



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, October 2, 2017

10:00 A.M. Session

BROWN ET AL. V. RAC ACCEPTANCE EAST, LLC (S17G1097)

A woman is appealing a Georgia Court of Appeals ruling in favor of a furniture rental company that had her arrested for failing to pay for furniture she had rented. The intermediate appeals court ruled that despite the arrest, the company still had the right to force her into "arbitration," which is a less expensive way of resolving disputes than taking a case to court.

FACTS: On Jan. 25, 2012, **Mira Brown** signed a Lease Purchase Agreement with RAC Acceptance East, LLC to rent a bedroom set. Brown indicated to RAC that she was self-employed and received social security payments and NFL pension funds in the amount of \$8,300 a month. The rental agreement contained an arbitration provision, which stated that either Brown or RAC could require any claim to be arbitrated, and that either could do so before or after a lawsuit had been started over the claim. (For parties who agree to arbitration, any dispute that arises is decided by a neutral "arbitrator," and the decision is legally binding.) In the agreement Brown signed, "claim" is defined as "any claim, dispute or controversy between you and us that in any way arises from or relates to the Rental-Purchase Agreement or the leased property." The agreement gave Brown the option of rejecting the arbitration provision and stated clearly that if she did not reject it, "it will become part of your Rental-Purchase Agreement and have a substantial impact on the way in which you or we will resolve any claim which you or we have

against each other now or in the future.” Brown did not reject the arbitration provision and signed the agreement.

Brown arranged to make monthly rental payments starting March 1, 2012, but by April 2012, she stopped paying. RAC contacted her repeatedly for more than a year about her payment obligations and told her that because she was not paying, she was required to return the furniture. In January 2014, RAC went to magistrate court in **Fulton County** with an application for an arrest warrant. The magistrate court scheduled a hearing for the end of the month, but Brown did not appear. The magistrate court subsequently issued a warrant for Brown’s arrest for “theft by conversion.” Under the law, a person commits theft by conversion when, “having lawfully obtained funds or other property of another...he knowingly converts the funds or property to his own use in violation of the agreement or legal obligation.” In February 2014, Brown returned the furniture. She claimed RAC had informed her it had obtained an arrest warrant but said it would recall the warrant if she returned the furniture, so she returned it. Four months later, in June 2014, while driving with her two minor sons in the car, a police officer stopped Brown over a traffic concern, learned there was an outstanding warrant for her arrest, and arrested her. She spent four days in jail. In July 2014, the District Attorney declined to prosecute because Brown had returned the furniture and the company was not pursuing charges. Subsequently, the criminal case against Brown was dismissed. In September 2014, on behalf of herself and her two sons, Brown sued RAC in Fulton County Superior Court for “malicious prosecution.” Brown alleged that RAC acted improperly in applying for a warrant and in failing to recall the warrant when she returned the furniture. She alleged that she and her children had suffered damages when she was arrested in their presence.

In October 2014, RAC filed a motion asking the court to compel arbitration. The trial court granted RAC’s motion, and an arbitrator with the American Arbitration Association, ruled in RAC’s favor. Brown then appealed to the Court of Appeals, contending that RAC had waived the arbitration provision by having her arrested and invoking the litigation process prior to demanding arbitration. The appellate court, however, upheld the trial court’s ruling. It found that in seeking a criminal warrant, RAC did not waive its right to compel arbitration because the issues litigated in the warrant process (whether Brown knowingly failed to return or pay for the furniture) were different from the issues in the malicious prosecution suit (whether RAC was liable for the damages Brown claimed she and her children had suffered as a result of the warrant remaining outstanding even though she had returned the furniture.) Brown now appeals 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 compelling arbitration.

