



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, August 14, 2017

10:00 A.M. Session

BRINDLE ET AL. V. ROGERS (S17G0036)

Two attorneys representing a housekeeper, who secretly videotaped her employer having sex with her, are appealing a Georgia Court of Appeals decision upholding a lower court's disqualification of them as the woman's attorneys.

FACTS: This is the latest legal battle in this high-profile case involving the current chairman and former CEO of Waffle House, Joseph Rogers, Jr., and his former housekeeper of many years, Mye Brooke Brindle. Brindle claims that while she was employed by Rogers during his two marriages, he made her perform sex acts as a condition of her employment; he claims the sex was consensual. To support her accusations, she made a video recording of one of their encounters without him knowing, which her attorneys said she did to prevent Rogers from denying that "the workplace sexual demands" had occurred. During what was supposed to be the parties' mediation of Brindle's allegations, in 2012, Rogers pre-emptively sued Brindle in **Cobb County** for invasion of privacy and intentional infliction of emotional distress. Rogers also sought an injunction to prevent the dissemination of the video. Brindle countersued Rogers for battery and other claims related to his alleged sexual harassment of Brindle. During discovery (the pre-trial phase in a lawsuit when both parties may obtain information from each other to prepare their case), Rogers sought information on whether her attorneys, David Cohen and John

Butters, were involved in the plan to make the surreptitious video. Rogers claimed that if Cohen and Butters helped plan the video, they broke the law under Georgia Code § 16-11-62 (2), which states it is illegal for any “person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view.” Brindle objected to turning over documents or information related to that issue, arguing they were protected by attorney-client privilege. But eventually the trial court granted Rogers’ motion, requiring Brindle and her attorneys to turn over limited information on the issue. The judge concluded Brindle had violated Code § 16-11-62 by video-recording Rogers without his knowledge and that the attorney-client privilege had been waived under the “crime-fraud” exception after Rogers provided enough evidence to show that Brindle had been planning to make the video recording when she sought the advice of Cohen and Butters. In a June 14, 2013 order, the trial court then allowed Rogers’ attorneys to re-take Brindle’s deposition and ordered Brindle to answer questions related to where and from whom the recording device was obtained; under what circumstances the recording device was obtained; and who else besides Brindle was involved in planning the video recording. Four days later, Rogers filed an emergency motion to have the attorneys disqualified from representing Brindle. Meanwhile, Brindle pursued a pre-trial appeal of the June 14 order demanding she answer questions related to how the video was made.

In May 2014, while Brindle’s appeal of the discovery order was pending, Rogers filed a second lawsuit in Cobb County against Cohen, Butters, and Hylton B. Dupree, Jr., a third lawyer who represented Brindle. In that separate lawsuit, Rogers sought damages and accused the attorneys of having committed criminal actions related to their participation in having the video made. The attorneys filed motions to dismiss Rogers’ second lawsuit under Georgia’s Anti-Strategic Lawsuit against Public Participation (anti-SLAPP) statute. In June 2015, the trial court granted Rogers’ motion to disqualify the attorneys based on two of its findings: 1) that under Georgia Rule of Professional Conduct 3.7, the attorneys could not act as advocates for Brindle because they were “necessary witnesses” in both lawsuits (as well as defendants in the second suit) and because their testimony, which would be relevant to the issue of who had planned or assisted with the video, could conflict with testimony Brindle gave; and 2) that the attorneys had a conflict of interest in representing Brindle because the court could foresee a situation where Brindle and the attorneys would be “pointing fingers at each other about the planning of the video.” Brindle, Cohen, and Butters then appealed, and on July 14, 2016, the Georgia Court of Appeals upheld the trial court’s order disqualifying the attorneys. They now appeal to the Georgia Supreme Court, which has agreed to review the case to determine whether the Court of Appeals erred in affirming the trial court’s order disqualifying Brindle’s attorneys based on an alleged conflict of interest. (Separate from these civil suits, in June 2016, a Fulton County grand jury indicted Brindle and the attorneys on criminal charges of conspiracy to commit extortion and unlawful surveillance related to the video. Although the trial court dismissed those charges in November 2016, State prosecutors have appealed the dismissal, and their appeal is also currently pending in the Georgia Supreme Court.)

ARGUMENTS: The attorneys for Brindle, Cohen and Butters argue the Court of Appeals erred in disqualifying Cohen and Butters. The trial court’s disqualification of Brindle’s attorneys “validated a relentless campaign by Rogers,” they argue in briefs, to deprive Brindle “of representation and cripple her ability to pursue sexual harassment claims against him.” Both

the trial court and the Court of Appeals failed to heed the Georgia Supreme Court's admonition that efforts to disqualify a litigation adversary "should be viewed with caution... for it can be misused as a technique of harassment." Nor did those courts apply the proper legal standard before granting the "extraordinary remedy" of disqualification. Georgia law does not permit a party's lawyer of choice to be disqualified based on an alleged conflict without a finding by the judge that the party filing the motion has "standing," or the legal right, to sue. In its 2005 decision in *Bernocchi v. Forcucci*, the state Supreme Court ruled that, "In order for counsel to have standing to raise the issue of an opposing lawyer having a conflict of interest...there must be a violation of the rules which is sufficiently severe to call in question the fair and efficient administration of justice, and opposing counsel must provide substantiation." "Neither Rogers' motion to disqualify nor the trial court's order disqualifying Cohen and Butters even mention, much less address, the standing requirement," the attorneys argue. "Compounding that error, the Court of Appeals acknowledged the existence of the standing requirement, yet failed to apply it in this case." Georgia law also does not permit an attorney to be disqualified as a "necessary witness" when there are other witnesses available. Finally, Rogers' "strategic suit against Brindle's counsel is barred by Georgia's abusive litigation statute, which is the 'exclusive remedy for abusive litigation,'" the attorneys for Brindle, Cohen and Butters argue.

