Supreme Court of Georgia
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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, October 19, 2015

10:00 A.M. Session

<u>THE STATE V. TUNKARA</u> (S15A1715)

The **Fulton County** District Attorney is appealing a judge's order granting a new trial to a man convicted of murder because he lacked a qualified interpreter during his trial.

FACTS: On Oct. 16, 2007, a police officer was dispatched to the Sene Gambian Restaurant off Campbellton Road in Atlanta, where he found Mohamed Turay lying in the parking lot in a pool of blood. Standing nearby was Mahamadou Tunkara, also covered in blood. Tunkara, who grew up speaking Soninke in his native country of Gambia, had emigrated to the United States in 1995. A number of witnesses, who were at the restaurant and also from Gambia, spoke to police. Turay, Tunkara, and some of the others owned businesses located in the same flea market. According to the witnesses, a short time earlier that day Turay and Tunkara had been in an argument, which later resulted in Tunkara stabbing Turay and severing his carotid artery. Turay died a week later from complications at Grady hospital. According to the defense, Turay was a much taller and heavier man than the "skinnier" and weaker Tunkara. In the earlier fight, Turay had slapped Tunkara, who fell to the ground, the defense said. With Turay on top of him, Tunkara bit him before the witnesses broke up the fight and Turay went inside the restaurant. When he came back outside, the defense said Turay again confronted Tunkara and got on top of him, but this time Turay had a knife. During the scuffle, Turay dropped the knife,

Tunkara grabbed it and stabbed Turay. Tunkara did not intend to stab Turay, the defense claimed, but Tunkara could not breathe and he had to escape. State prosecutors, however, said multiple witnesses told a different story. They said it was true Turay hit Tunkara, who was bleeding from his nose. They helped break up the fight, and took Turay into the restaurant to talk to him. Turay told them Tunkara had bitten him and he felt embarrassed because "if you don't want to fight [Tunkara], there's no way you can escape from him." Two of them told Turay to get into his car and leave, which Turay agreed to do. As Turay walked to his car, with keys in hand, Tunkara ran up behind him and stabbed him in his left ear, witnesses for the State said. One of the witnesses then grabbed Tunkara and held him until police arrived. Tunkara was arrested at the scene.

Tunkara was indicted for murder, aggravated assault and possession of a knife during the commission of a felony. In January 2010, his first trial ended in a mistrial. At that trial, Tunkara had a state certified court interpreter who spoke Tunkara's native language. A second trial began in November 2010, and at that trial, Tunkara had a different interpreter. While the State said the second interpreter was "capable of understanding and speaking" Soninke, the defense said the he was "not a court certified, authorized, registered, or conditionally approved interpreter in the state of Georgia." One of the disputes at the second trial was who first had the knife, with three witnesses for the State saying Turay did not have a knife when he left the restaurant and was only holding keys. Tunkara, however, testified that Turay came to him with a knife in his left hand, and he grabbed it when Turay dropped it. Toward the end of the trial, Tunkara's attorney moved for a mistrial, arguing that the court appointed attorney had not been providing Tunkara with adequate translation of the court proceedings and as a result was deprived of his constitutional rights to understand the proceedings against him and participate in his defense. The trial judge denied the motion, stating that based on Tunkara's "demeanor throughout the trial…that he knew what was going on in this trial because he wanted to explain away what the witnesses had said…." On Nov. 19, 2010, the jury convicted Tunkara on all counts, and he was sentenced to life in prison plus five years for the knife charge. In October 2014, with a new attorney, Tunkara filed a motion requesting a new trial, arguing his due process rights had been violated by the absence of a qualified interpreter. Following a hearing on his motion for new trial, the same judge who presided over his second trial, granted the motion and ordered a new trial. The judge's order stated: "Based on the testimony of defendant's trial counsel at the hearing and the record, the court finds that there was a complete breakdown of the defendant's understanding of what was transpiring at trial due to the interpreter, and that this prejudiced him at trial….the court, therefore, in the interests and principles of justice and equity, and the sound discretion of the court, hereby grants the defendant's motion for new trial." The trial court's order cited Georgia Code § 5-5-20 and 5-5-21. Georgia Code § 5-5-20 states: "In any case when the verdict of a jury is found contrary to evidence and the principles of justice and equity, the judge presiding may grant a new trial before another jury." Georgia Code § 5-5-21 states: "The presiding judge may exercise a sound discretion in granting or refusing new trials in cases where the verdict may be decidedly and strongly against the weight of the evidence even though there may appear to be some slight evidence in favor of the finding." The State now appeals to the Georgia Supreme Court.