ARGUMENTS: Brown’s attorney argues the Court of Appeals erred in affirming the trial court’s compelling arbitration because the decision directly conflicts with the Georgia Supreme Court’s 1985 decision in *Taft v. Buttram*. That case had similar facts. The parties had signed an arbitration agreement, but before there was any arbitration, one party swore out warrants against the other party and had them arrested. The criminal case subsequently was dismissed. But the arrested party sued for malicious prosecution. The party being sued filed motions asking the court to stay the lawsuit pending arbitration. The trial court granted the stay. But the Supreme Court of Georgia reversed the grant of the stay, ruling that the party who had sworn out the warrants had waived the right to arbitration. In “choosing the forum of criminal law rather than arbitration in their first attempt to sort out their dispute... Taft and Kilroy waived

their right to compel arbitration,” the high court said in its opinion. “Any other holding would be contrary to the clear federal policy of encouraging parties to resolve disputes through arbitration, rather than a resort to the courts.” In this case, at “no time did RAC attempt to arbitrate their claim for the payment, return or possession of the furniture,” Brown’s attorney argues. “If the Court of Appeals decision is allowed to stand it would be an endorsement of the disregard of decisions and opinions made by the Supreme Court of Georgia.” Brown is asking that the state Supreme Court reverse the Court of Appeals decision and remand the case to the trial court so a jury can decide the claims of Brown and her minor children.

Attorneys for the rental furniture company argue the state Supreme Court should affirm the Court of Appeals ruling because the arbitration delegation clause required the issue of waiver to be decided by the arbitrator. And the Federal Arbitration Act “restricts any challenge to the arbitrator’s findings on the issue of waiver,” the attorneys contend in briefs. “There is no dispute here that a valid contract or arbitration agreement exists and that such is governed by the Federal Arbitration Act. The sole issue is whether a waiver of the Arbitration Agreement occurred.” They argue it did not. “The arbitrator properly decided upon the question of waiver and concluded that there was no waiver of the right to compel arbitration. There is no error. This case is no more than an impermissible attack on the arbitrator’s rulings.” Furthermore, the *Taft* decision does not apply here for several reasons. There is no indication that the state Supreme Court applied the Federal Arbitration Act in *Taft*, and the facts of *Taft* “are distinguishable from the facts in this case.” Also, “*Taft* is squarely at odds with the Federal Arbitration Act and controlling case law post-*Taft*,” the attorneys for RAC argue. “This case presents the opportunity for the Court to provide clarity to the Georgia courts that arbitration agreements with valid delegation clauses are to be upheld, and the decisions of the arbitrators in accordance with those delegation clauses are to be respected.” In this case, “the arbitrator correctly concluded that RAC had not waived its right to require arbitration.”

Attorney for Appellants (Brown): Mitchell Albert III

Attorneys for Appellee (RAC): Matthew Rosenkoff, Glianny Fagundo

WALSH V. THE STATE (S17G0884)

A man charged with drunk driving is appealing a ruling by the Georgia Court of Appeals allowing the State to admit test results as evidence when the case goes to trial. The results show that the man was impaired by alcohol, but the arresting officer didn’t follow normal procedures when administering the test.

FACTS: In June 2015, a little after midnight, Officer D.T. Snively of the Brookhaven Police Department noticed a car stopped on Buford Highway in **DeKalb County** with its brake lights on, but no headlights. As he approached the car, Snively observed that the car was running and in drive, but the driver – **James Roy Walsh** – was asleep at the wheel. Snively, who is trained in the detection of Driving Under the Influence (DUI) proceeded to investigate Walsh to determine if he was driving drunk. As part of his investigation, he administered a Horizontal Gaze Nystagmus (HGN) test, a field sobriety test that measures involuntary jerking of the eye, which can become exaggerated by alcohol consumption. The officer performed the test while Walsh wore his eyeglasses. Snively later testified that based on the results of the test, Walsh’s blood-alcohol level was above the legal limit and he was impaired. He charged Walsh with DUI (less safe) and other traffic violations.