No issue of "standing" barred the trial court from disqualifying Cohen and Butters, Rogers' attorneys argue. Under *Bernocchi*, an opposing party in Georgia has standing to raise a conflict that clearly calls into question the "fair or efficient administration of justice." Here, Cohen and Butters were disqualified not "by mere technicality, but because the trial court could not foresee the case proceeding fairly or efficiently with Cohen's and Butters' continued participation as counsel," the attorneys argue. "In 2012, prior to any litigation, Cohen and Butters met with private investigators who warned them that having their client surreptitiously film Rogers in his home without his knowledge would be illegal. Nonetheless, Cohen and Butters retained those investigators to train and equip Brindle with a disguised spy camera in order to do just that. Now, as a result of that video recording and the extortion attempt that followed, Brindle is being sued by Rogers in this action and was also indicted (with Cohen and Butters) by a Fulton County grand jury. Moreover, with Cohen and Butters as her counsel, defying an order of the trial court, Brindle has refused to provide basic discovery regarding who participated with her in creating the videos – discovery likely to further implicate Cohen and Butters, against whom Rogers is also now seeking damages in a separate lawsuit." Also, Brindle and her attorneys failed to raise their "standing" argument at the trial court level, and therefore they have waived their right to raise it for the first time when the case is on appeal. Despite the standing argument, because the trial court found that Cohen and Butters would be "necessary witnesses" in the case, their disqualification was appropriate, Rogers' attorneys argue. It was also required because surreptitious video recording in private places is illegal and they participated in that activity. Finally, the Court of Appeals confirmed that Cohen and Butters were sued not for their actions as lawyers but rather for their criminal conduct and civil wrongdoing, the attorneys argue. "It would be unthinkable for any trial court to tolerate a case going forward with lawyers who share civil and criminal liability exposure with the defendant they represent."

Attorneys for Appellants (Brindle): John Floyd, Michael Terry, Tiana Mykkeltvedt, Hylton Dupree, Jr., Darren Summerville

Attorneys for Appellee (Rogers): Robert Ingram, Jeffrey Daxe, David Conley

BLACH V. DIAZ-VERSON (S17Q1508)

At issue in this appeal is the interpretation of Georgia's new garnishment statute and whether under the new law, an "insurance company" is always considered a "financial institution" subject to stricter garnishment limitations.

FACTS: Harold Blach filed a garnishment action in December 2015 to collect a \$158,343.40 judgment that he obtained in an Alabama federal court against Sal Diaz-Verson. Blach had the judgment registered in the U.S. District Court of the Middle District of Georgia. Blach has not received the money, and he now seeks to garnish the bi-monthly retirement benefit payments that AFLAC, Inc., an insurance company, pays to Diaz-Verson, its former employee. The federal court ruled that under Georgia's garnishment statute at the time, AFLAC's payments to Diaz-Verson were not exempt from garnishment but only 25 percent of the payments could be garnished. The court also ruled that a continuing garnishment would be improper because Diaz-Verson is not a current employee. Consequently Blach files a new garnishment about once a month and in response, AFLAC deposits approximately \$9,500 into the court. To date, AFLAC has deposited more than \$140,000 into the court's registry to satisfy the judgment against Diaz-Verson.

On May 12, 2016, Georgia's new garnishment statute went into effect. The statute amended the old statute in response to a ruling by U.S. District Judge Marvin Shoob who held that Georgia's garnishment statute was unconstitutional on due process grounds because it: 1) failed to require notice of exemptions available; 2) failed to inform debtors of procedures for claiming an exemption; and 3) failed to provide a prompt procedure for resolving exemption claims. Shortly after entering the order, Judge Shoob limited his ruling "to garnishment actions filed against a financial institution holding a judgment debtor's property under a deposit agreement or account." Shoob's final order did not apply to the garnishment of employee wages and earnings. At the next session of the Georgia General Assembly, legislators enacted the new garnishment statute "to modernize, reorganize, and provide constitutional protections in garnishment proceedings" and "to provide for procedures only applicable to financial institutions." Relevant to this case, the Georgia legislature substantially shortened the garnishment period for garnishments against a "financial institution." The former statute provided for a 30-to-45 day garnishment period for all garnishments. The new statute provides that garnishments against "financial institutions" may only last for five days. All other garnishments against nonfinancial institutions have a 29-day garnishment period. As a result of the new statute, separate forms became available for garnishments that involved financial institutions and garnishments that involved nonfinancial institutions. (The new statute defines "financial institution" as: "every federal or state chartered commercial or savings bank, including savings and loan associations and cooperative banks, federal or state chartered credit unions, benefit associations, **insurance companies**, safe-deposit companies, trust companies, any money market mutual fund, or other organization held out to the public as a place of deposit of funds or medium of savings or collective investment.")

After the new statute went into effect, Blach used the "nonfinancial institution" garnishment form, and AFLAC followed the instructions on the form and garnished payments to Diaz-Verson for 29, not five, days after receiving each summons of garnishment. But under the new statute, Blach was using the wrong form, Diaz-Verson contended, and he filed motions to dismiss all garnishments filed by Blach after May 12, 2016, the date the statute went into effect.

Diaz-Verson argued that under the statute, AFLEC, as an insurance company, is a financial institution and Blach should have used the financial institution garnishment form which provided only a five-day garnishment period.

