



Supreme Court of Georgia

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CASES DUE FOR ORAL ARGUMENT

Summaries of Facts and Issues

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Monday, April 16, 2018

10:00 A.M. Session

CARPENTER V. MCMANN ET AL. (S17G1894)

A man is appealing a Georgia Court of Appeals decision that upheld a **Bibb County** court ruling denying his motion to transfer a civil lawsuit against him to the county where he lives. At issue in this case is what the proper venue is for a lawsuit against two people accused of causing a car wreck when the identity of one of those people is unknown.

FACTS: **Sherinna McMann** and Childronda Holton were passengers in a car traveling on Interstate 75 in Bibb County when a "John Doe" defendant negligently entered the lane in front of them, causing their driver to slam on his brakes. The vehicle behind them, driven by **Eric Carpenter**, then collided into the rear of their vehicle. The John Doe defendant fled the scene and has never been identified. McMann and Holton sued Carpenter and John Doe, seeking damages for injuries they sustained in the collision. They filed their lawsuit in Bibb County, where the wreck occurred. Carpenter filed a motion to transfer venue to Crawford County where he lives. The trial court denied his motion, relying in part on Georgia's Uninsured Motorist statute (Georgia Code § 33-7-11 (d) (1)), which states that in cases where the operator of a vehicle that causes injury is unknown, "the residence of such 'John Doe' defendant shall be presumed to be in the county in which the accident causing injury or damages occurred," or in the county of the residence of the person suing. The trial court found that because Carpenter and John Doe

were alleged to be joint wrongdoers, venue was proper in Bibb County, the site of the collision. Carpenter then appealed to the Georgia Court of Appeals.

In its opinion, the appellate court states that under the Georgia Constitution, lawsuits against joint “tortfeasors,” or wrongdoers, “residing in different counties may be tried in either county.” The Constitution also states that, “All other civil cases, except juvenile court cases..., shall be tried in the county where the defendant resides.” Because this case involves two alleged wrongdoers, then, venue could be in the county where either man resides. But the other alleged wrongdoer was a John Doe defendant who to this day remains unidentified, the Court of Appeals points out, and under Georgia Code § 33-7-11 (d) (1), “the residence of such ‘John Doe’ defendant shall be presumed to be in the county in which the accident causing injury or damages occurred.” Carpenter argued in his appeal that the John Doe defendant should be treated as a “nominal party” (i.e. a party to a lawsuit who has no control over it and no financial interest in its outcome), and Carpenter, who is a known party, should be able to insist on having the lawsuit heard in his own county of residence. But to rule that the John Doe defendant should not be considered for purposes of establishing venue because he was allegedly a nominal party, the Court of Appeals concluded, would ignore the plain language of § 33-7-11 (d) (1). The appellate court ruled that the statute authorized the trial court’s determination that venue was proper under a joint “tortfeasor” theory, with the John Doe defendant playing a vital role in causing the plaintiffs’ alleged injuries. Consequently, the Court of Appeals determined that because venue was proper in Bibb County as to the John Doe defendant, it was likewise proper as to Carpenter. Carpenter now appeals to the Georgia Supreme Court, which agreed to review the case to determine whether the venue provision of the uninsured motorist statute applies in a suit involving an automobile collision brought against a known Georgia resident and an unknown defendant legally presumed to be a Georgia resident.

ARGUMENTS: Carpenter’s attorneys argue that the Court of Appeals erred. “In civil cases such as this, the Georgia Constitution clearly states that venue properly lies in the county *where the defendant resides*,” the attorneys argue in briefs. “The venue provision of the uninsured motorist statute should not apply in the instant case because the presence of a nominal party cannot deprive an identified defendant of his constitutional right to be sued where he resides.” “Extending the uninsured motorist statute’s venue provisions so far to override an identified defendant’s constitutional right to be sued where he resides is error,” the attorneys argue. “Petitioner is a real, substantial party and should not be deprived the right to be sued in his own county by the inclusion of a nominal party.” Also, the venue provision of the uninsured motorist statute should not apply in this case as demonstrated by the language of other Georgia special venue statutes, the attorneys contend. For one thing, this Court has determined in other rulings that the statutory venue provision permitting suit to be brought in either county when joint tortfeasors are involved “applies *only* where *both* joint tortfeasors are Georgia residents.” Finally, the venue provision of the uninsured motorist statute should not apply here because as demonstrated in other jurisdictions, Carpenter’s right to be tried in his resident county “outweighs any interest to the other parties to maintain the action where the accident occurred,” Carpenter’s attorneys argue.