Prior to trial, Walsh's attorney filed a motion to suppress the HGN test results, arguing that Snively's failure to ask Walsh to remove his glasses rendered the test results inadmissible. The trial court agreed and ruled the HGN test results would be excluded. In evaluating the admissibility of an HGN test, it is necessary to find: 1) that the general scientific techniques involved are valid and capable of producing reliable results; and 2) that the person administering the test performed the scientific procedures in an acceptable manner. Because in Georgia, the HGN test is recognized as a "common procedure that has reached a state of verifiable certainty in the scientific community," these cases generally turn on whether the State has offered evidence that the person performing the test substantially performed the scientific procedures in an acceptable manner. In this case, the trial court found that the State had failed to show by a preponderance of the evidence that the HGN test was administered properly. The officer himself testified that his failure to have Walsh remove his glasses was a "substantial deviation" from his National Highway Traffic and Safety Administration training, and he had not failed to ask for eyeglass removal in his prior administration of about 800 HGN tests. However, Snively also testified that the removal of glasses is sought so the officer can see each eye without any obstruction but that the presence of Walsh's glasses did not impair his ability to read Snively's responses to the HGN test. Rather, Snively said he was able to make a fair observation of the six validated clues that are evaluated by the HGN test. The State then appealed to the Court of Appeals, which reversed the trial court's ruling. The intermediate appeals court ruled that the irregularity in the administration of the HGN test went to the weight of the test results but not to its admissibility. Walsh now appeals to the state Supreme Court which has agreed to review the case to determine whether the trial court had properly ruled to exclude the HGN evidence.

ARGUMENTS: Walsh's attorney argues that the Court of Appeals erred in finding that the officer substantially complied with applicable law enforcement guidelines when administering the HGN test. The trial court properly found that the officer failed to "substantially comply" with law enforcement guidelines by failing to remove Walsh's glasses in violation of his standardized training in HGN. "Further, Georgia law has always been that the admission or exclusion of expert opinion evidence 'lies within the sound discretion of the trial court,'" Walsh's attorney argues in briefs. Also, there was never any testimony "that the HGN has ever been performed with eyeglasses on in the past, that the officer's training allowed the eyeglasses to remain on, or that any HGN validation testing had been performed with eyeglasses on the test subject. Furthermore, the officer was never tendered as an expert at all. Absent qualification as an expert witness and tender of the witness as an expert, a witness's opinion is that of a layperson." The trial court properly excluded the results of Walsh's HGN test, and the Court of Appeals erred in finding that the officer substantially complied with law enforcement guidelines in administering the test, Walsh's attorney concludes.

In answer to the Supreme Court's question, "the trial court erred in excluding the results of the HGN evaluation," the State, represented by the Solicitor-General's office, argues in briefs. Under a number of decisions by the Georgia Supreme Court and the Court of Appeals regarding HGN evidence, "the State need only show that the officer substantially performed the HGN evaluation in an acceptable manner." As the Court of Appeals said, the nature of the error needed to exclude evidence is "fundamental error," or error that renders the results without meaning. "The record here shows that the officer had significant training and had performed the HGN evaluation around 800 times. While the officer stated that having someone wear glasses during

the evaluation was contrary to training, the officer testified that such deviation did not affect the officer's ability to obtain and interpret results from the evaluation." This is all the State needs to show for an admissible result, the State argues. "The possibility of error in the form that it is in this case goes to the weight of the evaluation in the hands of the fact finder rather than admissibility of the evidence." The trial court excluded the evidence in error.

Attorney for Appellant (Walsh): George Creal, Jr.

Attorneys for Appellee (State): Donna Coleman-Stribling, Solicitor-General, Wystan Getz, Asst. Sol. Gen.

VEAL V. THE STATE (S17A1758)

A young man originally sentenced to life in prison with no chance of parole, is appealing his resentence to two consecutive life prison sentences with the chance of parole. He argues that his new sentence is the equivalent of a de facto life-without-parole sentence.