Because the Georgia courts have not had an opportunity to interpret the state's new garnishment statute, the U.S. District Court has certified the following question for the Supreme Court of Georgia to answer before it issues its decision: "Whether an insurance company is a 'financial institution' under the Georgia garnishment statute when the insurance company is garnished based on earnings that it owes the defendant as the defendant's former employer."

In its 15-page order sending the question to the Georgia Supreme Court, the federal judge writes that given that "the statute clearly states that insurance companies are financial institutions," and given that AFLAC is an insurance company, "this Court would be inclined to hold that an insurance company is a financial institution for purposes of the Georgia garnishment statute and that the garnishment period for any garnishment action against it is five days and not 29." However, the Georgia Supreme Court deserves "the opportunity to determine what this Georgia statute actually means," the federal judge writes, "particularly given that an argument can be made that this Court's plain meaning interpretation cannot be what the General Assembly intended." The judge goes on to say that "AFLAC is not being garnished based on an insurance policy that Diaz-Verson maintains with AFLAC or based on property it holds under some type of deposit agreement. Rather, AFLAC is garnished based on 'earnings' that it owes Diaz-Verson as his former employer." However, "the Court cannot write a limitation into the statutory definition where one does not exist." The federal judge suggests that, depending on "how far the Georgia Supreme Court finds it appropriate to drift from the text of the statute, evidence of legislative intent can be found to support a non-frivolous alternative interpretation of the statute." The last catchall phrase in the statute's definition of "financial institution" may mean the legislature intended for the garnishment amendments to apply to a certain class of financial institutions – "those which hold deposits for their customers." The federal judge concludes by saying that the issue is whether "the shortened period applies to all garnishment actions against financial institutions or only those relating to property held by the financial institution pursuant to a deposit or account agreement." "The resolution of that issue has significant implications for financial institutions, employees of financial institutions, and garnishment creditors of employees of financial institutions," the federal judge says. The parties now appeal to the Georgia Supreme Court.

ARGUMENTS: "The issue before the Court arises from the latest attempt by Diaz-Verson to evade the consequences of Blach's 2012 judgment against him," Blach's attorney argues. "The cardinal rule of statutory construction requires the Court to 'look diligently for the intention of the General Assembly....'" A plain reading of Georgia's new garnishment statute "makes clear that an insurance company is only a 'financial institution' when it is answering a garnishment that seeks to garnish a defendant's fund or account as opposed to his wages or payments." Here, a traditional garnishment is appropriate "because AFLAC does not serve as a repository of Diaz-Verson's money. It is not Diaz-Verson's bank," the attorney argues in briefs. Diaz-Verson's interpretation of the Georgia statute would produce "the unreasonable or absurd result that continuing garnishment can never be used to garnish employees of insurance companies." Under his interpretation of the law, "a spouse or ex-spouse seeking child support must file a new garnishment every five days if the non-paying parent works in the financial

industry.” AFLEC has never shown any confusion about its identity as a traditional garnishee, the attorney points out. “The Georgia Legislature clearly did not intend the financial institution garnishment procedure to apply when an insurance company is garnished based on earnings it pays its former employee.”

Diaz-Verson’s attorney argues that the plain language of the new Georgia garnishment statute dictates that an insurance company is a financial institution, “and therefore, a garnishment summons served upon an insurance company must follow the procedures outlined for financial institution garnishments.” Significantly, the attorney argues, “there is no language in the Georgia garnishment statute that limits or qualifies the context(s) in which a financial institution garnishee may or may not be subject to financial institution garnishment procedures.” Blach attempts to ignore the plain meaning of the statute and impose a limitation that is not expressed in the statute itself, arguing that an insurance company can only be a “financial institution” when it maintains a bank or depository account for the debtor. Under Georgia’s well-established rules of statutory construction, this Court must “presume that the General Assembly meant what it said and said what it meant.” Blach’s efforts to create an alternative interpretation is contrary to the plain language adopted by the General Assembly. He “attempts to manufacture a procedural scheme purely for the sake of his own convenience and to salvage his claim to a subset of funds garnished through an incorrect procedure.” But as the federal judge noted, if the garnishee is a “financial institution,” “nothing in the amendments expressly distinguishes between garnishments directed at financial institution account holders and financial institution employees.” The fact that the plain meaning of the new statute calls for a different procedural mechanism to garnish financial institution does not mean that those circumstances rise to the level of absurdity or contradiction, the attorney argues. As one of the lead legislators stated in crafting the new statute, “there will be what we call a follow-up tweaking” of the statute. Therefore, “the General Assembly has explicitly stated that it both expects and intends to make any necessary adjustments to the new statute. Respectfully, this Court should not disturb that rightful process.” For the courts “to change the plain language of a statute as written under the guise of judicial interpretation would violate separation of powers and encourage a slippery slope where the courts will be burdened to constantly fix perceived legislative errors based on arguments about what a statute ‘should’ mean,” Diaz-Verson’s attorney argues. As the Georgia Supreme Court has ruled previously, “If the act works unscientifically, absurdly, or unjustly, that is for the Legislature to correct.”

Attorney for Appellant (Blach): A. Binford Minter

Attorney for Appellee (Diaz-Verson): Kurt Powell

EDOKPOLOR ET AL. V. GRADY MEMORIAL HOSPITAL CORPORATION ET AL.
(S17G0429)

A man who sued Grady Hospital for the wrongful death of his wife is appealing a decision against him by the Georgia Court of Appeals. The intermediate appeals court upheld a **Fulton County** court in dismissing the man’s appeal on the ground that he failed to file it within the required timeframe.