The attorney for McMann and Holton argues that the Court of Appeals was correct in its ruling, as was the trial court. “As shown herein, the venue provision of the uninsured motorist statute requires an unknown defendant to be legally presumed a Georgia resident residing within

the county in which the accident causing injury or damages occurred,” the attorney argues in briefs. “Because this is a case involving two alleged joint tortfeasors who are both Georgia residents, venue is proper in the county of residence of either tortfeasor. Therefore, the rulings of the Court of Appeals and trial court should be affirmed, and venue should remain within Bibb County.” Carpenter’s argument that venue should be transferred to his resident county because John Doe is a “nominal party” fails as Carpenter himself asserted that “defendant *John Doe was independently negligent.*” John Doe “played a vital role” in causing McMann’s and Holton’s alleged injuries, “and this scenario falls squarely within the Georgia Constitution’s venue prescription for joint tortfeasors.” Also, other Georgia special venue statutes support the Court of Appeals’ application of the uninsured motorist statute’s venue provision. Finally, the laws of other states have no authoritative application to this litigation, the attorney argues, concluding that the state’s high court should affirm the rulings by the Court of Appeals and trial court denying Carpenter’s motion to transfer venue of the lawsuit to his home county.

Attorneys for Appellant (Carpenter): Dan Bullard, IV, Erin Corbett

Attorney for Appellees (McMann): Bryan Cigelske

ELLIOTT V. THE STATE (S17G0716)

In another case challenging Georgia’s Implied Consent Notice statute, a woman facing trial for Driving Under the Influence is appealing a Georgia Court of Appeals order involving a pre-trial motion. When her case goes to trial, **Andrea Elliott** wants the evidence of her refusal to take a breath test to be suppressed. The **Athens-Clarke County** court denied her motion to suppress, and the Court of Appeals subsequently denied her application to appeal the denial.

FACTS: On Aug. 20, 2015, Officer Nathaniel Franco of the Athens-Clarke County Police Department stopped Elliott after observing her driving erratically. As he approached her, Franco smelled a strong odor of alcohol on Elliott’s breath and observed that her eyes were bloodshot and her speech was slurred. Elliott initially denied having consumed any alcohol but later admitted she had had a glass of wine earlier that evening. After conducting some roadside field tests, Franco arrested Elliott for DUI. He did not read her the *Miranda* rights, which include the right to remain silent and the right to an attorney. Following her arrest, Franco did read to Elliott the implied consent notice and requested a breath test from Elliott. Georgia Code § 40-5-67.1 states that, “Georgia law requires you to submit to state administered chemical tests of your blood, breath, urine, or other bodily substances for the purpose of determining if you are under the influence of alcohol or drugs. If you refuse this testing, your Georgia driver’s license or privilege to drive on the highways of this state will be suspended for a minimum period of one year. Your refusal to submit to the required testing may be offered into evidence against you at trial.” Elliott refused to consent to the breath test. She then filed a motion in Athens-Clarke County State Court to suppress evidence of her refusal when her case goes to trial. Her attorney argued that the admission of her refusal would be a violation of her privilege against forced self-incrimination as provided in the Georgia Constitution. (“No person shall be compelled to give testimony tending in any manner to be self-incriminating.”) In November 2015, the trial judge denied her motion, noting that Elliott’s privilege against self-incrimination was not violated by admitting into evidence her refusal to submit to the test. She then filed an application to appeal to the Georgia Court of Appeals, but that intermediate appellate court denied her application. She now appeals to the state Supreme Court.

