Criminal Law

by Bernadette C. Crucilla*

I. INTRODUCTION

The adversarial nature between prosecutors and those charged with crimes makes criminal law, in particular, be in a constant state of transformation. Thus, as in prior years, this year's survey of criminal law will include only a few of the most significant cases and statutory amendments.[1] Due to this constant evolution, it is simply not practical to attempt to make note of every single legal development. Therefore, the discussion this period has been limited to the changes that will have the widest application or interest to criminal law practitioners from June 1, 2016 through May 31, 2017.

II. STATUTORY CHANGES

As is typical, the statutory changes in this survey period are closely reflective of the times in which we live. Such changes include the following: expansion of the definition of sexual abuse to include acts involving trafficking a person for sexual servitude,[2] a shift to allow retroactive sentencing as first offenders,[3] a change to more politically-correct terminology for the disabled,[4] and additions to the diseases for

---

*Owner and Attorney, Crucilla Law Firm LLC, Macon, Georgia. University of South Florida (B.A., 1993); Mercer University School of Law (J.D., cum laude, 1996). Member, State Bar of Georgia; Member American Bar Association; Member, Georgia Association of Criminal Defense Lawyers; Member, Macon Bar Association; Member, National Innocence Network (Shaken Baby Division); Master, Bootle Inn of Court.

1. For an analysis of criminal law during the prior survey period, see Bernadette C. Crucilla, *Criminal Law, Annual Survey of Georgia Law,* 68 MERCER L. REV. 93 (2016).

2. O.C.G.A. § 19-7-5 (2017).

3. O.C.G.A. § 42-8-66 (2017). This statute allows an individual sentenced between March 18, 1968 and October 31, 1982, to a period of incarceration not exceeding one year, who would have qualified for first offender sentencing, to be retroactively sentenced as a first offender with consent of the prosecutor. *Id.*

4. O.C.G.A. §§ 17-2-4, 17-7-131 (2017). Where the Code previously referred procedurally to "mental retardation" it is now updated throughout to reflect the more

which the possession of "low THC oil" is lawful.[5] This period is also significant for changes to accountability courts,[6] establishment of certain requirements for parents and guardians within the rubric of juvenile courts,[7] important changes to the DUI laws[8] and, as usual, a litany of additions to Georgia's lexicon of crimes and registration requirements of sex offenders. Each will be discussed in turn.

---

politically correct "intellectually disabled" or "intellectual disability." *See* O.C.G.A. §§ 17-2-4, 17-7-131.

5. O.C.G.A. § 31-2A-18 (2017).

6. O.C.G.A. §§ 49-3-6, 51-1-54 (2017). Major changes include the following: the Council of Accountability Courts creating risk and need assessments as well as a peer review process for veterans' courts; the creation of a new family treatment court; changes to both the probation system and day reporting system; and provisions for removing a person from probation. The statutory scheme is complicated and the Author encourages practitioners to read it in full. One important change is that if a person is sentenced to probation (not to include a split sentence), has no prior convictions, and is compliant with all terms and conditions, the Department of Community Supervision shall notify the prosecutor and provide the court with an order to terminate defendant's probation. The prosecutor or the court can conduct a hearing, at which the court can take whatever action it deems appropriate. *See* O.C.G.A. §§ 49-3-6, 51-1-54.

7. O.C.G.A. §§ 15-11-2, 15-11-29.1, 15-11-560, 15-11-561, 15-11-562, 16-5-19, 16-5-21, 16-5-24, 16-10-24, 16-10-56, 45-9-85 (2017). The changes to the Juvenile Code provide that when a child is found in need of services, the court may issue an order requiring the parent or guardian to take actions that enhance the child's best interests. One such requirement is that, after providing the parent or guardian an opportunity to be heard, the parent or guardian take any action reasonably related to the child's treatment, rehabilitation, or welfare, as well as safety to the public. The statute also details that children deemed incompetent must be placed in the least restrictive setting possible. *See* O.C.G.A. §§ 15-11-656(d), 15-11-656(g), 15-11-29.1.