FACTS: This case has to do with procedural rules and when a case is considered final. In July 2010, Patrick Edokpolor and his daughter, Linda Patrick, sued Grady Hospital and a nurse for medical negligence leading to the death of their wife and mother, Rose Edokpolor. They

claimed Rose choked on bowel cleansing fluid which was given to her orally instead of through a nasogastric tube as the doctor had directed. As part of the legal process, Edokpolor and his daughter were required to notify the hospital and nurse that they were suing them. Under Georgia law (Georgia Code § 9-11-4 (d) (4)), to avoid legal costs, plaintiffs such as Edokpolor may ask a defendant such as Grady to waive the requirement that it be served with a formal summons. The law states that if a defendant “fails to comply with a request for a waiver made by a plaintiff..., the court shall impose the costs subsequently incurred in effecting service on the defendant unless good cause for the failure is shown.” Edokpolor requested waiver of service from Grady, and when the waiver was ignored, he went ahead and had Grady served in the normal manner. He then filed a motion, asking the court for an award of attorney’s fees. In May 2013, the trial court granted his motion but reserved until later determination of the amount of the award. On Oct. 7, 2014, the trial court ruled in Grady’s favor and granted it “summary judgment” after finding that Edokpolor had failed to prove “causation,” i.e. that the nurse’s actions had caused the woman’s death. (A judge grants summary judgment after determining a jury trial is unnecessary because the facts are undisputed and the law falls squarely on the side of one of the parties.) At that point, still pending was the issue of the amount of attorney’s fees. In November 2014, the trial court denied Edokpolor’s “Emergency Motion for Reconsideration of Order Granting Summary Judgment.” On Jan. 22, 2015, Edokpolor filed a motion to revise the order granting summary judgment to Grady, arguing that the case was still pending because of the unresolved issue of attorney’s fees. On Sept. 14, 2015, the trial court entered an order assessing the service expenses and fees at \$1,374. In the same order, it also determined that its earlier order granting summary judgment to Grady on Oct. 7, 2014 was a final judgment, and it denied Edokpolor’s motion to revise the summary judgment order. On Oct. 14, 2015 – more than a year after the judgment – Edokpolor filed a notice of appeal with the Georgia Court of Appeals, stating he was appealing “from the summary judgment dated 10/7/2014, made a final order on 9/14/2015.” Under state law, a notice of appeal must be filed within 30 days of the trial court’s final judgment. In September 2016, the Court of Appeals dismissed Edokpolor’s appeal after determining that the notice of appeal, which was filed more than one year following the entry of summary judgment in favor of Grady, was “untimely.” Edokpolor then appealed to the Georgia Supreme Court, which has agreed to review the case to determine whether a trial court’s order that reserves determination of the amount of attorney’s fees to be awarded based on Georgia Code § 9-11-4 (d), while disposing of all other issues, is a final order.

ARGUMENTS: Edokpolor’s attorney argues the answer to the question is no, and that this case remained pending because of the unresolved fee issue. Therefore, the October 2014 judgment was not final. This exact issue was addressed by the Georgia Supreme Court in its 2012 decision in *Sotter v. Stephens* and in that case, the high court “held that the pendency of claim for attorney’s fees prevented the judgment from being final,” the attorney argues in briefs. Specifically, *Sotter* states that “if the judgment reserves the issue of attorney’s fees under Georgia Code § 13-6-11, then one cannot claim that ‘the case is no longer pending in the court below.’” Therefore, Edokpolor and his daughter were “timely” in their motion asking the trial court to reconsider its Oct. 7, 2014 grant of summary judgment to Grady Hospital on the causation issue. The Supreme Court should reverse the Court of Appeals decision and send it back to that court to address the substantive issues presented, the attorney argues.

Attorneys for Grady Hospital argue that the answer to the question posed by the Supreme Court is yes, and Edokpolor's appeal should be dismissed. The filing of their brief in this Court was late, as the Rules of the Supreme Court require that it be filed within 20 days after the case is docketed – or filed – here. This appeal was docketed in this Court on May 1, 2017 and therefore Edokpolor's brief setting forth his arguments was required to be filed by May 21, 2017, but it was not filed until June 10, 2017. Furthermore, the trial court's Oct. 7, 2014 order granting Grady's motion for summary judgment was a final order. Edokpolor's contention that an outstanding determination of attorney's fees to be awarded under § 9-11-4 (d) prevents an order that disposes of all other issues in a case from being a final judgment "is based on a misinterpretation of the law," the attorneys argue in briefs. "There is a clear distinction made by this Court when it comes to attorney's fee statutes that become active as a result of conduct occurring during the litigation versus attorney's fees statutes that either become active, or function as their own cause of action, due to events arising out of the underlying cause of action." In *Sotter*, this Court distinguished between attorney's fees awarded under § 13-6-11 from other attorney's fees statutes, such as § 9-11-4 (d) by noting that, "Awards of attorney's fees under the aegis of § 13-6-11 apply to conduct "arising from the transaction underlying the cause of action in litigation." When the conduct occurs during the litigation, as opposed to arising from the underlying cause of action, "the outstanding attorney's fee determination should not affect the finality of the judgment, i.e. an order that disposes of all other issues, save the amount of attorney's fees to be awarded, should be deemed a final order subject to appeal...." The attorney's fees authorized by § 9-11-4 (d) "clearly fall within the category of fees awardable for conduct occurring during litigation, namely failure to accept a waiver of service once a suit is pending," the hospital's attorneys argue. "Such fees are not the result of the underlying conduct that gave rise to the suit, but conduct that occurred during litigation for which fees are awardable." The fact that the amount of attorney's fees to be awarded remained outstanding after all the other issues were adjudicated did not prevent the judgment from being final. Therefore, Edokpolor's appeal was late "as it was required to have been filed within 30 days of the summary judgment order." The Court of Appeals decision should be upheld and Edokpolor's appeal should be dismissed, Grady's attorneys argue.

