



Supreme Court of Georgia

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SUMMARIES OF OPINIONS

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ELLIOTT V. THE STATE (S18A1204)

The Supreme Court of Georgia has struck down as unconstitutional parts of Georgia statutory law that allow a person's refusal to submit to a breath test upon being stopped for DUI to be used as evidence in the driver's criminal trial.

In today's unanimous opinion, **Justice Nels S.D. Peterson** writes for the Court that a person's right against self-incrimination under Article I, Section I, Paragraph XVI of the Georgia Constitution prohibits admission in a criminal trial of a person's refusal to blow into a breathalyzer.

"We acknowledge that the State has a considerable interest in prosecuting DUI offenses (and thereby deterring others), and that our decision today may make that task more difficult," the opinion says. But, "the right to be free from compelled self-incrimination does not wax or wane based on the severity of a defendant's alleged crimes."

In this case, the State is prosecuting **Andrea Elliott** for driving under the influence of alcohol. As recounted in the opinion, in August 2015, a police officer in **Clarke County** stopped Elliott after observing her commit several traffic violations, including failing to maintain her lane. During the stop, Elliott admitted she had consumed alcohol earlier that day. After smelling alcohol and observing several signs of impairment, the officer arrested Elliott for DUI and other traffic offenses and read her Georgia's "implied consent notice." The implied consent notice, which is written in Georgia Code § 40-5-67.1 (b), states: "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." Asked if she would submit to a breath test, Elliott refused and was taken to jail. Her attorney later filed a motion to suppress her refusal, claiming that the admission of that evidence at trial would violate her right against compelled self-incrimination under the Georgia Constitution and Georgia Code. The trial court denied her motion, and she then appealed to the Georgia Supreme Court.

In 2017, this Court ruled in *Olevik v. State* that the Georgia Constitution's right against compelled self-incrimination prevents the State from forcing someone to submit to a chemical breath test. Elliott argues in her appeal that asserting that right cannot now be used against her at trial. The State argues that the Court was wrong in its *Olevik* decision and should overrule it, but it also argues that the right does not prohibit the State's use of refusal evidence against a defendant.

In today's 91-page opinion, the Court concludes that *Olevik* was correctly decided and "after extensive review of the historical record and our case law," it concludes that "our state constitutional right does prohibit admission of evidence that Elliott refused a breath test."

"Both Elliott's arguments challenging the denial of her motion to suppress evidence of her refusal and the State's arguments that we should reconsider our decision in *Olevik* require us to begin by reviewing some important principles that guide our interpretation of the Georgia Constitution in this case," the opinion says. "We have often explained that we interpret the Georgia Constitution according to its original public meaning."

Paragraph XVI of the Constitution states: "No person shall be compelled to give testimony tending in any manner to be self-incriminating."

Much of today's lengthy opinion examines the history of Georgia's constitutional law. Paragraph XVI of the Georgia Constitution is a holdover from prior constitutions, the opinion points out, "and we must remember that the right against compelled self-incrimination was first constitutionalized with the adoption of the 1877 Constitution, thereby preserving a right at common law."

Olevik examined whether Paragraph XVI's mandate applied to chemical breath tests. "In answering that question, we reviewed an unbroken line of precedent beginning with *Day v. State* (1879) and clarified in *Calhoun v. State* (1916), that interpreted the 1877 Provision that is virtually identical to Paragraph XVI of the 1983 Constitution as barring compelled acts, not merely compelled oral or written testimony," today's opinion says. "Based on the well-established meaning given to the constitutional right against compelled self-incrimination and carried forward into subsequent state constitutions, we concluded [in *Olevik*] that a breath test is an act incriminating in nature and, therefore, Paragraph XVI prohibits the State from compelling such a test."