FACTS: This is the second time the case of **Robert Veal**, who was 17 years old at the time of the crimes, has come before the state's high court. According to the facts of the case, around 9:30 the night of Nov. 22, 2010, Charles Boyer and his girlfriend, Lisa McGraw, returned from a convenience store to the Virginia Highland Apartment Homes where McGraw lived in Atlanta, **Fulton County**. They were walking toward her apartment when Boyer went back to retrieve something from his car. As McGraw continued, someone behind her placed a gun to her head and ordered her not to look back. She realized two men were behind her and a third was with Boyer. The men ordered the couple to turn over the car keys, and McGraw gave them her purse. She and Boyer then tried to run away. McGraw made it into her neighbor's apartment, but Boyer did not escape. A neighbor who was walking his dog saw Boyer holding a grocery bag and facing three assailants. When he noticed one of the men was wearing a mask, he realized a robbery was in progress. He turned so the assailants could not see him, then heard two gunshots followed by a third. McGraw also heard three gunshots. The neighbor ran to his apartment and called 911. The three young men – later identified as Veal, Tamario Wise, and Raphael Cross – fled the scene. Boyer subsequently died from gunshot wounds to his torso.

Several hours later, John Davis noticed three men drive up as he walked outside his apartment in Grant Park, a neighborhood several miles from Virginia Highlands. The men held a gun to him and ordered him to take them to his apartment, which he did. Inside they found Davis's roommate, C.T., in bed with her boyfriend, Joseph Oliver. The assailants tied up Davis and Oliver in separate rooms, then took C.T. down the hall, where she was raped and sodomized. DNA from her rape kit later matched Veal's. Police put together a task force to find the perpetrators of these crimes as well as other similar crimes in Atlanta.

With Cross testifying against them, Veal and Wise were tried jointly in October 2012 and convicted of murder, rape, aggravated sodomy, kidnapping, false imprisonment, armed robbery, street gang participation, and other crimes. According to evidence at trial, Veal, Wise and Cross were members of the Jack Boys gang, which was based in the Pittsburgh neighborhood of Atlanta. Additional evidence, including a bag of stolen cell phones and other belongings, tied the Jack Boys to a string of armed robberies in Atlanta prior to the Nov. 22 crimes. Veal was sentenced to life without parole for Boyer's murder, plus six additional life prison sentences to be served consecutively and another 60 years for his other crimes.

Veal appealed to the Georgia Supreme Court, and in March 2016, the high court upheld Veal's murder conviction but threw out his life-without-parole sentence and sent the case back to the trial court for resentencing. Relying on the U.S. Supreme Court's recent decision in *Montgomery v. Alabama*, the Georgia Supreme Court ruled that a life-without-parole sentence cannot be imposed on a defendant who was 17 or younger at the time of his offense without the trial court first finding the defendant to be "irreparably corrupt" or "permanently incorrigible." In Veal's case, the trial court had failed to make the requisite findings.

At the resentencing hearing in January 2017, the State announced it would forego seeking life without parole and asked the court to impose instead two consecutive life-*with*-parole sentences for his malice murder conviction and one of the armed robbery convictions, in addition to the six existing life sentences already imposed. Veal's attorney introduced life expectancy tables, arguing that Veal's new sentence would amount to a de facto life-without-parole sentence as Veal's first opportunity for release from prison would be beyond his natural life expectancy. The trial court rejected the assertion and sentenced Veal to a total of eight consecutive life sentences plus 60 years. Veal again appeals to the state Supreme Court.

