

Criminal Law

by Bernadette C. Crucilla*

I. INTRODUCTION

As in prior periods, this year's survey of criminal law will include only a few of Georgia's more significant statutory amendments and cases. Due to the constant flux of criminal laws in our society, it is never practical to make note of every legal development.¹ As such, the Author has intentionally limited the discussion to changes she believes will serve the greatest purpose and interest to criminal law practitioners for the period from June 1, 2017 through May 31, 2018.

II. STATUTORY CHANGES

As is usually the case with statutory changes, this period's changes mirror the current times. This survey period is significant for encompassing a number of "the Criminal Justice Reform Council's recommendations for its final year of existence."² These include, among other items, electronic court filing in criminal cases,³ judicial council

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1. For an analysis of Georgia criminal law during the prior survey period, see Bernadette C. Crucilla, *Criminal Law, Annual Survey of Georgia Law*, 69 MERCER L. REV. 73 (2017).

2. See Kendra Mitchell, *2018 Georgia Association of Criminal Defense Lawyers Legislative Report*, 33 GA. DEFENDERS 1 (GACDL, Decatur, Ga.), Issue 2, 2018, at 4.

3. *Id.*; Ga. S. Bill 407, Reg. Sess., 2017 Ga. Laws 550 (codified as amended at O.C.G.A. §§ 15-6-11 and 15-7-5 (2018)). This Senate bill requires each superior court and state court to have electronic case filing in criminal cases by January 1, 2019. See O.C.G.A. §§ 15-6-11 and 15-7-5.

collection of data from delinquency cases,⁴ citations in lieu of arrest,⁵ bail reform,⁶ changes to driver's license issuance,⁷ community service or alternative sentence changes,⁸ termination of a probated portion of a sentence,⁹ changes to first-offender laws,¹⁰ and enhanced penalties for

4. Mitchell, *supra* note 2, at 4; O.C.G.A. § 15-11-64 (2018). The statute requires clerks of juvenile courts to collect data on each child alleged or adjudicated delinquent and submit the same to the Judicial Council by January 1, 2019, who will make the rules as to this part of the bill. *See* O.C.G.A. § 15-11-64.

5. Mitchell, *supra* note 2, at 4; O.C.G.A. § 17-4-23 (2018). The statute provides that a law enforcement officer issue a citation in lieu of an arrest in state court for criminal trespass, shoplifting, retail refund fraud, or misdemeanor possession of controlled substances. O.C.G.A. § 17-4-23. Further, if a defendant fails to show up for court, the law enforcement officer may request a bench warrant be issued. *Id.*

6. Mitchell, *supra* note 2, at 4. Bail reform has finally come about this period. One section prevents excessive bail for misdemeanors and requires the court to consider the defendant's financial resources, financial earnings, and any other factors in the court's discretion. O.C.G.A. § 17-6-1 (2018). An exception is for crimes of family violence, where the matter is left to the court on an individual basis, giving consideration to the injury to the victim. *Id.* For those offenses punishable by a fine, the court may allow the defendant to satisfy probation supervision by way of community service. O.C.G.A. § 17-10-1 (2018). Also permissible is the waiver of a fine, exclusive of statutory surcharges, if the defendant has a financial hardship. *Id.* The final section caps a felony at a fine of \$100,000. O.C.G.A. § 17-10-8 (2018).

7. Mitchell, *supra* note 2, at 4. O.C.G.A. § 40-5-22 (2018) permits the Department of Drivers Services (DDS) to "issue a probationary license, limited driving permit, or ignition interlock device limited driving permit" to anyone with an expired license, as long as they are otherwise eligible. O.C.G.A. § 40-5-22(e) (2018). Another section allows accountability-court judges to issue an ignition interlock limited driving permit and to revoke the same for a period of one year with the option for renewal. O.C.G.A. § 40-5-76(a)(1)(D)(3) (2018). If the offense was not a motor vehicle offense, the judge may order the DDS to issue a limited driving permit or an ignition interlock limited permit with all applicable fees. O.C.G.A. § 40-5-76(b) (2018).

8. Mitchell, *supra* note 2, at 4. Several statutes this period provide for a loosening of community service requirements and alternative sentences. For example, O.C.G.A. § 42-3-50 (2018) permits "a defendant to complete community service at any 501(c)(3) organization, including religious and educational institutions." *Id.*; O.C.G.A. § 42-3-50. Amendments to O.C.G.A. § 42-3-52 (2018) permit community service or educational advancement as a condition of probation. O.C.G.A. § 42-3-52.