Attorney for Appellant (Edokpolor): Joseph King, Jr.

Attorneys for Appellee (Grady): Jeffrey Tompkins, Gerond Lawrence, LaTisha Jackson

2:00 P.M. Session

LEBIS V. THE STATE (S17A0948)

A woman is appealing her murder conviction and sentence to life in prison without parole for her role in the death of a **Clayton County** police officer who was killed during a shootout with her husband.

FACTS: According to prosecutors, Lisa Ann and Tremaine Lebis first met in 2000 when Tremaine was serving a 20-year prison sentence for aggravated assault after shooting a man in Gwinnett County. They lived together for three years, then married in June 2012. Both were convicted felons. Lisa had three prior felony convictions, including a 2004 conviction for aggravated assault in Fulton County. Tremaine also had a criminal history, and after getting out

of prison for his 1992 aggravated assault, he went back to prison for firearms possession and was again released in May 2012. By December 2012, there was yet another warrant for his arrest.

On Dec. 17, 2012, Lisa and Tremaine, who had been staying at a Motel 6 in Stockbridge, were evicted for late payment of the room. The room was registered not under either of their names, but rather under the name of Lisa's son. Lisa, who was visibly intoxicated or high on drugs, confronted the front desk clerk, yelling and cursing and resulting in her calling 911 for police assistance. When the clerk's supervisor went to the room to make sure the couple had left, she saw Tremaine for the first time and found the room in upheaval with a terrible odor from the couple's three dogs. There were dog feces and dog food on the floor, two dresser drawers had been broken, and the box spring was damaged. The supervisor asked where Lisa was, and Tremaine responded she had gone to get money to pay for the room. The supervisor replied she would not accept the payment and they would have to leave. She also informed him police were on their way.

Clayton County Police Officers Sean Callahan and Waymondo Brown responded to the call, arriving separately at the motel. From speaking from staff, the officers thought they might have criminal-damage-to-property charges against the people staying in room 226. Callahan, 25, was new to the police force and had only been an officer three-to-four months. As they headed to room 226, they saw Tremaine and Lisa taking items from the room and stacking them outside. Officer Brown asked Tremaine what was going on, and Tremaine said there had been a misunderstanding between the motel staff and Lisa. After going to the room and finding evidence of damage, Officer Brown approached Tremaine, noticing he had a pocket knife. He did not notice that Tremaine was wearing a fanny pack. As he tried to handcuff Tremaine, Lisa started yelling loudly and Tremaine escaped, running to the back of the Motel 6. The officers pursued with Callahan running ahead of Brown. As they rounded the corner, Brown saw Tremaine's hands reach to his fanny pack before Tremaine shot at them, hitting Callahan in the shoulder and neck. Brown returned fire, hitting Tremaine who fell to the ground. Brown located Callahan, who had fallen over a retaining wall, called for backup and began administering emergency medical help. When Callahan's lips started turning blue, Brown began CPR. According to prosecutors, Callahan was still breathing. Suddenly Lisa appeared out of nowhere "going bonkers," Brown later testified. She was cursing at him and flailing about, and he could not see if she had a weapon. He then pointed his gun at her with one hand while trying to maintain pressure on Callahan's gunshot wound with the other and yelled at her to show him her hands, which initially she did not do. When she finally stood up and he could see she was unarmed, he resumed CPR, later testifying he'd lost about 50 seconds while responding to the belligerent and uncooperative Lisa. When other officers arrived, Lisa, who had to be restrained, was arrested. Callahan was transported to Grady hospital where he underwent surgery but died 14 hours later. Tremaine, meanwhile, died at the scene.

In May 2013, a Clayton County grand jury indicted Lisa Ann Lebis for being party to the crime of felony murder based upon the underlying felony of possession of a firearm by a convicted felon. She was also indicted for a number of other crimes, including obstruction of a law enforcement officer and possession of a firearm by a convicted felon. The State filed notice it intended to seek an enhanced punishment for a repeat offender due to her felony crime record. Following a 2014 trial, Lebis was convicted of all charges except disorderly conduct and felony

theft by receiving stolen property. She was sentenced to life without parole plus 35 years in prison. Lebis now appeals to the Georgia Supreme Court.

ARGUMENTS: Lebis's attorneys argue the trial court made eight errors, six of which involve the insufficiency of the evidence to convict her of felony murder, obstruction of the officers during their attempt to arrest her husband and during Brown's life-saving efforts, possession of dangerous weapons as a party to the crime with Tremaine Lebis, and possession of a firearm by a convicted felon as a party to the crime with Tremaine. Her attorneys also argued her trial attorney rendered "ineffective assistance of counsel" in violation of her constitutional rights by failing to request and preserve a recording and transcript of opening and closing arguments. And the attorney was ineffective for failing to retain an expert to repudiate the State's evidence that Lisa Lebis's actions at the scene contributed to Callahan's death by hindering Brown's CPR actions. Lebis asks the high court to reverse the conviction for felony murder as there was "insufficient evidence Ms. Lebis was a party to the crime of felony murder as alleged by the State simply because she knew her husband possessed a weapon," her attorneys argue in briefs. Also, "There was insufficient evidence that she knowingly hindered or let alone actually hindered Officer Brown when he attempted to perform lifesaving CPR on Officer Callahan."