8. Now, if a person is stopped for drinking while driving and refuses a breath test, fails to send in a ten-day letter to the Department of Driver Services, or loses their administrative license suspension (ALS) hearing, they will still be able to obtain a limited driving permit if they elect to have an interlock ignition device and pay for its installation. O.C.G.A. §§ 40-5-64.1, 40-5-67.1(g)(1) (2017). Note: An application for an Interlock Ignition Driving Limited Permit (IIDLP) constitutes a waiver of the ALS hearing and cannot be obtained if applicants are under the age of twenty-one, have another DUI conviction on their record within the previous five years, or hold a CDL or out-of-state license. O.C.G.A. § 40-5-64.1(a)(4) (2017). If a person has a previous DUI conviction on their record within the past five years, they are still subject to 120 days hard suspension before applying for an IIDLP (with payment of $25 permit fee and proof of eligibility from an accountability court or enrollment in a substance abuse program). O.C.G.A. § 40-5-64.1(a)(3) (2017). In addition, once they have entered a plea of guilty to DUI (if it is the first in five years), there are no restrictions as to where they can drive if they agree to install an interlock ignition device for a period of one year and they pay for it for the entire period. *Id.*

A. New Crimes and Sex Offender Registration Changes

As part of the legislature's addition of litany to our lexicon of crimes this period, new requirements have been added for sex offenders required to register. Each will be discussed in turn.

1. Back the Badge Act

The Back the Badge Act[9] defines "public safety officer" to include peace officers, correctional officers, emergency health workers, firefighters, highway emergency responders, and officers of the court.[10] Additionally, it created the crime of hijacking a motor vehicle by making it a designated felony and a serious delinquent act for which pretrial release is not presumed in juvenile court.[11]

The Act also provides increased penalties for aggravated assault or battery against public safety officers (including mandatory imprisonment), but allows the court to depart from these minimum mandatory sentences if both the state and the defendant agree.[12] It also creates a new felony obstruction crime, which carries a one to five-year sentence for placing urine, feces, vomitus, or seminal fluid on a public safety officer in the discharge of his official duties.[13] Lastly, it expanded the definition of "penal institution" to include any place of confinement for purposes of the crime of riot in a penal institution.[14]

2. Hijacking a Motor Vehicle, Manufacture/Distribution of False Insurance Documents, "Upskirting," and Fentanyl and its Derivatives

Senate Bill 104[15] was the legislative means of accomplishing the following: (1) creating the new crime of second-degree hijacking a motor vehicle; (2) changing punishments for distribution of false insurance documents; (3) prohibiting the use of a device to film underneath someone's clothing (upskirting); and (4) including sale, manufacture, delivery, or possession of fentanyl and its derivatives within the

9. Ga. S. Bill 160, Reg. Sess., 2017 Ga. Laws 198, §§ 1-1–3-5 (codified at O.C.G.A. §§ 15-11-2, 15-11-560–62, 16-5-19, 16-5-21, 16-5-24, 16-10-24, 16-10-56, 45-9-85 (2017)).

10. O.C.G.A. § 16-5-19(9) (2017).

11. O.C.G.A. §§ 15-11-2, 15-11-505 (2017). It further gives superior courts exclusive jurisdiction in cases involving the use of a firearm (while allowing for a discretionary transfer of these cases to juvenile court). O.C.G.A. § 15-11-560(b) (2017).

12. O.C.G.A. §§ 16-5-21, 16-5-24 (2017).

13. O.C.G.A. § 16-10-56 (2017).

14. *Id.*

15. Ga. S. Bill 104, Reg. Sess., 2017 Ga. Laws 182 §§ 1-1–2-2, 4-1–7-4 (codified at O.C.G.A. §§ 15-11-2, 505, 16-5-44.1, 16-5-47, 16-7-1, 16-9-5, 16-11-91, 16-13-25, 16-13-26, 16-13-30, 16-13-31, 17-6-1, 17-6-12 (2017)).

trafficking class of controlled substances.[16] Each will be discussed in turn.