9. Mitchell, *supra* note 2, at 5. Several statutes have been amended to deal with the probated portion of a sentence. For example, O.C.G.A. § 42-8-37 (2018) requires the court to rule on a petition to terminate as soon as possible or within ninety days. O.C.G.A. § 42-8-37. Additionally, O.C.G.A. § 42-8-105 (2018) prohibits probation officers from seeking tolling orders for probation sentences if the defendant reports within ten days of being notified by mail ostensibly to bring them in compliance. O.C.G.A. § 42-8-105.

10. Mitchell, *supra* note 2, at 5. One important change comes in the form of how first offenders are treated. Ga. S. Bill 407 § 2-14, Reg. Sess., 2018 Ga. Laws 550 (codified as amended at O.C.G.A. § 42-8-62.1(b) (2018)). Defendants serving a first offender sentence handed down before July 1, 2016, can seek to limit public access to such information.

violations involving firearms—perhaps due to the rash of gun violence across the nation.¹¹ The Georgia General Assembly also created the Criminal Case Data Exchange Board.¹²

A. New Crimes or Sentencing Changes

Not to be outdone by previous years, the Georgia General Assembly has added to our state's lexicon of crime this survey period. When not outright adding crimes, the General Assembly also added enhancements to the sentencing structure of existing crimes.

1. Emergency Exit Bill

A bill created a new misdemeanor for running out of an emergency exit door while shoplifting.¹³ An interesting question is, when the shoplifting is a felony, whether the crime of running out of an exit door will also be a felony.¹⁴

2. Unauthorized Computer Access

The computer crimes statute has been amended to add a new subsection and revise other paragraphs, including venue, civil remedies,

O.C.G.A. § 42-8-62.1(b). Another section eliminates the filing fee for his or her petition, hearing, and retroactive grant of such treatment. Ga. S. Bill 407 § 2-15, Reg. Sess., 2018 Ga. Laws 550 (codified as amended at O.C.G.A. § 42-8-66 (2018)). A third statutory section clarifies that educational advancement may be considered in lieu of money owed the court. Ga. S. Bill 407 § 2-16, Reg. Sess., 2018 Ga. Laws 550 (codified as amended at O.C.G.A. § 42-8-102(d) (2018)).

11. Mitchell, *supra* note 2, at 5; Ga. S. Bill 407 §§ 4-1, -2, -4, Reg. Sess., 2018 Ga. Laws 550 (codified as amended at O.C.G.A. § 16-8-12 (2018)). Perhaps due to this rash of gun violence across the nation, the legislature enhanced “the penalties for theft of a firearm or destructive device or explosive. For a second or subsequent offense the penalty shall be 5–10 years imprisonment.” Mitchell, *supra* note 2, at 5. Use of a firearm with an altered identification mark shall be one to ten years in prison and five to ten years for the second and subsequent offenses. O.C.G.A. § 16-8-12(a)(6)(iii)(B) (2018). For a felony first offender on probation the penalty will be one to ten years imprisonment for a first offense and five to ten years for a second or subsequent offense. O.C.G.A. § 16-11-131(b) (2018).

12. Mitchell, *supra* note 2, at 4. Two new statutory sections were amended to establish the Criminal Case Data Exchange Board, which will consist of fifteen members including heads of state agencies, judges, administrative court members, and a county commissioner appointed by the Governor to assist in the development of the criminal case management system and the creation of the electronic case filing system. O.C.G.A. §§ 35-6A-13 and 35-6A-14 (2018).

13. Mitchell, *supra* note 2, at 6; Ga. H.R. Bill 890 § 1, Reg. Sess., 2018 Ga. Laws 342 (codified at O.C.G.A. § 16-11-40 (2018)). Additionally, the crime is separate from the shoplifting offense. Mitchell, *supra* note 2, at 6.