The State, represented by the District Attorney's and Attorney General's offices, argues that the State "presented sufficient evidence from which a rational trier of fact could have found appellant [i.e. Lisa Lebis] guilty of felony murder by being a party to the crime and co-conspirator with Tremaine Lebis." A rational jury could find beyond a reasonable doubt that she "had guilty knowledge of the firearms at issue in this case including the murder weapon." The jury was authorized to find that she and Tremaine had been conspiring to possess firearms since April 2011 to protect themselves from Lisa's family members. And the evidence showed she helped Tremaine get the guns that were found in their Motel 6 room. "Most importantly, the evidence authorized the jury to find that Appellant continued to assist her husband possess the murder weapon right up until the time that he murdered Officer Callahan when she distracted the officers who were trying to arrest her husband by screaming at them and acting aggressively toward them...." Her actions helped her husband elude arrest and run away from the officers. She obstructed their attempt to arrest him, knowing that her husband had a handgun in his fanny pack and that he had just been released earlier that year from prison on a gun possession charge. Among other arguments, the State also "presented sufficient evidence from which a rational trier of fact could have found appellant guilty of being a party to the crimes of possessing dangerous weapons and firearms by convicted felons," the State's attorneys argue.

Attorneys for Appellant (Lebis): Sandra Michaels, John Martin

Attorneys for Appellee (State): Tracy Lawson, District Attorney, Jeff Gore, Asst. D.A., Christopher Carr, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Ashleigh Headrick, Asst. A.G.

JOHNSON V. THE STATE (S17A1479)

A man convicted of murder in **Decatur County** is appealing on the ground that the District Attorney racially discriminated in his striking of potential jurors, in violation of the man's constitutional rights.

FACTS: Jonathan Johnson was indicted for malice murder, attempt to commit kidnapping, aggravated assault, possession of a firearm by a convicted felon and possession of

less than an ounce of marijuana following the shooting death in Bainbridge, GA of Robert “Cannonball” Cannon, Jr. Joshua Anthony Lee and Marquis Trevon Scott were indicted with Johnson as co-defendants. After Scott pleaded guilty to criminal attempt to commit murder, in November 2015, Johnson and Lee proceeded to jury trial. The first day of trial began with jury selection and “peremptory strikes” – in which both the prosecution and the defense may dismiss potential jurors without stating why. In this case, the defense had 11 peremptory strikes, and the State was allowed 10. After the parties made their strikes, but before the jury was sworn, Johnson’s defense attorney challenged the State’s strikes, based on the U.S. Supreme Court’s 1985 ruling in *Batson v. Kentucky*. Under *Batson*, prosecutors may not use peremptory strikes to exclude jurors solely based on their race. In response to a *Batson* challenge, the trial court must conduct an analysis involving a three-step process: 1) the opponent of a peremptory challenge must provide evidence to show racial discrimination; 2) the proponent of the strike must then provide a “race-neutral” explanation for the strike; and 3) the trial court must then decide whether the opponent of the strike has proven discriminatory intent.

At a pre-trial hearing on Johnson’s *Batson* challenge, the Clerk of Court testified that the jury pool for Johnson’s and Lee’s trial included 24 white potential jurors and 16 African Americans. Among its 10 peremptory strikes, the State excluded nine African Americans. In other words, starting from an array that was 40 percent African American, the State used 90 percent of its strikes on African Americans. Following the presentation of the evidence, the trial judge concluded that the defendants had failed to make a case for their *Batson* motion, but the judge required the State to articulate the reasons for its peremptory challenges. District Attorney Joe Mulholland then articulated purported race-neutral reasons for his 10 peremptory challenges, which included the jurors’ previous run-ins with the law, relatives who had been or were being criminally prosecuted for unrelated incidents, knowing the victim or co-defendant, and medical problems that would interfere with the trial. At the conclusion of the District Attorney’s testimony, the trial court ruled that the State had “articulated race-neutral reasons for the exercise of its peremptory challenges” and denied Johnson’s *Batson* challenge. The case proceeded to trial with a jury that was 75 percent white and 25 percent black. On Nov. 16, 2015, Johnson was convicted of murder, aggravated assault and possession of marijuana, and he was sentenced to life in prison. Johnson filed a motion requesting a new trial, and at a hearing on the motion, called four African American prospective jurors whom the State had struck. All four testified that the State had presented inaccurate information about them as the basis for striking them. The trial court nevertheless denied Johnson’s motion for new trial. Johnson now appeals to the state Supreme Court.

ARGUMENTS: Johnson’s attorney argues the trial court erred in denying his motion for new trial because the State “used its peremptory challenges to systematically exclude African Americans” from Johnson’s trial jury, and because “many of the State’s purported race-neutral reasons for excluding African Americans were demonstrably false.” “Although the State did submit race-neutral reasons for striking nine African American jurors, a pattern of untruths among the State’s proffered reasons demonstrates that those reasons are merely pretext for discrimination.” Under the first step of the *Batson* analysis, the courts have ruled that a party has carried his burden of purposeful discrimination where nearly all the opposing party’s strikes were used against a single racial group, as they were here. Having used 90 percent of his peremptory strikes against African Americans, “there is ample evidence to permit the judge to