ARGUMENTS: The State argues the trial judge erred in granting a new trial based on the same issue "presented at trial, argued at length at trial, and denied by the same trial judge."

Because the issue was already argued before the trial judge, who denied the motion for a mistrial based on the interpreter's shortcomings, the "law of the case doctrine" barred Tunkara from re-litigating the same issue again at his motion for new trial. "It is well established that any issue that was raised and resolved in an earlier appeal is the law of the case and is binding on this court," the Georgia Court of Appeals wrote in its 2011 opinion in *Ross v. State.* The trial court "clearly abused and exceeded the considerable discretion afforded to it by statute under § 5-5-20 and 5-5-21," in granting a new trial, which was prompted by the suggestion by Tunkara's attorney that the court was authorized to do so under any circumstance in which the court found the verdict to be contrary to the principles of justice and equity. "This was an incomplete and misleading representation of the extent of a trial court's power to grant a new trial under the discretionary grounds," the State argues. In its 2011 decision in *Alvelo v. State,* the Georgia Supreme Court stated that "the discretion of a trial court to award a new trial on the general grounds is not boundless," and "should be exercised with caution and invoked only in exceptional cases in which the evidence preponderates [i.e. weighs] heavily against the verdict." In this case, "it is undeniable that the evidence of [Tunkara's] guilt was more than overwhelming," the State argues. And it was clear that Tunkara, who was the only one among the others from Gambia who did not testify in English, understood what was going on at trial. He's been here 16 years, owns three stores that sell goods, and engages in business on a routine business. In denying his motion for mistrial, the same judge pointed out he had observed that Tunkara understood the proceedings. "Consequently, it is apparent that the trial court improperly invoked its discretion under the general grounds set forth in § 5-5-20 and § 5-5-21 to overturn a jury's verdict which was obviously <u>not</u> contrary to the 'principles of justice and equity,'" the State argues. Under a 1939 decision in *Mills v. State,* the Georgia Supreme Court stated that the discretion given to trial courts under these statutes must be "carefully reviewed to see that the discretion to grant [a new trial] has been justly, wisely, and prudently exercised." Here, "it is evident that the trial judge's discretion afforded to it under the general grounds was not 'justly, wisely, and prudently exercised' as the trial court completely failed to give any consideration to the jury's verdict, in light of the facts and evidence adduced at trial, to support their verdict of guilt." The trial court's order awarding the new trial, based on the language of the two statutes, "constitutes plain legal error," and the State "requests that this Court reverse the trial judge's order, and also provide guidance on the appropriate use and application of the discretion afforded to a trial court pursuant to § 5-5-20 and 5-5-21," the State says, adding that without that guidance, it fears "that trial courts may abuse the powers afforded to them and grant defendants new trial for any reason (or perhaps for no reason) and under any instance they deem fit."