"Unhappy with our decision in *Olevik* and its potential implications, the State has, in this case and in other appeals currently before the Court, asked us to reconsider our decision in *Olevik*," the opinion says. The State argues that the Georgia Supreme Court's 1879 decision in *Day* and its 1916 decision in *Calhoun* were wrong because they contradict the plain meaning of the word "testimony" found in Paragraph XVI. "The State also argues that this Court stands alone in affording protection to incriminating acts, and we should start over with our interpretation of Paragraph XVI according to the plain meaning of its text.... The State concludes

that a plain reading of Paragraph XVI would limit the right against compelled self-incrimination to only oral and written testimony....”

“Undertaking that review, we conclude that, although the scope of the common-law right against compelled self-incrimination is indeed debatable, our case law around the time the 1877 Provision was adopted had extended the right to more than oral and written testimony,” today’s opinion says. “That case law included our decision in *Day*, which research reveals was not out of step with other courts that considered the issue around the same time. Indeed, the right against compelled self-incrimination was previously understood in many courts, including federal courts, to be more expansive than it is now.”

In conclusion, today’s opinion states that, “This Court cannot change the Georgia Constitution, even if we believe there may be good policy reasons for doing so; only the General Assembly and the people of Georgia may do that. And this Court cannot rewrite statutes. This decision may well have implications for the continuing validity of the implied consent notice as applied to breath tests, but revising that notice is a power reserved to the General Assembly.”

Here, “we conclude that Paragraph XVI precludes admission of evidence that a suspect refused to consent to a breath test,” the opinion says. “Consequently, we conclude that §§ 40-5-67.1 (b) and 40-6-392 (d) are unconstitutional to the extent that they allow a defendant’s refusal to submit to a breath test to be admitted into evidence at a criminal trial. We reverse the trial court’s denial of Elliott’s motion to suppress.”

In a concurrence, **Justice Michael P. Boggs** writes that he agrees with the opinion in full, but he wants “to clarify certain implications of the Court’s decision today and our earlier decision in *Olevik v. State*. First, it is important to identify the provisions of the implied consent law that are not affected,” the concurrence says. “As acknowledged both in the Court’s opinion today and in *Olevik*, the scope of these decisions is limited to chemical tests of a driver’s breath; they do not apply to tests of a driver’s blood... Additionally, the holding that a driver’s refusal to take a breath test may not be used in a *criminal* proceeding does not forbid its use in an *administrative* proceeding concerning suspension of a driver’s license....” However, both today’s decision and the decision in *Olevik* “affect significant portions of the implied consent law.” The statements in Georgia Code § 40-5-67.1 (b) “that Georgia law ‘requires’ the driver to submit to breath testing; that the ‘refusal to submit... may be offered into evidence’ against the driver at trial; and that the driver’s license ‘may be suspended (as opposed to ‘shall’) if the driver submits and the results indicate an alcohol concentration above a prohibited level – are likely to become problematic in future cases as a result of *Olevik* or the Court’s decision today,” the concurrence says. The Georgia General Assembly, therefore, “may wish to revise the provisions of the implied consent law, particularly the content of the implied consent notice.”

“It is also worth noting that the General Assembly and the people could reconsider Paragraph XVI itself,” the concurrence says. “This understanding of Paragraph XVI has become something of an outlier in state and federal constitutional interpretations of self-incrimination, but, as this Court observed in *Olevik* and demonstrates more fully today, it has a long history stretching back over more than a century of case law and through several Georgia constitutions.” The concurrence is joined by Justices Keith R. Blackwell and Charles J. Bethel.

Attorney for Appellant (Elliott): Greg Willis

Attorneys for Appellee (State): Carroll Chisholm, Jr., William Fleenor, Ethan Makin – Office of the Solicitor General, Athens-Clarke County

BELLSOUTH TELECOMMUNICATIONS, LLC ET AL. V. COBB CO., GA ET AL. (S17G2011)

The Supreme Court of Georgia has ordered the dismissal of damages claims worth millions of dollars that were filed by **Cobb and Gwinnett counties** against telephone companies for the failure to collect and remit to the counties certain charges for 911 services.

With today's opinion, written by **Justice Nels S.D. Peterson**, the high court has reversed a decision by the Georgia Court of Appeals and is directing the intermediate appellate court to return the case to the trial court for the purpose of dismissing the counties' claims for damages.