Senate Bill 104 created the crime "hijacking a motor vehicle in the second degree," which carries a possible sentence of one to twenty years (depending on whether it is the first, second, or third conviction). Further, carjacking in the first-degree is only bailable before a superior court judge, and is further designated as a forcible felony, among other things.[17] Part V of Senate Bill 104 enhances the punishments for the unlawful manufacture, sale, or distribution of false insurance documents, raising a first offense from a misdemeanor to a felony that carries two to ten years' imprisonment and a fine of $10,000.[18]

Part V(A) made it a felony to use a device to film through or underneath someone's clothes where a reasonable expectation of privacy exists.[19] The felony carries a sentence of one to five years and a fine of $10,000 for either committing the act or disseminating the images therefrom.[20] Certain entities are exempt, including law enforcement, prosecutors, and businesses that have signage of its unlawfulness visible.[21]

Part VII now includes the sale, manufacture, delivery, or possession of fentanyl and its isomers or derivatives within the prohibition of trafficking controlled substances.[22] Fentanyl and its isomers, salts, derivatives, and analogs were added to Schedule I; Thiafentanil was added to Schedule II; and Carfentanil was relocated within that section as a Schedule II drug.[23] Along those lines, as far as Schedule I, II, IV, and V drugs are concerned, House Bill 231[24] modified and expanded the list of controlled substances and dangerous drugs to include the fentanyl analog structural class.[25]

3. Sex Crimes of Interest

This legislative session, the Georgia General Assembly attempted to rid Georgia of sex trafficking (of both adults and minors) through House

16. *Id.*
17. O.C.G.A. §§ 16-5-44.1, 16-11-131, 17-6-1, 17-6-12, 17-7-130, 17-10-9.1 (2017).
18. O.C.G.A. § 16-9-5 (2017).
19. O.C.G.A. § 16-11-91(b)(1) (2017).
20. O.C.G.A. § 16-11-91 (2017).
21. *Id.*
22. O.C.G.A. § 16-13-25 (2017).
23. O.C.G.A. §§ 16-13-26, 16-13-30, 16-13-31 (2017).
24. Ga. H.R. Bill 231, Reg. Sess., 2017 Ga. Laws 17, §§ 4, 5, 9 (codified at O.C.G.A. §§ 16-13-25, 16-13-26, 16-13-28, 16-13-71 (2017)).
25. *Id.*

Bill 341.[26] The Bill added "solicits by any means" to the sex trafficking statute, thereby making every type and kind of sex trafficking illegal.[27] It also increases the punishment for the sex trafficking of minors or those with developmental disabilities.[28] While crimes such as pimping and pandering shall remain misdemeanors, keeping a place of prostitution shall be punished as a misdemeanor of a high and aggravated nature, and twenty-four hours' jail time shall be mandatory.[29]

Further, sex trafficking is added to those crimes for which a person must register with the sex offender registry and the mandatory probation is clarified, such that it be imposed upon the final consecutive sentence, rather than at the end of each individual sentence.[30] Sex trafficking is also included in the list of "dangerous sexual offenses occurring after June 30, 2017."[31]

Senate Bill 250[32] expanded the list of individuals who are prohibited from loitering at a child-care facility, school, or anywhere minors congregate to those who are (or should be) registered sex offenders in another state.[33]

III. CASE LAW CHANGES

In addition to this period's vigorous legislative activity, the appellate courts were not without similar assertiveness. Although there is not a neat categorization of cases possible, some of the more significant or interesting developments are set forth below.

A. Felony Murder Oddities

As one of the few southeastern states that has codified the felony murder rule,[34] this survey period included some of the Georgia oddities surrounding the rules that have been enforced via appellate court decisions. At least four cases this period highlight such oddities.

---

26. Ga. H.R. Bill 341, Reg. Sess., 2017 Ga. Laws 194 (codified at O.C.G.A. §§ 16-5-46, 47, 16-6-13, 16-12-100, 17-10-6.2, 42-1-12 (2017)).