ARGUMENTS: Elliott’s attorney argues the Court of Appeals erred in denying her application for this pre-trial appeal. Under the Georgia Supreme Court’s 2017 ruling in *Olevik v. State*, the state Constitution’s protection against compelled self-incrimination applies not only to *testimony* but also to *acts* that generate incriminating evidence. In this case, Elliott “had a constitutional right to refuse to ‘act’ to provide evidence that might tend to incriminate” her by her refusal to submit to the State-administered chemical breath test, the attorney argues in briefs. “This honorable Court has consistently found that the exercise of the constitutional right against self-incrimination is not admissible against a defendant, and it should not be admissible against Appellant [i.e. Elliott].” Indeed, the State cannot point to any cases in which a defendant exercised the constitutional right against self-incrimination after arrest and the State was permitted to present that evidence to the detriment of the defendant in a criminal trial. “Appellant’s exercise of the Georgia Constitutional and statutory right against self-incrimination should not be paraded in front of the jury for any reason by the State,” the attorney argues. Paragraph XVI of the Georgia Constitution “creates a statutory right to refuse state-administered chemical testing when it requires an act such as a breath test.” And Georgia Code § 24-5-506 states that, “No person who is charged in any criminal proceeding with the commission of any criminal offense shall be compellable to give evidence for or against himself or herself.” Furthermore, this Court ruled in 1998 in *Price v. State* that “once a person is in custody, *Miranda* warnings must be read to that person in order for any statements or ‘acts’ to be admissible against that person,” the attorney argues. “This case involves a basic, uncontroverted principle that is well-settled in Georgia and federal case law. The State cannot admit evidence of the exercise of the Georgia Constitutional right to be free from self-incrimination to the detriment of Appellant in a criminal trial, and therefore, her refusal to waive that Georgia Constitutional right and statutory right is not admissible against Appellant.”

The State, represented by the Clarke County Solicitor General’s office, argues that the Court of Appeals did not err in denying Elliott’s application for a pre-trial appeal, and in upholding the trial court’s denial of her motion to suppress evidence of her refusal to submit to the breath test. Although Paragraph XVI of the Georgia Constitution preserves the right to refuse to submit to chemical breath tests, “the State may nevertheless introduce evidence of a defendant’s refusal to take a breath test at trial,” the State argues in briefs. The state Supreme Court recently ruled in *Olevik* that Paragraph XVI protects against compelled breath tests and gives individuals a constitutional right to refuse testing. However, “The State may nevertheless introduce evidence of Appellant’s refusal to submit to a breath test at trial because the Georgia Constitution and the laws of this State do not categorically exclude evidence of such refusals,” the attorneys argue. “Further, the Georgia implied consent law is narrowly tailored to satisfy the compelling State interest in effectively and thoroughly prosecuting DUI offenders.” Georgia case law (i.e. law established by court rulings as opposed to by the legislature), including the *Olevik* ruling, makes clear that the protection of Paragraph XVI “only covers *compelled* testimony and acts of the defendant.” “In *Olevik*, this Honorable Court made clear that the implied consent notice merely contains a request for cooperation rather than a demand.” “To assure that a defendant’s constitutional rights have not been violated, trial courts can look at the totality of the circumstances to ensure that a suspect was not compelled or coerced by law enforcement to refuse the test,” the State argues. “To that end, this Court can be assured that the dictates of the Georgia Constitution are not being violated when a suspect’s refusal of implied consent is

introduced into evidence. The *Olevik* Court, in reaffirming the constitutionality of the implied consent statute, instructed trial courts to look to the ‘totality of the circumstances’ in determining whether a suspect has voluntarily consented to a breath test,” the State contends.