ARGUMENTS: Veal's attorney argues the trial court erred by failing to find whether Veal was irreparably corrupt or permanently incorrigible prior to imposing on him a de facto prison sentence of life without parole. Without these findings, resentencing Veal to eight consecutive life sentences plus 60 years goes against a number of U.S. Supreme Court decisions, beginning with its 2005 decision in *Roper v. Simmons*. The Supreme Court in *Roper* emphasized three differences between juveniles and adults: 1) juveniles are less mature and have an underdeveloped sense of responsibility; 2) they are more vulnerable to peer pressure; and 3) they possess a character that is less fixed. The U.S. Supreme Court stated in *Roper* that life without parole denies juveniles the opportunity to demonstrate growth and maturity and is in direct contradiction of the rehabilitative ideal. Only the "worst-of-the-worst juvenile murderers" should be sentenced to such a harsh sentence as life without parole, and only after the trial court finds a juvenile defendant to be "irreparably corrupt" or "permanently incorrigible." To say that the U.S. Supreme Court's rulings only apply to life-without-parole sentences "permits a label to supersede the actual ingredients," Veal's attorney argues. Veal will not be eligible to get out of prison on parole until he is 77 – 60 years from the age of 17. Based on published life expectancy tables, introduced at Veal's sentencing, he will remain incarcerated beyond his natural life expectancy, "which is the same as serving a sentence of life without parole – and should be held as such by this Court." The trial court also erred by using non-murder offenses to impose a de facto life-without-parole sentence against a juvenile. In its 2010 ruling in *Graham v. Florida*, the U.S. Supreme Court created a categorical rule that banned juvenile life-without-parole sentences for non-homicide offenses. However, here, Veal was convicted only of a single count of murder, but he also received consecutive life sentences for seven counts of armed robbery. Use of these non-murder offenses to create a de facto life-without-parole sentence violates the Eighth Amendment of the Constitution, the attorney argues.

The State, represented by the District Attorney's and Attorney General's offices, argues the trial court did not err in sentencing Veal to two consecutive life sentences with parole, and his sentence does not violate the Eighth Amendment. "Here we have a crime spree that terrorized a neighborhood and included murder, rape, and armed robbery," the State argues in briefs. "Here we have a sentence that includes the option for parole, albeit at an older age. However, these

crimes were horrific and he represents a danger to society at this time.” The trial court did not have to make the findings required for sentencing a juvenile to life without parole because Veal was resentenced to life *with* parole. The trial court also did not err when it sentenced Veal to life for a non-murder crime because *Graham v. Florida* does not prohibit such a sentence. *Graham* does not apply to this case because Veal was not sentenced to life without parole. And Veal’s “sentence for armed robbery includes the possibility of parole,” the State argues.

Attorney for Appellant (Veal): Stephen Reba

Attorneys for Appellee (State): Paul Howard, Jr., District Attorney, Lyndsey Rudder, Dep. D.A., Joshual Morrison, Sr. Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Youn, Asst. A.G.

DREWS V. THE STATE (S17A1873)

A man is appealing the murder conviction and life prison sentence he received in **Bartow County** for stabbing a 70-year-old man to death.

FACTS: In February 2012, a number of people lived in a trailer in Cartersville, GA, located behind a flea market on Joe Frank Harris Parkway. Among those living in the trailer were **Herbert Eberhardt Drews**, James David “Lucky” Ayers, and Jamie Gatlin. Over time, various people moved in and moved out. Drews eventually left the trailer and moved into a motel room with Derinda Hope Rader. The couple had left after Rader got into a physical altercation with another woman who also stayed at the trailer. After the couple left, among those who moved in was Troyce Warren. Drews did not like Warren and had not allowed him to live at the trailer while he was still there.

The night of Feb. 5, 2012, Drews was drinking at Rader’s motel room when he decided to go over to the trailer and pick up his dog, Smokey, and some other belongings. He called a friend who picked up Drews and Rader and took them to the trailer. As they approached, Drews saw an addition had been built onto the trailer, and he became angry when he learned that Warren was living there, after Ayers had agreed Warren would not be permitted to stay there. According to testimony, one of the women living there heard the front door of the trailer open, then heard men arguing. She came out of her room to investigate and saw Drews standing in the door to Ayers’ room. The two men were arguing about the dog. Warren later testified that Drews ripped off the door to his room and stood there with a knife in his hand and blood dripping down. Drews then said, “Lucky’s dead, and it’s all y’all’s f----- fault.” Ayers was found in his room, bleeding but still alive. Meanwhile, Drews assaulted Warren, one of the women called 911, and the two were still fighting when police arrived. Warren had stab wounds to his face and leg. Ayers suffered nine stab wounds and died less than a week later after his family removed him from life support. Drews later testified at trial but denied ever going to Ayers’ room. He said Warren attacked him when he arrived that day at the trailer.