draw an inference of discrimination,” the attorney argues in briefs. Yet the trial court erroneously ruled that Johnson had failed to make the case, although the judge did require the State to articulate the reasons for the peremptory challenges. In the *Batson* test’s second step, Johnson concedes that the State met its burden by stating a race-neutral reason for each of his peremptory strikes. In analyzing the *Batson* test’s third step, the burden shifts back to the defendant who must prove that the State’s explanation “is merely pretext for discrimination.” Here, “a suspicious pattern emerges,” Johnson’s attorney contends. “The State struck nine African American jurors. Of these nine, seven strikes were justified with essentially the same explanation: the State claimed to know of some family member with prior negative law enforcement contact. As to four of those seven strikes, the Appellant [i.e. Johnson] was later able to prove that the State’s proffered explanation was untrue.” The unreliability and inaccuracy of the information about family members of the African American jurors “compounds suspicions raised by the pattern of the State’s proffered explanations, and tends to establish discriminatory intent,” the attorney argues. “The third step of the *Batson* analysis is satisfied. It was therefore error to deny the Appellant’s motion, and to deprive him of the appropriate remedy.” The Georgia Constitution’s guarantee of equal protection of the law should require that the State’s proffered race-neutral reasons be supported by competent evidence. Before completing the second step of the *Batson* analysis, the trial court ought to “require that additional evidence be heard in support of the prosecutor’s proffered reasons,” the attorney argues. “If a defendant is to be offered any protection whatsoever against a potentially racially-biased prosecutor, his challenge to the prosecutor’s peremptory strikes cannot be dispelled with that most easily-generated explanation, ‘I have received information that this juror has family members who have had negative contact with law enforcement,’” Johnson’s attorney argues.

The State, represented by the District Attorney and Attorney General’s office, argues the trial court properly denied Johnson’s *Batson* challenges. The State’s argument that the District Attorney’s purported race-neutral reasons for striking nine African American jurors was a pretext for discrimination that violates equal protection under the Constitution, “lacks merit,” the State argues in briefs. Before articulating his race-neutral reasons, the District Attorney went over the list of those he struck with the Decatur County Sheriff’s Office, the probation department and the Bainbridge Police Department. He also ran every name on the jury list through EAGLE, a computer program showing any prior arrests in the county. The District Attorney further testified that in identifying family ties, he spoke to law enforcement and relied on personal knowledge. “The trial court subsequently found that ‘the State has articulated race-neutral reasons for the exercise of its peremptory challenges,’ and denied the motion,” the State argues. And following the hearing on Johnson’s motion requesting a new trial, the trial judge found that, “The defendants’ motion for new trial, based on their assertion that the State failed to make race-neutral reasons for their peremptory strikes, is without merit. At trial, the State provided legitimate reasons for their strikes which were in no way racially motivated. The fact that some of the information provided by law enforcement to the State later proved to be inaccurate is irrelevant since there was a good faith basis for the State to rely on information provided to them prior to trial.” Regarding step two of the analysis, according to previous Supreme Court rulings, an explanation for a peremptory strike is race-neutral when it is “based upon the personal experience of the venire man in question rather than a characteristic or stereotype peculiar of any race.” The explanation does not need to be “persuasive” or even “plausible,” the State argues.

And as to the third step of the analysis, “Though the reasons provided for the strikes of four of nine potential African American jurors were later proved to be unsupported, Appellant has still not shown that the State’s strikes were racially motivated,” the State contends. Finally, because Johnson did not at trial raise any challenges to the Georgia Constitution’s guarantee of equal protection, under procedural rules, he may not do so for the first time when the case is on appeal. Regardless, Johnson’s contention “is currently supported by law and lacks merit.”

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Attorneys for Appellee (State): Joe Mulholland, District Attorney, Moruf Oseni, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Elizabeth Haase, Asst. A.G.

MANNER V. THE STATE (S17A1519)

A young man is appealing his **DeKalb County** murder conviction, arguing that his trial attorney was incompetent and he was given “ineffective assistance of counsel” in violation of his constitutional rights.

FACTS: According to the facts presented by state prosecutors, on Aug. 22, 2013, **Paul Ime Manner**, known as “P-Roo,” drove by the home of brothers Brandon and Quintavius Hishida in DeKalb County. He told the Hishida brothers that Tracey Kingcannon, who lived in the area on Haymarket Trail, had stolen something from him and he was going to “get that ni***r.” The Hishidas later testified that a man they knew as “YG” was with Manner, and they saw a pistol in the front seat of the car. Earlier, Kingcannon had told a friend, Darion Ross, that while visiting Manner, he had stolen a 9 mm Hi-Point pistol from Manner.

Kingcannon also had problems with the Hishida brothers. Earlier that year, in May 2013, Kingcannon had gotten into a fight with one of the brothers and Brandon Hishida’s gun discharged, hitting a neighbor’s house. The Hishidas were arrested that day and charged with aggravated assault. A week later, the Hishida brothers reported to law enforcement that Kingcannon had come near their home and fired a gun.

Then on Aug. 22, 2013 – the same day Manner came by and told the Hishidas he was going after Kingcannon – several hours earlier, Kingcannon, Ross and a third man had emerged from the woods near the Hishidas’ home. While the Hishida brothers and their mother stood on their driveway, Kingcannon and the others started shooting at them. The Hishidas called police.

Later that night, Manner called Jermaine Davis who later testified that Manner wanted to know if he was still in the market to sell his .380 pistol. Davis said he was. Manner also asked Davis if he could come by and give him a ride around the corner because he needed to get something from somebody. Early on Aug. 23, Davis drove over in his 2002 white Mercury Grand Marquis to get Manner, and found him standing outside with “YG,” whose name was Demarcus Abrams. Manner paid for the gun and Davis gave him the .380 firearm. As Davis was driving through the neighborhood, Manner and “YG” told him to stop the car, and the two jumped out and ran back to Kingcannon’s house. Davis then heard gunshots and when he looked in his rearview mirror, he said he saw both men firing at the house. Manner had the .380 firearm and “YG” had a larger silver and black firearm which Davis believed was a 9-millimeter firearm. During the shooting, Davis said he saw Manner hitting his gun as if it had jammed, while “YG” continued firing at the house. The two ran back to Davis’s car and told him to “drive, drive, drive.” Davis took Manner and “YG” back to his house because they had instructed him to do so.