In 1977, the Georgia General Assembly passed the "911 Act" – Georgia Code § 46-5-120. The purpose of the legislation was to establish a statewide 911 system. The 911 Act authorized a local government to pay for the 911 services it provided by imposing "a monthly 911 charge upon each telephone service." The Act makes telephone companies intermediaries between local governments and citizens for collecting the funds necessary to implement the 911 service. The law stated that telephone customers "may be billed for the monthly 911 charge" of up to \$1.50 for each subscription per telephone service provided.

In December 2015 and January 2016, Cobb and Gwinnett counties sued **BellSouth Telecommunications, LLC**, EarthLink, Inc., EarthLink, LLC, Deltacom, LLC, and Business Telecom, LLC. The counties alleged that the phone companies purposely did not bill certain kinds of customers enough 911 charges under the statute. The counties sought to hold the defendants liable for the amount of 911 charges owed by their customers, claiming damages of more than \$39 million. The phone companies filed motions to dismiss the lawsuits, arguing that the 911 charge is a tax and counties do not have the authority to sue.

The Gwinnett County Superior Court denied the phone companies' motions and ruled in favor of Cobb and Gwinnett counties. The trial court ruled that 911 charges are **fees**, not **taxes**; that the lawsuit was permissible because there is "no express language" preventing the counties from suing the telephone companies; and that the counties can also bring damages claims against the companies under "common law" and under Georgia Code § 51-1-6 and § 51-1-8 for allegedly failing to bill their customers all the 911 charges the 911 Act required them to pay.

In a pre-trial appeal, the Georgia Court of Appeals partially reversed and partially affirmed the trial court's ruling. The intermediate appellate court disagreed with the trial court and ruled that the 911 Act does not sanction a lawsuit by the counties against the phone companies for their alleged failure to collect the 911 charges. However, it affirmed the trial court's ruling that the counties could pursue their claims against the phone companies under Georgia Code § 51-1-6 and § 51-1-8. The Court of Appeals also vacated the trial court's ruling that the 911 charges are fees, and remanded the issue of whether they are a tax or a fee to the trial court for further proceedings.

The phone companies then appealed to the Georgia Supreme Court, which agreed to review the case to determine whether the 911 charge is more properly characterized as a tax or fee. The phone companies claim there are now more than 30 complaints pending in Georgia state and federal courts awaiting resolution of this case. Lawsuits have been filed by 20 local

governments seeking more than \$110 million in 911 charges from more than 50 telephone companies. A number of amicus curiae briefs have been filed in this case, including by the U.S. and Georgia Chambers of Commerce.

In today's opinion, "We conclude that the charge is a tax and that the 911 Act does not give the counties a right of action to collect that tax from the telephone companies." Only the Legislature is authorized to determine not only the amount of taxes but also the process for collecting them. The counties cannot collect 911 taxes from telephone companies through a lawsuit for damages because the 911 Act does not authorize such collection actions.

"A tax is an enforced contribution exacted pursuant to legislative authority for the purpose of raising revenue to be used for public or governmental purposes, and not as payment for a special privilege or service rendered," the 24-page opinion says, quoting the Georgia Supreme Court's 1958 decision in *Gunby v. Yates*.

Attorneys for Appellants (Phone companies): Frank Lowrey, IV, Amanda Bersinger, J. Henry Walker, IV, John Jett

Attorneys for Appellees (Counties): Roy Barnes, John Bevis, Benjamin Rosichan, David Worley, James Evangelista, Jeffrey Harris, Madeline McNeeley

VIRGER V. THE STATE (S18A1538)

CAVE V. THE STATE (S18A1539)

The Supreme Court of Georgia has upheld the convictions and life prison sentences given to a man and woman for the murder of a 13-month-old baby girl who was in their care.

Darius Virger and **Alexis Cave** appealed their convictions and sentences to the state Supreme Court on a number of grounds. "Our review of the record, however, reveals no reversible error, so we affirm the convictions in both cases," **Presiding Justice David Nahmias** writes for a unanimous Court.