27. O.C.G.A. § 16-5-46(c)(3) (2017).

28. O.C.G.A. § 16-5-46(f)(2) (2017).

29. O.C.G.A. § 16-6-13(a).

30. O.C.G.A. § 42-1-12(a)(10)(B.1) (2017).

31. *Id.*

32. Ga. S. Bill 250, Reg. Sess., 2017 Ga. Laws 171, § 1 (codified as amended at O.C.G.A. § 42-1-15 (2017)).

33. *Id.*

34. *See, e.g.*, O.C.G.A. § 16-5-1(c) (2017); ALA. CODE § 13A-6-2(a)(3) (2017); FLA. STAT. § 782.04(1)(A)(2) (2017).

In *Dubose v. State*,[35] the defendant was convicted of felony murder for shooting his girlfriend with her own pistol after discovering her unfaithfulness.[36] He was convicted and sentenced to felony murder and argued that, under the "modified merger rule" adopted in *Edge v. State*,[37] felony murder cannot be predicated on possession of a firearm; thus, he believed he should only have been convicted of voluntary manslaughter (based on his sudden fit of passion when learning of her unfaithfulness).[38] The Georgia Supreme Court held that the evidence showed the defendant shot his girlfriend with her own Browning 9mm (and not his Glock, as he contended); thus, the killing was independent of his possession of her Browning 9mm and the modified merger rule did not apply.[39] The felony murder conviction was held proper.[40] In *Williams v. State*,[41] the court used a number of tenets of statutory construction to hold that contributing to the deprivation or delinquency of a minor cannot qualify as a predicate offense for a felony murder conviction.[42]

In two other cases this period,[43] the supreme court held that felony murder should not have properly merged with malice murder, but more appropriately should have been vacated by operation of law.[44]

B. DUI Blood Draws: Establishing Voluntary Consent or Exigent Circumstances to Circumvent Warrant Requirement

In the opinion of our appellate courts, a number of cases were significant for defining what establishes voluntary consent or exigent circumstances sufficient to circumvent the warrant requirement necessary to draw someone's blood to check for driving under the influence of alcohol or drugs.[45]

---

35. 299 Ga. 652, 791 S.E.2d 9 (2016).

36. *Id.* at 652–53, 791 S.E.2d at 11.

37. 261 Ga. 865, 414 S.E.2d 463 (1992).

38. *Dubose*, 299 Ga. at 653, 791 S.E.2d at 11–12.

39. *Id.* at 654, 791 S.E.2d at 12.

40. *Id.*

41. 299 Ga. 632, 791 S.E.2d 55 (2016).

42. *Id.* at 634, 791 S.E.2d at 57.

43. Crews v. State, 300 Ga. 104, 793 S.E.2d 393 (2016); Buford v. State, 300 Ga. 121, 793 S.E.2d (2016).

44. *Crews*, 300 Ga. at 106–07, 793 S.E.2d at 396; *Buford*, 300 Ga. at 127, 793 S.E.2d at 95.

45. *See* Williams v. State, 296 Ga. 817, 819–21, 771 S.E.2d 373, 375–77 (2015); *see also* discussion in Bernadette C. Crucilla, *Criminal Law, Annual Survey of Georgia Law*, 67 MERCER L. REV. 31 (2015).

In *State v. Williams*,[46] after the supreme court remanded the first *Williams* case,[47] the lower court granted the defendant's motion to suppress and the state appealed.[48] The Georgia Court of Appeals held that the state failed to establish actual voluntary consent for the blood draw because the defendant appeared confused during field sobriety, was unable to follow directions, and had to lean on the officer while walking down the hospital hallway to have his blood drawn.[49]

Another case decided this period was *State v. Brogan*.[50] The trial court granted the defendant's motion to suppress evidence obtained through a warrantless blood test.[51] The court of appeals gave deference to the trial court's findings that the defendant appeared confused, lacked control over her physical movements, and was extremely intoxicated; thus, the court sustained the judgment.[52]

Yet another case this survey period is *Bailey v. State*,[53] where the court of appeals reversed the trial court's denial of a motion to suppress and vacated a less safe DUI verdict because the trooper had the defendant's blood drawn at the hospital while still unconscious from a serious traffic accident.[54] The court of appeals relied on the holdings in *Williams*, which was already in the pipeline when *Bailey* was decided, and the 2013 decision of the Supreme Court of the United States, *Missouri v. McNeely*,[55] which held that the natural metabolism of alcohol in the body does not create a *per se* exception to the Fourth Amendment's[56] requirement of a warrant to take a blood test but that exigency must be established under all the facts and circumstances.[57]

---

46. 337 Ga. App. 791, 788 S.E.2d 860 (2016).

