



Supreme Court of Georgia

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SUMMARIES OF OPINIONS

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DUKE V. THE STATE (S19M0969)

The Supreme Court of Georgia has dismissed **Ryan Alexander Duke**'s application to appeal a pre-trial decision by an **Irwin County** court that denied his request for state funds to pay for expert witnesses when his case goes to trial.

The high court concluded that it lacks jurisdiction, i.e., does not have the authority, to consider Duke's appeal under Georgia Code § 5-6-34 (b). The statute requires that before pursuing an "interlocutory" or pre-trial appeal, a party first must obtain a "certificate of immediate review" from the trial court. With today's unanimous decision, the court also has overruled its 2000 decision in *Waldrip v. Head*, which stated the Georgia Supreme Court could bypass that statutory requirement in cases that involve "an issue of great concern, gravity, and importance to the public."

"In short, *Waldrip* 'constitutes blatant judicial usurpation of the legislative function, and cannot be considered to be the legitimate exercise of inherent judicial authority,'" **Justice Charles Bethel** writes for the court, quoting former Justice George Carley's dissent in *Waldrip*.

In April 2017, Duke was indicted for malice murder, felony murder, aggravated assault, burglary, and concealing a death in connection with the 2005 death of Tara Faye Grinstead. Although initially Duke was represented by the Tifton Judicial Circuit Public Defender, in August 2018, private attorneys took over his case pro bono. In the lead-up to Duke's trial, they filed a number of motions, including a motion for state funding to pay for an investigator and defense experts. The trial court denied the motion, ruling that while Duke "has a constitutional right to be represented by private, pro bono counsel if he so chooses, he is not simultaneously constitutionally entitled to experts and investigators funded by the State."

Duke’s attorneys then attempted to appeal the order to the Georgia Supreme Court under the procedures mandated by statute for an interlocutory appeal. The trial court, however, did not grant Duke’s certificate of immediate review. Without the certificate of immediate review, Duke’s attorneys nevertheless applied to the Supreme Court for an interlocutory appeal. They asked the high court to exercise discretion under its 2000 decision in *Waldrip v. Head* to “bypass the statutory requirements for interlocutory review and address the substantive issues on appeal,” which *Waldrip* permitted in “exceptional cases that involve an issue of great concern, gravity, and importance to the public and no timely opportunity for appellate review.”

On March 28, 2019, in response to their emergency motion, the Georgia Supreme Court granted a stay in Duke’s trial, which was due to begin April 1. On May 7, 2019, the high court heard arguments in the case to consider whether it had jurisdiction to review the substantive appeal being requested and whether *Waldrip* should be overruled.

In today’s opinion, the court has determined that *Waldrip* should be overruled. “In handing down *Waldrip*, this Court enlarged its own power at the expense of the power the General Assembly has vested in trial courts to determine when an interlocutory appeal should be permitted,” the opinion says. For the reasons detailed in the opinion, “we overrule *Waldrip* to the extent it permits this Court to disregard the requirement set forth in § 5-6-34 (b) that a party must obtain a certificate of immediate review from the trial court before pursuing an interlocutory appeal not otherwise authorized by § 5-6-34 (a). Because the trial court did not issue a certificate of immediate review in this case, this Court is without jurisdiction to consider Duke’s application for interlocutory appeal. His application is therefore dismissed.”

Attorneys for Appellant (Duke): Ashleigh Merchant, John Merchant, John Gibbs, III

Attorneys for Appellee (State): C. Paul Bowden, District Attorney, Bradford Rigby, Special Asst. D.A., Jennifer Hart, Chief Asst. D.A.

THE STATE V. BURNS (S18G1354)

Under an opinion today, when a man goes on trial in **Cherokee County** for sexual crimes against his stepdaughter, it is possible the jury may hear evidence that the victim once made a false allegation of sexual misconduct involving someone else.

With today’s ruling, the high court has upheld the judgment of the Georgia Court of Appeals, which reversed a lower court’s ruling that the evidence of the prior false statement was inadmissible. But the high court has rejected the intermediate appellate court’s reasoning for doing so.

The Court of Appeals based its decision on the Georgia Supreme Court’s 1989 decision in *Smith v. State*, which held that evidence of prior allegations by a victim of sexual misconduct that are found to be false are always admissible at trial, both to attack the credibility of the victim and to prove that the conduct underlying the charges did not occur.

In today’s decision, however, written by **Justice Robert Benham**, the high court has overruled its 30-year-old decision in *Smith*.