At Davis's house, Manner told Davis they had shot at the house because "it had to be done." "YG" told Davis that Kingcannon had stolen something and that they had to "go teach him a lesson." Before leaving Davis's house, Manner gave Davis back the .380 firearm.

Meanwhile, inside Kingcannon's house, when his mother heard gunshots around 1:00 a.m. and she went to see what was going on, Kingcannon came out of his room and told her to call 911. "I've been shot," she said he told her. He then collapsed in the hallway near the steps. Kingcannon died later at the hospital from a gunshot wound to his chest. At 1:09 a.m., Brandon Hishida called Manner to ask where he was. Brandon later testified that Manner replied, "I got the ni**a." Law enforcement officers later recovered 17 shell casings in the street in front of Kingcannon's home. Sixteen were from 9-millimeter rounds and only one was from a .380 round. During the investigation, the Hishida brothers gave law enforcement the name "P-Roo" as someone who might have been involved in the shooting. The detective ran the street name through the police database and found it belonged to Manner.

The investigation led to Jermaine Davis who was arrested Nov. 13, 2013. He told different stories to police and was eventually charged with making false statements, to which he pleaded guilty and was given five years' probation under the First Offender Act. Investigators eventually learned that the day after the murder, Abrams/"YG" reported that his 9-millimeter Ruger had been stolen from his vehicle. In the police report, Abrams listed his cell phone number, and cell phone records revealed that he and Manner had been in frequent contact with each other around the time of the murder. In May 2015, a DeKalb County jury found Manner guilty of malice murder, felony murder, aggravated assault, criminal damage to property, and possession of a firearm during the commission of a felony. He was sentenced to life plus 15 years in prison. Manner now appeals to the state Supreme Court.

ARGUMENTS: Manner's attorney argues that his trial attorney provided ineffective assistance of counsel when she withdrew her request that the judge instruct jurors about the need for accomplice corroboration. In this case, the sole eyewitness testimony was provided by the getaway driver, Jermaine Davis. Although generally the testimony of a single witness is sufficient to establish a fact, Georgia law provides for one important exception: When the only eyewitness testimony identifying the defendant as the perpetrator comes from a person the jury finds to be an accomplice, that person's testimony alone is insufficient and it must be corroborated by other evidence. The jury in this case was not instructed on the accomplice corroboration exception "despite the fact that the bulk of the evidence implicating Manner in this crime came from Davis, who was the getaway driver and therefore an accomplice to the crime," Manner's attorney argues in briefs. "Indeed, the entire defense theory was that Davis (among others) was the actual shooter and was lying to stay out of trouble." "There was no forensic evidence linking Manner to the victim, the crime scene, or the murder weapon," the attorney argues. "No other eyewitnesses saw Manner near the crime scene at the time of the murder. No guns, ammunition, or other relevant evidence were found on Manner's person or in his house. Manner did not own or drive a car similar to that of the getaway car." While some circumstantial evidence – including Manner's phone records, the fact that he was with "YG" before the murder, and the testimony of the Hishida brothers – may constitute the "slight" evidence needed to corroborate an accomplice's testimony, it would not have been sufficient to prove Manner's death "beyond a reasonable doubt," the attorney argues, especially in light of the "mountain of evidence" calling into question the veracity of the Hishida brothers' testimony. "Brandon and

Quintavius had previously shot at Kingcannon with a 9-millimeter gun – the same caliber gun as that which killed Kingcannon – that the police never recovered and that could have been used to kill Kingcannon, according to ballistics testing,” the attorney argues. Furthermore, just hours before his death, Kingcannon had shot at the brothers. The conviction depended on the jurors believing Davis. Were it not for the attorney’s failure to request the accomplice corroboration instruction, there is a reasonable probability that the outcome of the trial would have been different. It was also error for the judge not to have instructed jurors that evidence that a witness has been convicted of a crime involving an act of dishonesty must be admitted for the purpose of attacking the witness’s credibility. The fact that Davis pleaded guilty to felony false statements should have been brought to jurors’ attention. Among other arguments, Manner’s trial attorney was also ineffective for failing to elicit testimony or evidence of the Hishida brothers’ confessions to shooting a 9-millimeter gun at Kingcannon.

The State, represented by the District Attorney’s and Attorney General’s offices, argues that Manner’s trial attorney was not ineffective but made a strategic decision to withdraw the request asking the judge to instruct jurors on accomplice corroboration. That decision was reasonable, the State contends. Manner’s trial attorney has practiced law since 1993 and handled about 65 felony trials. She changed her mind on requesting the charge because giving that instruction would have “implied that the Defendant was an accomplice and that the charge would not be helpful because part of the defense theory was that the Defendant was not involved.” The trial attorney determined that the defense theory she would pursue at trial was that Manner was not even present at the shooting, and that Abrams, aka “YG”, had done the shooting. Manner also has not shown that the trial court erred by not instructing jurors on Davis’s prior conviction. Under the First Offender statute, Davis did not have a “conviction” because a defendant who fulfills the terms of probation imposed under the law is discharged without ever having an adjudication of guilt or a conviction. Therefore, his guilty plea did not constitute a conviction. As to Manner’s claim about the Hishida brothers’ confessions, the trial attorney did elicit evidence through the testimony of various witnesses about the May 2013 altercation and the brothers’ resultant aggravated assault case.

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