47. *Williams*, 296 Ga. at 819–21, 771 S.E.2d at 375–77; *see also* Crucilla, *supra* note 44.

48. 337 Ga. App. at 793–98, 788 S.E.2d at 862–66.

49. *Id.* at 796–97, 788 S.E.2d at 865.

50. 340 Ga. App. 232, 797 S.E.2d 149 (2017).

51. *Id.* at 235–36, 797 S.E.2d at 152.

52. *Id.* at 236, 797 S.E.2d at 152.

53. 338 Ga. App. 428, 790 S.E.2d 98 (2016), *overruled on other ground by* Welbon v. State, 301 Ga. 106, 799 S.E.2d 793 (2017).

54. *Bailey*, 338 Ga. App.at 436, 790 S.E.2d at 104–05.

55. 569 U.S. 141 (2013).

56. U.S. CONST. amend. IV.

57. *McNeely*, 569 U.S. at 703–10.

C. Timeliness of Motion for New Trial

Southall v. State[58] is significant for the overturning of a forty-five year-old precedent interpreting section 5-5-40(a)[59] of the Official Code of Georgia Annotated (O.C.G.A.), which governs the timeframe for filing of motions for new trial.[60] The statute applies equally to civil and criminal cases and provides, "All motions for new trial, except in extraordinary cases, shall be made within 30 days of the entry of the judgment on the verdict or entry of the judgment where the case was tried without a jury."[61] Previously, the law stated that if a motion for new trial was prematurely filed, it was considered void and no ground raised in such motion could later be used in the appeal.[62] The supreme court found that reasoning to be inconsistent with its interpretation of similar language used in O.C.G.A. § 5-6-38,[63] but it also found fault with earlier case interpretation.[64]

In fact, the court reasoned that "The word 'within,' when used in reference to time, is generally a word of limitation that means 'not beyond' or 'not later than.'"[65] Thus, the court held that a premature motion for new trial will now ripen upon the filing of the final judgment of conviction and sentence, and previous decisions holding otherwise are expressly overturned.[66]

D. Guilty Plea Not Knowingly and Voluntarily Made

Criminal defense practitioners that delve into the appellate world know how difficult it is to appeal the judgment of conviction and sentence from a guilty plea.[67] In fact, it is widely known that "[o]nce a petitioner raises a question about the validity of a guilty plea, the State has the burden to show that the plea was voluntarily, knowingly, and

58. 300 Ga. 462, 796 S.E.2d 261, 265-66 (2017)

59. O.C.G.A. § 5-5-40(a) (2017).

60. *Southall*, 300 Ga. at 463–65, 796 S.E.2d at 265–66.

61. O.C.G.A. § 5-5-40 (2017).

62. *Southall*, 300 Ga. at 463–65, 796 S.E.2d at 264–66.

63. O.C.G.A. § 5-6-38 (2017).

64. *Southhall*, 300 Ga. at 465–68, 796 S.E.2d at 265–67.

65. *Id.* at 464–65, 796 S.E.2d at 265 (citing Hodges v. S. Ga. Nat. Gas Co., 111 Ga. App. 180, 181, 141 S.E.2d 182, 183–84 (1965)).

66. *Id.* at 465–67, 796 S.E.2d at 265–66, *overruling* Harrison v. Harrison, 229 Ga. 692, 194 S.E.2d 87 (1972).