According to the facts at trial, Cave was 16 years old when she married Virger in May 2011. He was nearly 10 years older. In April 2012, the couple had a baby together. However, by then the couple had separated, and Virger had become romantically involved with Tina Chappell, who had recently given birth to a baby girl, Diarra. By October 2012, Virger, Chappell and her baby, Diarra, had moved into a townhouse together in **Douglas County**. Shortly after, Chappell was arrested and sent to jail. Virger became Diarra's primary caretaker while Chappell was incarcerated. During the following months, various individuals who came into contact with Diarra noticed bruises on the baby girl.

In November 2012, while Chappell was still in jail, Cave and Virger began seeing each other again; their relationship was volatile and at times violent. Cave claimed Virger physically abused her daily. The following month, Virger took Diarra to the jail to see her mother, Chappell, who noticed her baby had a black eye. Virger said Diarra had fallen while trying to pull herself up. In January 2013, Cave moved into the townhome with Virger and Diarra, along with the baby girl she and Virger had had together. Cave accused Virger of giving more affection to Diarra than to his own biological daughter.

On Feb. 14, 2013, Cave and Virger began sending a series of increasingly hostile text messages to each other. At about 9:00 the night of Feb. 14, the hostility grew to a head and Cave left the house, returning at about 10 p.m. She later testified that in the hours before the baby's death, Virger pressed his hand over the baby's nose and mouth to get her to stop crying. She

claimed she feared Virger would beat her if she tried to intervene. She said Virger began swinging the baby by her ankles and hitting her into the couch. Virger then put Diarra into her crib and he and Cave went to bed.

The next morning, Cave and Virger rushed the baby to a hospital, where medical personnel found Diarra unresponsive. Medical staff noticed injuries on the baby's head. After removing her diaper, an examination revealed signs of trauma to Diarra's rectum, specifically tearing around the edges. The emergency room physician pronounced Diarra dead at 9:54 a.m. the morning of Feb. 15, 2013. Physicians then called in law enforcement. That day, officers searched Virger and Cave's townhouse and found a diaper that later tested positive for blood.

The medical examiner who conducted the autopsy found extensive bruising throughout Diarra's body, particularly concentrated on her head. Internally, the baby suffered catastrophic injuries, including subdural bleeding. There was blood in Diarra's cervical cord and fresh tears to her rectum. Both of the baby's eyes had retinal hemorrhages. The physician concluded that the cause of death was blunt impact injuries to Diarra's head caused by vigorous acceleration. The medical examiner also observed bruising to the victim's back, forearm, and knee.

Chappell learned of her baby's death while still in jail. After authorities released her, she moved back in with Virger. By then, Cave had moved out.

In June 2015, Cave and Virger were indicted for malice murder, felony murder, aggravated battery, cruelty to children in the first degree, and aggravated sexual battery in connection with Diarra's death. Virger was sentenced to life in prison without the possibility of parole plus 40 years for malice murder, first-degree child cruelty, and aggravated sexual battery; Cave was sentenced to life in prison with the possibility of parole plus 45 years for felony murder, first-degree child cruelty, and aggravated sexual battery. Both then appealed to the state Supreme Court, arguing that the evidence was insufficient to support some of their convictions and that the trial court erred by not severing their cases for trial. In addition, Virger argued the trial court erred by failing to strike a juror for cause, by physically separating the co-defendants during trial, and by overruling several of his objections. Cave argued the trial court erred by allowing the admission of impermissible character evidence, by excluding expert testimony about her mental condition, and by denying her motion for a continuance. In today's 48-page opinion, the high court has addressed each of their arguments, finding no reversible error.

Among the arguments is Cave's contention that the trial court erred by excluding testimony by an expert witness that Cave suffered from battered person's syndrome and post-traumatic stress disorder. "We disagree," says today's opinion, which has devoted 13 pages to the issue.