Attorney for Appellant (Elliott): Gregory Willis

Attorneys for Appellee (State): Carroll Chisholm, Jr., William Fleenor, Ethan Makin

ABRAMS V. LAUGHLIN, WARDEN (S18A0594)

A man who pleaded guilty to kidnapping, rape and other crimes is appealing a lower court’s dismissal of his petition challenging his kidnapping convictions based on a change in the state’s kidnapping law.

FACTS: In October 2005, **Cardell Jerome Abrams** pleaded guilty and was convicted in **Gwinnett County** of kidnapping (five counts), rape, armed robbery (five counts), aggravated sodomy (two counts), burglary, and possession of a weapon during commission of a crime (five counts). He was sentenced to 35 years, with 25 to be spent in prison and the remaining 10 on probation. In May 2016, he filed a petition for a “writ of habeas corpus” in Wheeler County. (Habeas corpus is a civil proceeding that allows already convicted prisoners to challenge their conviction on constitutional grounds in the county where they are incarcerated. They generally file the action against the prison warden, who in this case was **Vince Laughlin** of Wheeler Correctional Facility.) Abrams alleged in his petition that the version of the kidnapping statute under which he was convicted in 2005 was unconstitutional in light of the Georgia Supreme Court’s decision three years later in *Garza v. State*. Prior to 2008, only the slightest movement of an alleged victim had to be shown to satisfy the “asportation” element required to prove the crime of kidnapping. (Asportation is a legal term that means the forced movement of another person without that person’s consent.) With its 2008 decision in *Garza*, the state Supreme Court overruled the “slight movement” standard and established four factors that needed to be analyzed to determine whether the asportation element was met. The state’s high court later held that the new rule in *Garza* was “substantive,” as it alters the range of conduct that the law punishes, and therefore should be applied retroactively, as opposed to a new “procedural” rule, which generally does not apply retroactively to habeas cases. Abrams also alleged that his due process rights were violated because the kidnapping statute under which he was convicted “failed to give Petitioner fair warning that his specific conduct was forbidden as required by law.”

Following a hearing, the habeas court dismissed Abrams’ habeas petition, finding that he had failed to file it within the four-year limitations period under Georgia Code § 9-14-42 (c) (1) and (3) as it was not filed within four years of when his convictions were “final,” and it was not filed within four years of the *Garza* decision.

Abrams then filed an application to appeal to the state Supreme Court, arguing that the habeas court erred in dismissing his petition as untimely, because *Garza* announced a new “substantive” right, and he had not had the opportunity to challenge his convictions at trial and on appeal since *Garza* was decided.

ARGUMENTS: Abrams’ attorney argues the habeas court erred in dismissing his petition for a writ of habeas corpus as untimely. His petition was indeed filed in time based on Georgia Code § 9-14-42 (c) (4), which allows the petition to be filed within four years of the “date on which the facts supporting the claims presented could have been discovered through the exercise of due diligence.” Abrams argued that he timely filed his petition based upon the date he

discovered the *Garza* ruling. Because he has not had an attorney since he entered his guilty plea, “he was not aware of the Court’s holding in *Garza* until long after his conviction was final and the case was published,” his appellate attorney argues in briefs. Abrams pleaded guilty in 2005; *Garza* came into effect in 2008. Abrams’ attorney also argues the habeas court failed to consider § 9-14-42 (c) (4) in its dismissal order in spite of the fact that Abrams raised this point of law in his argument. During the hearing on his petition, Abrams stated, “By me not being knowledgeable of the law, I didn’t know about appealing it at the time, because I didn’t have no knowledge of the law being changed in 2008. I was doing my time.” In its dismissal order, the habeas court only considered Georgia Code § 9-14-42 (c) (1) and (3). “However, the lower court failed even to consider Mr. Abrams’ claim that he filed his claim as soon as he discovered it, under an exercise of due diligence,” the attorney argues. And the court erred in hearing the State’s motion to dismiss Abrams’ petition as untimely without providing proper notice of a hearing on such notice. “Without proper notice, Mr. Abrams was unable to adequately prepare for the hearing and successfully argue his case,” his attorney argues in briefs. At the hearing, the judge did not allow Abrams to present any evidence and only heard arguments surrounding the motion to dismiss.