In March 2016, **James Phillip Burns** was charged with aggravated sexual battery, aggravated sodomy, and incest. The charges arose after Burns’s wife discovered that her daughter – Burns’s stepdaughter – had been in a “direct message” Twitter discussion with a friend in which she said her stepfather had sexually molested her in a July 2015 incident. The young woman, identified as K.R., also said in the message: “And my brother’s best friend tried

to rape me.” Regarding the alleged rape attempt, she later said in a videotaped forensic interview that, “I just made that up, I guess.” The State subsequently filed a motion to exclude the statement about her brother’s best friend at Burns’s trial under Georgia’s Rape Shield statute, which prohibits evidence of an alleged victim’s past sexual history. The trial court granted the State’s motion and ruled that the prior false allegation was inadmissible, based on Georgia Code § 24-4-403, which states that “Relevant evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury....”

Burns then appealed to the Georgia Court of Appeals, which reversed the trial court’s ruling. The intermediate appellate court concluded that, “under the principles recognized in *Smith*, § 24-4-403 must yield to greater constitutional concerns” – specifically, “the defendant’s right of confrontation and right to present a full defense.” The appellate court also found that the false-allegation evidence failed to create a “danger of unfair prejudice or confusion of the issue” under § 24-4-403. The State then asked to appeal to the Georgia Supreme Court, which agreed to review the case to answer several questions, including whether the high court’s decision in *Smith* remains good law under the state’s new Evidence Code and whether in a criminal proceeding involving alleged sexual misconduct, § 24-4-403 applies to evidence of prior false accusations of sexual misconduct made by the victim or a person close to the victim.

In today’s opinion, the Supreme Court has affirmed the Court of Appeals’ judgment but overruled the *Smith* decision on which the Court of Appeals relied. The decision in *Smith* was two-fold, the opinion says. “We first held that, as a threshold matter, Georgia’s Rape Shield statute, as it then existed, ‘does not prohibit testimony of previous false allegations by a victim’ because such ‘evidence does not involve the victim’s past sexual conduct but rather the victim’s propensity to make false statements regarding sexual misconduct.’” Second, *Smith* held that “evidentiary rules preventing evidence of specific acts of untruthfulness must yield to a defendant’s right of confrontation and right to present a full defense,” which are guaranteed by the Sixth and Fourteenth Amendments to the Constitution.

In today’s opinion, the high court holds that the Rape Shield holding in *Smith* “remains good law in the era of the new Evidence Code.” However, the constitutional holding in *Smith* “was wrongly decided.”

“Our sweeping decision in *Smith* lacked nuance,” today’s 21-page opinion says. “The holding was reached without any meaningful analysis and without consideration of whether the relevant rules of evidence (or other applicable statutes) could pass muster under the Sixth and Fourteenth Amendments; our blanket holding that rules of evidence must ‘yield’ to constitutional concerns – and must permit the admission of evidence that may be considered for both impeachment and as substantive evidence – was unwarranted and incorrect.”

The opinion acknowledges that under the doctrine of “stare decisis,” “courts generally stand by their prior decisions, because it promotes the evenhanded, predictable, and consistent development of legal principles, fosters reliance on judicial decisions, and contributes to the actual and perceived integrity of the judicial process. Stare decisis, however, is not an inexorable command.” “In reconsidering our prior decisions, we must balance the importance of having the question *decided* against the importance of having it decided *right*.”

“Here, the stare decisis factors favor that we overrule *Smith*,” the opinion says. However, doing so “neither impedes the State’s ability to prosecute sex offenses, nor extinguishes a defendant’s statutory or constitutional rights in such cases.”

Although the trial court recognized that K.R.’s attempted-rape statement was false, it excluded the evidence under Georgia Code § 24-4-403, finding that any “probative value of the statement...is substantially outweighed by the danger of unfair prejudice and confusion of the issues.” On appeal, the Court of Appeals, relying on *Smith*, determined that § 24-4-403 does not apply to false-allegation evidence such as the evidence in this case. “This was incorrect,” today’s opinion says.

The Georgia statute tracks its federal counterpart, the opinion states, and regarding Rule 403, the U.S. Supreme Court has explained that “well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury.” Therefore, “there is no constitutional impediment to applying § 24-4-403 here, and the Court of Appeals erred to the extent that it held otherwise,” the opinion says.

“In a sexual-offense prosecution, where, like here, the case comes down to witness credibility, evidence that the complaining witness has made a prior false allegation of sexual misconduct is not of ‘scant’ probative force.” As to the issue of “unfair prejudice,” “it is unclear how K.R.’s admittedly false statement would inflame passions of the jury or inspire an emotional decision rather than facilitate a reasoned decision based on the evidence and determinations of credibility.” Here, § 24-4-403 “does not pose a bar to the jury learning about K.R.’s false statement,” the opinion says.