In August 2013, Warren’s estranged wife met with Deputy Lisa Fuller of Bartow County. Deputy Fuller recorded the meeting with her dashboard camera. Warren’s wife, Molly Warren, told Fuller that she had recorded a cell phone conversation with a woman she identified as Tina James. She played the phone conversation for the deputy but it was mostly inaudible. The gist of the phone conversation and Deputy Fuller’s interview of Warren’s wife was that Tina James told the wife that Warren and another person had killed Ayers for money and tried to frame someone else for the murder. Deputy Fuller filed a supplemental report of her meeting with Warren’s wife

and turned over the dashboard recording to the evidence custodian of the Bartow County Sheriff's office. While the district attorney's office became aware of the supplemental report and shared it with the defense 10 days before the November 2013 trial, the district attorney's office did not retrieve the dashboard recording from the sheriff's office and did not give a copy of it to the defense.

Following the trial, the jury found Drews guilty of the malice murder and felony murder of Ayers, the aggravated assault and aggravated battery of Ayers, and the aggravated assault and aggravated battery of Warren. Drews was sentenced to life plus 20 years in prison, and he now appeals to the Georgia Supreme Court.

ARGUMENTS: Drews' attorney for his appeal enumerates five errors that were committed during his trial. Among them: His trial attorney provided "ineffective assistance of counsel" in violation of his constitutional rights for failing to investigate evidence consistent with the defense's theory that Troyce Warren committed the murder. In another error that requires reversal of the trial court's order, the State violated Drews' due process rights by withholding the patrol car video recording that contained important evidence which pointed to Drews' innocence. Drews' attorney also claims the trial court abused its discretion when it refused to allow his trial attorney to introduce evidence of Troyce Warren's previous diagnosis of having homicidal ideations. Among other arguments, the attorney argues the evidence was insufficient to support Drews' murder convictions. "For these reasons, Drews requests that the trial court's order be reversed and that he be granted a new trial," his attorney states in briefs.

The State, represented by the District Attorney's and Attorney General's offices, argues that Drews' trial attorney provided constitutionally effective assistance of counsel, and the State did not violate his due process rights or withhold evidence that would have proven his innocence. The statement that was recorded on an officer's patrol car "was made by an unidentified female with no personal knowledge of the case who was referencing a recorded telephone call between two other people – Molly Warren and a person identified by Molly Warren as Tina James – a conversation that did not contain the statement this unidentified person stated to police," the State argues in briefs. "There is no person in the trial of this case, or unearthed in the preparation for the motion for new trial, who ever heard Troyce Warren" or anyone else brag about killing Ayers for money. Molly Warren's husband was in love with another woman, which upset her, "and the recording attempted to implicate Molly Warren's husband, Troyce Warren, and the other woman." The recording would not be admissible under Georgia law, the State contends. The trial court properly exercised its discretion in refusing to allow Drews' attorney to introduce evidence of Warrant's previous diagnosis of homicidal ideations. Finally, the evidence is constitutionally sufficient to support Drews' convictions, the State contends. However, the State agrees with the defense that Drews' second malice murder conviction and two felony convictions should have been tossed for sentencing purposes, and it asks the high court to vacate them.

Attorney for Appellant (Drews): Veronica O'Grady

Attorneys for Appellee (State): Rosemary Greene, District Attorney, Jana Allen, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Matthew Crowder, Asst. A.G.