14. See O.C.G.A. § 16-8-14 (2018). The emergency exit bill shall become effective on July 1, 2018. O.C.G.A. § 16-11-40.

and criminal penalties.¹⁵ Venue is addressed in the Official Code of Georgia Annotated (O.C.G.A.) section 16-9-94.¹⁶

3. Hands-Free Georgia Act

Effective July 1, 2018, Georgia joins fifteen other states by enacting the “Hands-Free Georgia Act.”¹⁷ The statute “is revised to require a hands-free accessory for wireless communications while driving. It prohibits all drivers from physically holding or supporting any wireless communication device;” writing, sending, or reading any texts; and watching or recording any videos.¹⁸ The statute further prohibits commercial drivers from using more than a single button to initiate or terminate a call or to reach for a device in any way that requires them to be no longer restrained in a seatbelt.¹⁹ The bill creates exceptions for reporting an accident, emergency, criminal act, or hazardous road condition, and an exception for contractors, utility companies, law enforcement, and people lawfully parked.²⁰

15. Mitchell, *supra* note 2, at 6. The revision to O.C.G.A. § 16-9-93 (2018) now makes it a misdemeanor of a high and aggravated nature. The crime is committed when someone intentionally accesses a computer or network with knowledge of its unlawfulness, but the statute makes an exception for members of the same household, legitimate college and business research, and cybersecurity active defense measures. *Id.*; O.C.G.A. § 16-9-93.

16. O.C.G.A. § 16-9-94 (2018); Mitchell, *supra* note 2, at 6. Venue includes “the county of residence of the subject of the violation” and any county “where an authorized user was denied service,” or service was interrupted due to unauthorized computer access. Mitchell, *supra* note 2, at 6.

17. Ga. H.R. Bill 673, Reg. Sess., 2018 Ga. Laws 127 (codified at O.C.G.A. §§ 40-5-57(c)(1)(A), 40-6-165(d)–(e), 40-6-241, 40-5-142, 40-5-159 (2018)).

18. Mitchell, *supra* note 2, at 6.

19. *Id.*; Ga. H.R. Bill 673 § 2 (codified as amended at O.C.G.A. § 40-5-57 (2018)). The House bill provides “first offenders to upgrade to a hands-free device and avoid prosecution if proof is shown.” Mitchell, *supra* note 2, at 6. Penalties are \$50 with no surcharges for the first offense in twenty-four months, \$100 without surcharges for the second offense in twenty-four months, and \$150 without surcharges for the third offense. *Id.*

20. Ga. H.R. Bill 673 § 2; Mitchell, *supra* note 2, at 6. Further, O.C.G.A. § 40-5-57 provides the point system for violations. O.C.G.A. § 40-5-57(c)(1)(A) (2018). The first offense is one point, the second is two points, and the third and subsequent are three points. O.C.G.A. § 40-5-57(c)(1)(A)(xiv)–(xvii) (2018).

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4. Sex Trafficking

Beginning July 1, 2018, O.C.G.A. § 16-5-46²¹ is amended to now make it a felony to patronize, by any means, any individual that is the subject of sexual servitude.²²

5. Providing a Firearm to a Felony First Offender on Probation

Meant to target purchasers of firearms for felony first offenders on probation, the bill²³ amends O.C.G.A. § 16-11-113 to schedule the penalty at one to five years in prison for a first offense and five to ten years for second or subsequent offenses.²⁴

6. Trafficking Elderly and Disabled Persons

A new Code section²⁵ was added this period making it a felony to traffic elderly and disabled people to appropriate that person's resources for one's own profit or benefit.²⁶ As defined by the bill, trafficking is using "deception, coercion, exploitation, or isolation and knowingly recruiting, harboring, transporting, providing, or obtaining by any means an elderly or disabled person for one's own benefit."²⁷ This new section sets the penalty at a substantial one to twenty years' imprisonment and a \$100,000 fine, or both, with each violation constituting a separate offense, not being permitted to merge with any other.²⁸

III. CASE LAW CHANGES

As in previous years, this period was also significant for its vigorous activity in the appellate courts. Although there is not a neat

21. O.C.G.A. § 16-5-46 (2018).

22. *Id.*; Mitchell, *supra* note 2, at 6. If the individual in sexual servitude is sixteen years or older, the penalty is five to twenty years in prison; if the individual is under sixteen or known to have a developmental disability, the minimum is ten years in prison. O.C.G.A. § 16-5-46.

23. Ga. H.R. Bill 657, Reg. Sess., 2018 Ga. Laws 540 (codified as amended at O.C.G.A. § 16-11-113 (2018)).

24. *Id.*; Mitchell, *supra* note 2, at 6. The bill does not require the dealer to confirm that a person is a first offender felon before selling him a firearm, but simply the person providing the firearm must knowingly and intentionally provide a firearm to the first offender. Ga. H.R. Bill 657.

