-6-4, relating to the offense of child molestation or aggravated child molestation; Code Section 16-6-5, relating to the offense of enticing a child for indecent purposes; or Code Section 16-6-8, relating to the offense of public indecency or to engage in any conduct that by its nature is an unlawful sexual offense against a child." Wetzel now appeals to the Georgia Supreme Court.

ARGUMENTS: Wetzel, who is represented by his father, argues that the trial court erred by rejecting his challenge of the indictment as invalid and void. The indictment is void, the attorney argues, because the charge on computer pornography did not charge the essential elements of the statute that Wetzel had "seduced, solicited or enticed" a minor "to commit any illegal act described in" one of the four enumerated statutes. "Put another way, § 16-12-100.2 (d) (1) does not provide a fifth way to prove computer pornography: seducing, soliciting, or enticing a minor 'to engage in conduct that is by its nature an unlawful sexual offense against a child,'" the attorney argues in briefs. "To engage in conduct that by its nature is an unlawful sexual offense against a child' **is not a separate offense** under § 16-12-100.2 (d) (1)." The trial court erred by denying Wetzel's motion for a directed verdict finding him innocent of the computer pornography charge. The trial court also erred in its instruction to jurors about the offense of computer pornography, because it did not include the essential elements of the statute. "The court's charge suffers from the same infirmity as the indictment and the State's evidence," the attorney contends. And the trial court erred by failing to direct a verdict of not guilty to the charge of electronically furnishing obscene materials to a minor, as there "is no evidence that Wetzel knew or should have known the alleged victim was a minor." Furthermore, there is no evidence that he "electronically furnished" obscene materials as the term is defined under law as "allowing access to information stored in a computer." Finally, the statute is unconstitutional due to its vagueness and "overbreadth." The Georgia Supreme Court has held "that a penal statute must be sufficiently explicit to inform those who are subject to it what conduct on their part would render them liable to its penalties," Wetzel's attorney argues. "If men of common intelligence must guess at the meaning of a statute, the statute violates the due process of law."

The State argues the trial court did not err in rejecting Wetzel's challenge that the indictment was invalid due to its failure to enumerate an offense contained in the statute. "'To engage in conduct that by its nature is an unlawful sexual offense against a child' is a separate method of committing computer pornography under § 16-12-100.2 (d) (1)," the State argues in briefs. While Wetzel argues "there are only four ways by which it is unlawful for one to solicit, seduce, or entice a minor to commit or engage in any illegal act, there are in fact five ways set out in the statute." Engaging in "conduct that by its nature is an unlawful sexual offense against a child' is the fifth method by which an individual may commit computer pornography under § 16-12-100.2 (d) (1), and is separate and distinct from the reference in the statute to public

indecenty,” despite the lack of a comma or semi-colon between the two. And by “sending pictures of male genitals via e-mail using his cellular phone to S.B.J., Appellant [i.e. Wetzel] utilized an electronic device to seduce, solicit, or entice S.B.J. to engage in conduct that is by its nature an unlawful sexual offense against a child.” One picture he sent her included a text asking: “What do I get in return?” In response, she sent him nude pictures of herself from the waist up. The statute is not unconstitutionally “void for vagueness,” the State also argues as it “sufficiently notifies individuals not to engage in conduct that is by its nature an unlawful sexual offense against a child.” The trial court also did not err in denying Wetzel’s motion for a directed verdict of innocent on the charge of computer pornography, nor did it err in its charge to the jury defining that crime as the language in the judge’s instruction tracked the indictment and the statute. Finally, the trial court did not err by denying Wetzel’s motion for a directed verdict on the charge of electronically furnishing obscene materials to a minor, the State argues. “By sending pictures of his genitals to S.B.J. as attachments to emails, and by using his Hotmail address to do so, Appellant electronically furnished obscene materials to a minor as codified in § 16-12-100.2 (d) (1).”

Attorney for Appellant (Wetzel): Michael Wetzel

Attorneys for Appellee (State): Kenneth Mauldin, District Attorney, Kristopher Bolden, Asst. D.A

BRADLEY R. COPPEDGE v. CATHERINE H. COPPEDGE (S15A1442)

In this contentious divorce, a man is appealing a **Muscogee County** judge’s ruling that finds him in contempt for failing to pay all his child support and that denies his request to alter his visitation schedule so he could spend more time with the couple’s two young daughters.

FACTS: Bradley Coppedge, an attorney, and Catherine Coppedge were divorced in 2006 when their daughters were about 5 and 2 years old. The divorce decree required him to pay his ex-wife \$2,000 in monthly child support. It further stated that should the expenses associated with the private school where the girls attended increase or decrease “for any reason, including the after school or summer care amounts, the parties shall evenly divide the amount of any such increase or decrease....Wife shall be responsible for making all payments directly to the schools....” In the summer of 2010, Catherine withdrew the children from after-school care and summer care at the school and hired a private nanny to watch them in the home instead. Bradley then reduced the amount of his monthly child support payments by the amount he had been paying for his share of the cost of after-school care and summer care at the private school. In 2010, Bradley filed for a modification of child custody and visitation. Catherine filed an answer and counter claim for contempt based on his failure to pay all of the required child support and for denying her visitation with the children on her birthday in 2010. A “bench trial” (before a judge with no jury) was held in 2011, and the judge issued a final order in 2012 denying Bradley’s petition for modification, and holding him in contempt for the failure to pay all his required child support and for denying Catherine her visitation time on her birthday with the children. Bradley unsuccessfully sought reconsideration and a new trial, and twice sought to have judges recuse themselves.