67. *See* Caine v. State, 266 Ga. 421, 425, 467 S.E.2d 570, 574 (1996) (noting the most efficient way is to first file a motion to withdraw the guilty plea and then appeal the denial of that motion after a hearing upon the record, and if a delay in filing the motion to withdraw the plea beyond the expiration of the appeal period occurs, the defendant is relegated to the remedy of habeas corpus).

intelligently made."[68] As the U.S. Supreme Court explained in *Boykin v. Alabama*,[69] a number of federal and state constitutional rights are implicated when determining whether the guilty plea is knowing, voluntary, and intelligent.[70] These include such fundamental rights as the privilege against compulsory self-incrimination, the right to trial by jury, and the right to confront one's accusers.[71]

One habeas corpus case this period held the guilty plea was not knowingly or voluntarily made because the record showed the defendant was not adequately informed of the definition of "criminal negligence" in a second-degree cruelty to children case.[72]

E. Trial Court Can Reduce Original Sentence before Juvenile Turns Seventeen if Juvenile Sentenced as Adult

In a case decided by the Georgia Court of Appeals this survey period, it was expressly clarified that a juvenile sentenced as an adult can have his sentence reduced, probated, or subjected to whatever further disposition is deemed appropriate by the trial court.[73] First, the court noted that there was no case law interpreting the applicable statutes.[74] Interestingly, the court next engaged in a full statutory analysis that included sections 17-10-14[75] and 49-4A-9[76] of the Georgia code.[77] It also analogized the situation in light of a recent case, *Georgia Department of Juvenile Justice v. Eller*,[78] in which the full court determined in the negative whether the two statutes required the Department of Juvenile Justice to retain custody of the juvenile past his seventeenth birthday rather than transfer him to the Department of Corrections.[79]

---

68. Bazemore v. State, 273 Ga. 160, 161, 535 S.E.2d 760, 761 (2000) (citing Byrd v. Shafer, 271 Ga. 691, 692, 523 S.Ed.2d 875, 875–86 (1999)); *see also* Bowers v. Moore, 266 Ga. 893, 895, 471 S.E.2d 869, 871 (1996), *overruled as to burden of proof by* Lejeune v. McLaughlin, 296 Ga. 291, 766 S.E.2d 803 (2014).

69. 395 U.S. 238 (1969).

70. *Id.* at 244.

71. *Id.* at 243.

72. Kennedy v. Primack, 299 Ga. 698, 699–701, 791 S.E.2d 819, 820–21 (2016) (holding a guilty plea cannot be truly voluntary unless the defendant understands the law in relation to the facts).

73. State v. T.M.H., 339 Ga. App. 628, 634–35, 794 S.E.2d 201, 206 (2016).

74. *Id.* at 629, 794 S.E.2d at 203.

75. O.C.G.A. § 17-10-14 (2017).

76. O.C.G.A. § 49-4A-9 (2017).

77. *T.M.H.*, 339 Ga. App. at 630–35, 794 S.E.2d at 203–06.

78. 338 Ga. App. 247, 789 S.E.2d 412 (2016).

79. *T.M.H.*, 339 Ga. App. at 634–35, 794 S.E.2d at 206.

IV. CONCLUSION

This year was significant for expanding the definition of sexual abuse to include acts of trafficking a person for sexual servitude, a shift to allow retroactive first offender sentencing, a change to more politically-correct terminology for the disabled, and additions to the diseases for which possession of low THC oil is lawful. It was also significant for changes to accountability courts, changes to requirements of parents and guardians in juvenile court, changes to DUI laws, and as in other years, the creation of several new crimes. Additionally, the Georgia appellate courts clarified some oddities inherent in the felony murder statute, further explained what constitutes voluntary consent or exigent circumstances to circumvent the warrant requirement for DUI blood draws, and changed the rule as to the timeliness of filing a motion for new trial in appeals cases. Along those lines, the appellate courts clarified when a guilty plea is knowingly or voluntarily made, and when a trial court can reduce or modify a juvenile's sentence if sentenced as an adult. All in all, it is clear that the changes to our criminal laws this year, as in years past, closely track the times in which we live.