The State/warden, represented by the Attorney General’s office, argues the habeas court properly dismissed Abrams’ habeas petition as untimely under § 9-14-42 (c) (3) because it was not filed within four years of when *Garza* was announced. Furthermore, Abrams raises two new issues on appeal, neither of which he clearly raised in the lower habeas court, which procedurally he was required to do. First, he relies upon a different provision of the four-year limitations bar – § 9-14-42 (c) (4) instead of § 9-14-42 (c) (3) – to assert that the habeas court erred in dismissing his petition as untimely. “He also alleges for the first time that the court failed to give him ‘proper notice or adequate information on the hearing’ so that, contrary to his announcement to the court that he was ready to proceed on the motion to dismiss and understood they would not be getting into evidence, the court did not permit him to argue anything ‘evidentiary,’” the State argues in briefs. The state Supreme Court “should decline to consider new issues raised for the first time in this appeal.” “This Court sits to correct errors of a trial court and cannot decide questions for the first time on appeal.”

Attorney for Appellant (Abrams): J. Scott Key

Attorneys for Appellee (State): Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G.

REED V. THE STATE (S18A0624)

A man sentenced to life in prison for the murder of a tow-truck driver is appealing his conviction, arguing that he did not intend to shoot the driver and that the judge failed to instruct jurors about the law that applied to his case.

FACTS: Philmore Reed, Jr. occupied a large piece of property composed of four adjacent parcels of land along Donald Lee Hollowell Parkway and Etheridge Street in **Fulton County**. A six-foot fence topped with barbed wire enclosed the property. There were two entry gates, which Reed usually kept chained and locked. Reed claimed he had purchased all four parcels of land in 1995. He said that for 15 years he had lived in a two-story building on one of the properties and operated his woodcraft and automotive repair business there. He stored a number of vehicles on the land. However, according to a deed, Brandon Marshall purchased one

of the parcels, located at 1024 Donald Lee Hollowell Parkway, in a tax sale due to the owner's failure to pay property taxes. In 2011, Marshall hired two tow-truck drivers, Travis Fenty and James Donegan, to remove Reed's vehicles from the property. On Feb. 3, 2011, Fenty and Donegan parked across from the enclosed property, used bolt cutters to cut the locks off the gates, lowered the gates and loaded one of the cars onto their wrecker. Reed called the police. Officers arrived and determined that Fenty and Donegan did not have the proper documentation showing that Marshall owned the land. As a result, they could not move the vehicles.

On Feb. 24, 2011, Donegan and Fenty returned to the property in two separate trucks, but this time, according to prosecutors, they had a deed showing Marshall owned the land. When they arrived, the gates were already open so they immediately towed away several of Reed's vehicles before returning later to get more. When Reed learned they were there, he went to his bedroom, grabbed a 12-gauge shotgun, and went out onto the roof. Looking down at Donegan and Fenty, he ordered them off his property. Fenty started to call 911, telling Reed they had a court order this time and asking Reed to come downstairs to discuss the matter. According to Reed's testimony at trial, he then shot the gun at the front bumper of the first tow truck. He said he then turned and fired at the other tow truck. According to prosecutors, however, Reed aimed the gun at Fenty and shot him in the chest. Fenty staggered to the street and later died. After shooting Fenty, Reed turned and shot at Donegan but missed him, hitting one of the truck tires instead. Donegan fled the property and ran across the street to a tow truck company to get help. When police arrived, an officer ordered Reed to put his weapon down and exit the building, which Reed did. The officer handcuffed and arrested him. Following a June 2012 trial, the jury convicted Reed of malice murder, felony murder, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony. The jury found Reed not guilty of the aggravated assault of Donagan. The trial court sentenced Reed to life in prison, and he now appeals to the state Supreme Court.