ARGUMENTS: Bradley’s attorney argues the trial court erred in finding him in contempt. The final divorce decree clearly specified that the expenses he and his wife would share involved after-school care and summer care *at the private school*. There is nothing in the

decree that contemplates Bradley “paying the expenses of a babysitter or a private nanny at the mother’s house for the children,” his attorney argues in briefs. She unilaterally removed the children from the school’s summer care and hired a nanny without consulting him. Had the parties entertained the notion they would share the cost of a private in-home nanny, “such a provision would have been included” in the divorce decree, the attorney argues. The trial court also erred in holding him in contempt for not allowing Catherine to visit the children on her birthday. Under the decree, he was awarded visitation on alternating Labor Day weekends, while she was awarded visitation on her birthday. In 2010, they fell on the same weekend. “If the Appellee/Mother had exercised her birthday visitation in 2010, then Appellant would have been denied the Labor Day weekend he was specifically granted under the special holiday provisions of the Final Judgment and Decree,” his attorney argues. He claims she refused a compromise that he offered. Among other arguments, he also claims the trial court was wrong to deny his motion for modification of visitation. A “parenting coordinator” – a specialist hired to resolve disputes between “high-conflict parents” – stated that “the parties’ biggest problem was their ongoing mutual power struggle.” Bradley disagreed the coordinator was necessary and discontinued using her. The judge subsequently concluded “that the relationship of the parties deteriorated after they discontinued their relationship with the parenting coordinator. As such, the children were subjected to emotional distress that could cause them lasting emotional damage according to the experts...” The judge went on to say that “litigation should be discouraged between these parties, and that litigation was and is harmful to these children.” But Bradley’s attorney disagrees, finding that, “the court’s conclusion is just wrong: the trial court plainly misstated the evidence and, as a result, reached a conclusion that is not supported by the evidence.” “The evidence at trial clearly demonstrated that the Appellee [i.e. Catherine] was unable to appreciate the vital role an active and involved father plays in the lives of growing girls, because Appellee’s own bitterness saps her ability to cooperate in good faith in the parenting coordination process.”

Catherine’s attorney argues that the trial court’s finding that Bradley was in contempt for failing to pay child support was supported by the evidence. The Settlement Agreement that both signed contained the following sentence: “In addition, the parties recognize that also included in Husband’s direct cash payment to wife from Husband...are his proportional shares for any amounts paid in connection with either after-school or summer care for either or both of the children.” “Clearly, the above provisions contemplated that the parties would share the cost of private school tuition...and, in addition, any after-school care or summer care,” her attorney argues in briefs. “The trial court was authorized to interpret this document and to construe these provisions separately to conclude that the parties were not confined to choose any particular institution for summer care or after-care simply because the name of the private school is mentioned in the prior sentence.” When Bradley disagreed with the type of care Catherine chose, however, Bradley “unilaterally decreased child support payments by deducting after-school and summer care costs.” And yet, he had agreed in the divorce to give her “final decision making authority for major decisions, necessarily including decisions regarding after-care and summer care,” the attorney contends. The trial court also had the discretion to hold Bradley in contempt for not allowing her court-ordered visitation on her birthday, the attorney argues. While he was awarded visitation on Labor Day weekend in 2010, she was awarded three hours’ time with the children on her birthday, which fell in 2010 on that weekend. But to prevent her from having her time with her daughters, he took them out of town over her objection. “This was sufficient

evidence for the court to find appellant [i.e. Bradley] in willful contempt,” her attorney argues. Among other arguments, the trial court correctly denied Bradley’s motion to modify visitation, and essentially change Catherine from being primary custodian to the two having joint custody. “The trial court properly considered extensive evidence as to the best interests of the children for purposes of Appellant’s requested changes to the visitation schedule,” her attorney argues. “The evidence was sufficient to support the court’s ruling on this issue.” At trial, while the parenting coordinator testified on Bradley’s behalf, the coordinator “had no current, relevant or detailed information about the children and was ill qualified to testify as to the visitation schedule most likely to benefit the children,” Catherine’s attorney contends. The parenting coordinator later admitted she had not been aware that Bradley was telling friends and the parents of his children’s friends that Catherine had a sexually transmitted disease. A psychologist testified as an expert witness after conducting a psychological evaluation of both parties that Bradley was “very controlling, very obsessive-compulsive” and “into looking superior.” That expert said Bradley would benefit from psychological counseling, but that “he has no interest in that.” Contrary to the best interests of the children and against the advice of the parent coordinator and the therapist for one of the girls that litigation would be harmful to the children, Bradley went ahead and commenced this litigation, her attorney argues.

Attorneys for Appellant (Bradley): Maxine Hardy

Attorneys for Appellee (Catherine): Elizabeth McBride