25. Ga. H.R. Bill 803 § 1, Reg. Sess., 2018 Ga. Laws 608 (codified at O.C.G.A. § 16-5-102.1 (2018)).

26. *Id.*

27. Ga. H.R. Bill 803 § 1; Mitchell, *supra* note 2, at 6.

28. Ga. H.R. Bill 803 § 1(a)(5)(b)-(c); Mitchell, *supra* note 2, at 6.

characterization of cases possible, some significant and interesting changes are set forth below.

A. *Field Sobriety Tests*

Via the grant of an interlocutory appeal, in *Mitchell v. State*,²⁹ the Georgia Supreme Court ruled that to be admissible, the Rhomberg field sobriety test must meet the standards of reliability and validity set forth in *Harper v. State*.³⁰ In so finding, the court had to determine whether the test “falls into the category of a simple . . . dexterity [test] observable by the average lay person” or whether it “must meet the standards of validity and reliability.”³¹

In finding the test subject to the *Harper* analysis, the court held as follows:

The significance of eyelid tremors or an individual’s “internal clock,” how they may be affected by the consumption of alcohol, and particularly whether a range of five seconds above or below the actual passage of 30 seconds establishes impairment, are not matters of common sense or experience, nor are they obvious to the average lay observer.³²

B. *Entitlement to a Correct and Complete Transcript*

The Georgia Supreme Court ruled in *Johnson v. State*³³ that a defendant is entitled to a correct and complete trial transcript as part of his right to a meaningful appellate review of his case or else he is entitled to a new trial.³⁴ The original transcript and other materials (tapes and so forth) from an underlying murder prosecution were burned in a fire at

29. 301 Ga. 563, 802 S.E.2d 217 (2017).

30. *Id.* at 565–66, 802 S.E.2d at 220–21; 249 Ga. 519, 292 S.E.2d 389 (1982).

31. *Mitchell*, 301 Ga. at 566, 802 S.E.2d at 221 (citing *Stewart v. State*, 280 Ga. App. 366, 368–69, 634 S.E.2d 141, 144–45 (2006)).

32. *Id.* at 567, 802 S.E. at 221–22; *See, e.g.*, *Gadford v. City of Huntsville*, 557 So. 2d 1330, 1331 (Ala. Crim. App. 1989); *People v. Carlson*, 677 P.2d 310, 316 n.6 (Colo. 1984); *Commonwealth v. Jones*, 43 N.E.3d 349 (Mass. App. Ct. 2016); *State v. Klawitter*, 518 N.W.2d 577, 579 (Minn. 1994); *Commonwealth v. Keppel*, 154 A.3d 863 (Pa. Super. Ct. 2016); *Buchanan v. State*, No. 01-89-00204-CR, 1990 Tex. App. LEXIS 991 (Apr. 26, 1990); *Johnson v. State*, No. 03-08-00638-CR, 2009 Tex. App. LEXIS 3871, at *2 n.1 (June 5, 2009).

33. 302 Ga. 188, 805 S.E.2d 890 (2017).

34. *Id.* at 198, 805 S.E.2d at 898.

the court reporter's home.³⁵ In reliance on O.C.G.A. § 5-6-41(f)³⁶ and (g),³⁷ the state produced a fourteen-page, double-spaced narrative containing only brief summaries of the witnesses, not indicating whether the testimony was on direct or cross.³⁸ The supreme court indicated its rationale rested on two fundamental principles: "a defendant convicted of a crime has the right to appeal, and [also] . . . a right to a transcript of the trial to use in bringing the appeal."³⁹ Further, the key to the decision was the notion the defendant therein was effectively deprived of his right to appeal, and as such was entitled to a new trial.⁴⁰ Of further import was that the entire transcript was missing.⁴¹ Had there only been a "mere gap" in the transcript, the court indicated it would have presumed the regularity and correctness of the proceedings below.⁴² Certainly, said presumption is rebuttable.⁴³

C. *For Co-Conspirators Statements to Be Non-Hearsay They Must Be Made in Furtherance of the Conspiracy*

In one case this period, the Georgia Supreme Court analyzed the Georgia Evidence Code Rule 801(d)(2)(E)⁴⁴ for the first time.⁴⁵ The court held that a co-conspirator's statements would be excluded as hearsay based on the defendant's motion *in limine* because he was merely attempting to avoid arrest, not advance or conceal the crime.⁴⁶

The present Rule incorporates from the analogous Federal Rules of Evidence the requirement that, to be admissible, the statement must

35. *Id.* at 188, 805 S.E.2d at 891–92.