A week before the trial, Cave filed a notice of her intent to present the expert testimony of Dr. Marti Loring. At a pre-trial hearing, Cave's attorney said that Dr. Loring would testify that Cave did not "act unreasonably by failing to obtain medical assistance for Diarra in light of the physical abuse Cave had suffered. Cave argued that battered person's syndrome and PTSD evidence provided a "comprehensive defense" that would "explain her conduct...and negate mens rea" and would also support her defense that Virger coerced her to commit the crimes." (Mens rea is Latin for intention to commit a crime.) Following the hearing, the trial judge granted the State's motion to exclude Dr. Loring's testimony, explaining that expert evidence of battered person's syndrome is admissible only in evaluating a claim of self-defense, which was not an issue here.

In its 1981 decision in *Smith v. State*, the Georgia Supreme Court first recognized battered person’s syndrome as a scientifically established theory and ruled that expert testimony regarding the theory may be admissible to assist the jury in evaluating a defendant’s claim of self-defense. “Since then, we have clearly and consistently held that the only defense theory that BPS is admissible to support is a justification defense based on self-defense against the victim,” today’s opinion says. “In this case, as the trial court recognized, Cave did not assert a claim of self-defense – nor could she, as she was obviously under no threat from the 13-month-old victim. And we have consistently held that evidence of violent acts or abuse committed against the defendant by someone other than the victim – including expert testimony about psychological conditions caused by such abuse – is inadmissible to support a justification defense based on self-defense.”

“If Georgia’s longstanding law is to be changed to allow the admission of expert testimony in criminal cases to negate intent or otherwise support a mental capacity defense other than the ones now authorized by statute, that change should come from the General Assembly,” today’s opinion says. “The trial court did not abuse its discretion in excluding Cave’s proffered expert testimony.”

Attorney for Appellant (Cave): James Luttrell

Attorneys for Appellee (State): Ryan Leonard, District Attorney, Sean Garrett, Asst. D.A., Christopher Carr, Attorney General, Beth Burton, Dep. A.G., Paula Smith, Sr. Asst. A.G., Michael Oldham, Asst. A.G.

IN OTHER CASES, the Supreme Court of Georgia has upheld **murder** convictions and life prison sentences for:

* Shuntae Battle (Fulton Co.)

BATTLE V. THE STATE (S18A1445)

(The Supreme Court has upheld Battle’s convictions for malice murder and cruelty to children for the death of her 3-year-old daughter, Jazmine Jenkins. But the Court has vacated her conviction for aggravated assault, which should have been merged into the malice murder conviction for sentencing purposes.)

* Terrance Beasley (Fulton Co.)

BEASLEY V. THE STATE (S18A1252)

* Marquavis Benton (Gwinnett Co.)

BENTON V. THE STATE (S18A1299)

* Douglas Terry Goodson (White Co.)

GOODSON V. THE STATE (S18A1428)

* Varocus Antonio Grant (Crisp Co.)

GRANT V. THE STATE (S18A1060)

* Tito Ivey (DeKalb Co.)

IVEY V. THE STATE (S18A1030)

* Frank Raymond Miller (Union Co.)

MILLER V. THE STATE (S18A1519)

(The Supreme Court has upheld Miller’s convictions for murder and aggravated assault for the shooting death of his adult daughter, Colleen Miller Grant. But it has reversed his convictions for

two counts of false imprisonment due to insufficient evidence.)

- * Raemon Moore (Fulton Co.)
- * Jimmy Lee Riley (Richmond Co.)

MOORE V. THE STATE (S18A1429)

RILEY V. THE STATE (S18A1048)

(The Supreme Court has upheld Riley's murder conviction for the beating and stabbing death of Pauline McCoy. However, the Court has vacated Riley's convictions for burglary and possession of a knife during the commission of a felony and remanded the case for the trial court to determine when the State had sufficient information to establish that Riley was the person who had committed those crimes, as pertains to the statute of limitations.)

- * Dameino Roberts (Richmond Co.)
- * Willie Winters, III (Houston Co.)

ROBERTS V. THE STATE (S18A1440)

WINTERS V. THE STATE (S18A1234)