Tunkara's attorney argues the trial judge "properly exercised his broad and substantial discretion" in granting Tunkara a new trial. The trial court was authorized to review and rule on the issues Tunkara raised in his motion for new trial even though the same judge had previously denied Tunkara's motion requesting a mistrial. His motion for mistrial preserved his right to bring up the issue on appeal and the so-called "law of the case rule" does not apply to this case. At the hearing on the motion for new trial, the trial judge was presented with additional evidence, additional case law, and additional arguments. Tunkara's prior attorney, James Bryant, testified at that hearing, and most of his testimony had not been in the record at the time the trial judge denied the motion for a mistrial. Bryant talked extensively about the interpreter's failure to interpret the proceedings, requiring the attorney several times to stop and ensure that the

interpreter was communicating with Tunkara. "The trial court's order on the motion for new trial, and the record established at the motion for new trial hearing, clearly show that the trial court recognized that it could grant [Tunkara] a new trial under the authority of § 5-5-20, and in fact, decided to do so," the attorney argues. Furthermore the State did not bring up this issue at the hearing on the motion for new trial, and therefore did not preserve it to bring it up for the first time on appeal. The trial court "properly exercised its discretion in finding that the verdict of the jury was contrary to the principles of justice and equity," Tunkara's attorney argues. "As such, Appellee [i.e. Tunkara] respectfully requests that this court affirm the trial court's order granting appellee's motion for new trial."
Attorneys for Appellant (State): Paul Howard, Jr., District Attorney, Paige Whitaker, Dep. D.A., Sheila Gallow, Asst. D.A.
Attorney for Appellee (Tunkara): Bruce Harvey

AMOS V. THE STATE (S15A1580)

A man is appealing his murder conviction and life prison sentence for shooting and killing a man in **Fulton County** during an argument at a friend's apartment.

FACTS: The night of Jan. 29, 2010, a group got together at the College Park apartment of Sherrell "Shaky" Moore. Among those attending were Deuntaie Amos and Richard "Rip" Saylors, II. Saylors, who was typically loud, was particularly loud that night because he had been both drinking and using cocaine. Both Moore and Amos told Saylors to be quiet, but he continued being boisterous. Amos later testified that Saylors, "couldn't be quiet. He wouldn't – he just – everybody else was sitting down kind of chilling out. Everybody was just calmly talking…He was the only one that was pacing around the room as if it was like a party or somebody was dancing or something." One of those at the party testified that Moore had warned Saylors to be quiet because "her kids was in the back asleep." The tension between Amos and Saylors continued to build as Saylors behaved obnoxiously, witnesses said. Amos finally yelled at Saylors to leave. But Saylors refused, saying "We ain't got to go nowhere, we came over here to see Shaky and we ain't got to go." Amos told Moore to make Saylors leave and she tried to do so, telling Saylors he could come back later. At that point, everyone started to leave. Saylors' girlfriend was the first to the door. As Saylors followed, Amos said something like, "Oh, so you do everything your bitch tell you to do." (Moore testified that Amos made no such comment, according to Amos' briefs.) Saylors quickly turned around to confront Amos. Moore got between them, but when Amos told her to stand behind him, she complied. The two men began to tussle. A couple of witnesses said they saw Amos and Saylors bent over, bear hugging each other, and moving around in a circle. At one point, Saylors held Amos in a chokehold. The State argued the chokehold was only "for several seconds," and would "not have been fatal or even nearly fatal." Moore testified that Saylors was straining so hard when he was choking Amos that Saylors was turning red. Amos testified he "couldn't breathe. I was blacking out." The witnesses said that Amos then pulled a gun out of his jacket pocket and shot Saylors in the abdomen. Saylors went out the front door, stumbled down the stairs, and fell to the ground in the parking lot. Amos fled. By the time law enforcement arrived, Saylors was not moving or breathing. Officers found the murder weapon hidden inside Moore's apartment. The gun was registered to Amos, although police later determined that he had no concealed carry permit. Amos later went to the police station with his attorney and made a statement, claiming he had shot Saylors in self-defense.

Following a jury trial, Amos was acquitted of malice murder but convicted of felony murder, aggravated assault and possession of a firearm during the commission of a felony. He was sentenced to life in prison and now appeals to the state Supreme Court.