ARGUMENTS: Reed's attorney argues the trial judge erred in failing to instruct jurors that they could consider whether Reed had committed involuntary manslaughter and criminal negligence as opposed to the more serious crime of murder. Involuntary manslaughter is a "lesser-included" crime of murder, and a "written request to charge a lesser included offense must always be given if there is **any** evidence that the defendant is guilty of the lesser included offense," Reed's attorney argues, quoting the Georgia Supreme Court's 1990 decision in *State v. Alvarado*. The evidence at trial was not overwhelming, the attorney contends. "Indeed, while the evidence was undisputed that the victim was shot in the chest, the conflicting evidence about the manner in which the shooting transpired would have allowed a properly instructed jury to consider reasonable alternatives for the shooting that did not involve an outright intent to commit malice murder." "The error was also obvious because there was evidence that the killing was the result of an unlawful act other than a felony [i.e. a misdemeanor] and a jury could conclude that Mr. Reed caused Fenty's death by deliberately engaging in 'reckless conduct' or 'criminal negligence' in support of a conviction for involuntary manslaughter," the attorney argues. "Mr. Reed was not necessarily engaged in the felony of aggravated assault with a deadly weapon, but an act of criminal negligence, if he was aiming for the nose of the truck." Reed's own testimony supports the charge, as he testified he "wasn't trying to fire at Mr. Fenty...." He was trying to stop the trucks from leaving with his vehicles. The trial court also erred by failing to instruct the jury on "no duty to retreat." During cross-examination, the State prosecutor raised the issue that

Reed could have called the police instead of confronting the men. “Well, what’s confusing to me is why didn’t you call 911 before shooting an unarmed individual,” the prosecutor asked. Reed’s defense was that he was defending his home or “habitation.” Under Georgia Code § 16-3-23.1, a person who uses threats or force in defense of habitation, “has no duty to retreat and has the right to stand his or her ground and use force...including deadly force.” “The trial court’s omission was a harmful oversight and Mr. Reed should be afforded a new trial where the jury can be properly apprised of law regarding no duty to retreat,” Reed’s attorney argues.

The State, represented by the District Attorney’s and Attorney General’s offices, argues the trial judge did not err in failing to charge the jury on the lesser-included offense of involuntary manslaughter and criminal negligence. For one thing, Reed’s defense attorney did not object when the judge failed to give the charge, and under court procedure, he cannot raise the issue for the first time when the case has reached the appeals stage. Even if the attorney had objected, the judge “correctly reasoned that giving the charge of involuntary manslaughter was improper because a firearm was used.” Reed argued the trial court erred in refusing to charge the jury on involuntary manslaughter because he was engaged in the act of a misdemeanor, but “this argument is flawed and not supported by the law or facts in this case.” Under Georgia Code § 16-11-102, a person is guilty of a misdemeanor when he intentionally and without legal justification points a gun at another. However, there is “a stark difference between pointing and/or aiming a loaded firearm and shooting it in the direction of a person,” the State argues. “Once Appellant [i.e. Reed] shot his loaded shotgun in the direction of Mr. Fenty, he committed an aggravated assault,” which is a felony. “In the instant case, a misdemeanor was not committed.” Reed’s argument that he was acting in defense of his habitation when he fired toward Fenty is also flawed and not supported by the law or the facts of this case, the State contends. Under the statute, the use of force in defense of habitation is lawful only if entry is made in a “violent and tumultuous manner” and one reasonably believes the entry is made for the purpose of assaulting or perpetrating violence against a person living there. Here, “there was no evidence of an unlawful entry into Appellant’s habitation that would have justified his use of force under § 16-3-23,” the State contends. And although Reed indicated he believed Fenty and Donegan were “taking” his vehicles, “he knew the vehicles were being removed as a result of a civil dispute that had been ongoing since 2010, concerning the land he was wrongfully occupying,” the State argues. “Appellant was not engaged in the lawful act of defense of habitation to warrant a charge of involuntary manslaughter....” Finally, the trial court did not err in refusing to instruct the jury about the lack of a duty to retreat, the State contends.

Attorney for Appellant (Reed): Nazish Ahmed

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