In a final footnote, however, the Court notes that “there may be other rules of evidence or law which bear on the admission or exclusion of the disputed evidence.”

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Attorneys for Appellee (Burns): Scott Poole, Michael Ray

SWANSON V. THE STATE (S19A0360)

The Supreme Court of Georgia has reversed the murder conviction of **Sean Swanson**, who was found guilty of shooting and killing a man in **Gwinnett County** during a marijuana sale.

The high court has concluded that Swanson’s trial attorney rendered “ineffective assistance of counsel” in violation of Swanson’s constitutional rights by failing to request that the jury be instructed about the law on “defense of habitation” before beginning its deliberations.

“Because we hold that counsel rendered constitutionally ineffective assistance in failing to seek a jury instruction on defense of habitation, Swanson’s conviction for felony murder is reversed,” **Justice Sarah H. Warren** writes for a unanimous court. “Consequently, Swanson is entitled to a new trial.”

According to today’s opinion, the evidence at trial showed the following: “On August 19, 2016, Swanson’s close friend, Tia Coleman, received a call from an acquaintance asking if Coleman would sell marijuana to Noel Reed. Swanson and Coleman arranged a meeting to sell a half-pound of marijuana, plus an ounce, to Reed at an apartment complex in Gwinnett County. Swanson drove his red car to the apartment complex; Coleman and three other friends were in

the vehicle with him. Swanson parked his car to wait on Reed, who arrived shortly thereafter and approached Swanson's car on foot. At some point during the encounter, Reed pulled out an Intratec 9-millimeter handgun (more commonly known as a TEC-9); Swanson then pulled out his own Sig Sauer 9-millimeter pistol and, from the driver's seat, shot Reed twice, killing him. Before driving out of the apartment complex, Swanson got out of his car and took back the bag of marijuana (which was lying on the ground) from near Reed's body. Two residents of the apartment complex called 911 after they heard multiple gunshots and saw someone get out of a red car and take the bag that was lying next to Reed before driving away. Officers stopped Swanson's car soon afterward and arrested him. From Swanson's car, officers recovered a large bag of marijuana, a Sig-Sauer 9-millimeter pistol, and a .460 Smith & Wesson Magnum revolver. From near Reed's body, officers recovered a TEC-9 pistol, a backpack, and two 9-millimeter shell casings that matched the bullets in the pistol found in Swanson's car."

At his trial, Swanson testified in his own defense. According to Swanson, he was sitting in his car with his door open when Reed approached. Suddenly, one of his friends said, "yo, watch out, he has a gun," and when Swanson looked up, Reed had a gun pointing at Swanson's chest. Reed told Swanson to "run it, I need everything or I'm going to shoot someone," then reached into the car and "snatched" the bag of marijuana while pointing the gun at Swanson. Swanson testified, "I was terrified," and he also thought Reed might hurt the others in the car. Swanson said that Reed still had the gun pointed at him "wanting more stuff," and when Reed "for a second, looked away toward the apartment area" and stepped back, Swanson began firing, hitting Reed twice at close range.

Following trial, the jury found Swanson guilty of sale of marijuana and felony murder predicated on that sale, and he was sentenced to life in prison. Swanson then appealed to the Georgia Supreme Court.

Although on appeal, Swanson did not challenge the legal sufficiency of the evidence against him, in today's opinion, the Supreme Court concludes that the evidence at trial "was sufficient to authorize a rational jury to find Swanson guilty beyond a reasonable doubt for the crimes for which the jury found him guilty."

However, Swanson argued that his trial attorney was ineffective for failing to request a jury charge on use of force in defense of habitation. In today's opinion, "we agree."

"To authorize a jury instruction, there need only be slight evidence at trial supporting the theory of the charge," the 28-page opinion says. Under Georgia Code § 16-3-23, "a person is justified in threatening or using force against another when and to the extent that he or she reasonably believes that such threat or force is necessary to prevent or terminate such other's unlawful entry into or attack upon a habitation." The statute says that force intended to cause death or great bodily harm is justified if the entry is made in a "violent and tumultuous manner" and a person believes the entry is for the purpose of committing violence against any person in the habitation. Under Georgia law, the definition of "habitation" includes a "motor vehicle."

The evidence presented at trial "constituted at least slight evidence that Swanson acted in defense of habitation," the opinion says. "We can identify no reasonable basis for an attorney failing to request a jury instruction on defense of habitation under § 16-3-23 under these circumstances. Yet trial counsel failed to do so here, and even admitted at Swanson's hearing on a motion for new trial that he did not request such a charge because at that time, he 'did not know about' the statute defining 'habitation' to mean a 'motor vehicle'...."