ARGUMENTS: Amos' attorney argues that a number of errors were made during the trial and his convictions and sentences should be reversed. Among the errors, the trial court was wrong to deny Amos immunity from prosecution because the evidence showed he shot Saylors in self-defense. The trial judge denied immunity based on two conclusions: first that Amos provoked Saylors' attack "by comments made about and to Saylors during the night," making Amos the aggressor. That was error, the attorney argues. "The court's reliance on Amos' words as provoking Saylors' violent response directly contradicts cases spanning over 100 years of this state's legal history." The trial court's conclusion that Amos was the aggressor "based on his hurling insults, but no threats, at Saylors unaccompanied by any physical action, was contrary to the long-standing law of this state, which unequivocally holds that Saylors was not justified in attacking Amos based on words alone," the attorney argues. The trial court also erred in finding that Amos and Saylors were engaged in "mutual combat" as there was no evidence Amos was willing to engage in any combat with Saylors. "The trial court therefore erred in concluding, as a matter of law that Amos was the aggressor, based on nothing more than his use of foul language, and should have held that he was immune from prosecution" under state law. The trial court also erred in denying him immunity after concluding Amos was not in compliance with the law on carrying and possessing firearms (§ 16-11-126) because although he could legally possess a firearm, he had no valid weapons carry license. Under § 16-11-126, "No person shall carry a weapon without a valid weapons carry license…." The trial court erred in not ruling that § 16-11-126 as applied to Amos' case was unconstitutional. The statute "violated his right to bear arms and therefore could not be the basis for the court's denial of immunity under § 16-3-24.2," which says that a person who uses threats or force in accordance with the law shall be immune from criminal prosecution "unless in the use of deadly force, such person utilizes a weapon the carrying or possession of which is unlawful by such person…." "The restrictions found in § 16-11-126 make no allowance for Amos to carry a handgun outside his home for the express purpose of self-defense," his attorney argues. Among other arguments, Amos' attorney argues the trial court erred in the instruction it gave jurors regarding the crime of voluntary manslaughter.

The State argues the trial court properly denied Amos' immunity request and the evidence was sufficient to sustain the verdict. The trial court concluded that Amos initially made comments that provoked the victim into an altercation with the intent of inflicting bodily harm, and therefore he was not entitled to pretrial immunity. At one point, Amos left and returned with his gun, the State contends. "He taunted the victim just as the victim was leaving and assumed a fighting position moving Moore from between the victim and himself to behind him," the district attorney argues in briefs. "The Appellant [i.e. Amos] and the victim joined in a bear hug and tussled before the victim placed the Appellant in a headlock which amounted to mutual combat" under Georgia Code § 16-3-24.2 (b) (1). Mutual combat exists when there is a fight and both parties are at fault because both are willing to fight due to a sudden quarrel. "Appellant's claim there was no evidence at the motion hearing he was willing to engage in any kind of combat with the victim must fail." Also, the trial court concluded Amos was not entitled to immunity under Georgia Code § 16-3-24.2 because he did not have a weapons carry permit. And the evidence

was sufficient for a jury to find Amos guilty of murder under the felony murder statute, because during the commission of aggravated assault, Amos caused the death of Saylors by shooting him with a handgun. As to the issue of the constitutionality of Georgia's statutes, under § 16-11-126, Amos "was not prohibited from carrying his handgun in his home, car, and place of business," the State argues. "Nor was he restricted from obtaining a firearms carry license, which would have permitted him to carry as he did." Another statute, § 16-11-129, regulates the ability of citizens to carry a weapon in public. "The statute meets the public safety objective by banning the carrying of a handgun without a license only in public, not on one's property or inside one's home," the State argues. The Supreme Court of Georgia has already held that a statute requiring a person to obtain a license before carrying a pistol does not violate the state constitutional right to keep and bear arms. Finally, the trial court properly instructed jurors on voluntary manslaughter, the State argues.

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Attorneys for Appellee (State): Paul Howard, Jr., Paige Whitaker, Dep. D.A., Cynthia Cartwright, Sr. Asst. D.A., Samuel Olens, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Meghan Hill, Asst. A.G.