36. O.C.G.A. § 5-6-41(f) (2018).

37. O.C.G.A. § 5-6-41(g) (2018).

38. *Johnson*, 302 Ga. at 195–96, 805 S.E.2d at 896–97.

39. *Id.* at 191, 805 S.E.2d at 894 (citing *Wilson v. State*, 246 Ga. 672, 675, 273 S.E.2d 9, 11 (1980)).

40. *Id.* at 191–92, 805 S.E.2d at 894 (citing *Sheard v. State*, 300 Ga. 117, 120, 793 S.E.2d 386, 388 (2016)).

41. *Id.* at 188, 805 S.E.2d at 891. As the supreme court made clear, where only a portion of the transcript is missing, especially those portions that are not required to be transcribed, an appellant must show some harm to be entitled to a new trial. *Id.* at 197–98, 805 S.E.2d at 897–98.

42. *Id.* at 198, 805 S.E.2d at 898.

43. *Id.*

44. O.C.G.A. § 24-8-801(d)(2)(E) (2018).

45. *State v. Wilkins*, 302 Ga. 156, 158, 805 S.E.2d 868, 871 (2017).

46. *Id.* at 160–62, 805 S.E.2d at 872–73; *see also* Ga. H.R. Bill 24 § 1, Reg. Sess., 2011 Ga. Laws 99. ("It is the intent of the General Assembly in enacting this Act to adopt the Federal Rules of Evidence, as interpreted by the Supreme Court of the United States and the United States circuit courts of appeal as of January 1, 2013, to the extent that such interpretation is consistent with the Constitution of Georgia.").

have been made in furtherance of the conspiracy.⁴⁷ Under the analogous federal rule, co-conspirator statements not made in furtherance of the conspiracy, but merely to disclose the scheme or “spill the beans,” are not admissible against the accused.⁴⁸ The Chatham County Superior Court excluded co-conspirator statements made after the act that merely “spill[ed] the beans.”⁴⁹ Thus, for that reason, the court correctly ruled the statements were not made in furtherance of any conspiracy and were not admissible under Rule 801(d)(2)(E).⁵⁰

D. Gang Statute Violates Confrontation Clause

In an important case this period, the Georgia Supreme Court affirmed a trial court’s order declaring O.C.G.A. § 16-15-9 (the Gang Statute)⁵¹ unconstitutional on its face for violating the Confrontation Clause.⁵² The court’s reasoning was, in essence, that it violated the Confrontation Clause to permit others’ convictions for gang activity in a wholly unrelated proceeding to prove an element of an offense against them (as that statute does).⁵³ The supreme court held that “O.C.G.A. § 16-15-9 is unconstitutional on its face to the extent it authorizes the admission of the convictions of non-testifying, non-parties as evidence of a criminal street gang,” proof of which is an element of the crime in gang cases.⁵⁴

E. Jury Charges: Both Voluntary Manslaughter and Insanity Not Warranted

One case during this survey period was instructive regarding when both voluntary manslaughter and insanity are appropriate as jury

47. *Wilkins*, 302 Ga. at 158–59, 805 S.E.2d at 871.

48. *Id.* at 160, 805 S.E.2d at 872.

49. *Id.* at 156, 160, 805 S.E.2d at 870, 872 ((1) “the male victim [was] bucking so [we] shot him;” (2) an acquaintance told the police that while the co-conspirators were at the witness’s home they stated that they were involved in a homicide; (3) a codefendant’s “estranged wife [told] . . . the grand jury that [he stated] he ‘did something horrible’ and ‘shot somebody;” (4) a police report stated the codefendant said he “got messed up in Thunderbolt;” (5) “[a]nother police report state[d the codefendant] told [a witness’s] stepsister that an attempted robbery failed and [the defendant] ‘got cold feet’” and the victims were shot; (6) and the co-conspirator testified at trial that the defendant told the witness “he got another body.”).

50. *Id.* at 162, 805 S.E.2d at 873.

51. O.C.G.A. § 16-15-9 (2018).

52. *State v. Jefferson*, 302 Ga. 435, 443, 807 S.E.2d 387, 393 (2017); *see also* U.S. CONST. amend. VI; *id.* amend. XIV, § 1.

53. *Jefferson*, 302 Ga. at 438, 807 S.E.2d at 390 (citing *Kirby v. United States*, 174 U.S. 47 (1899)).

54. *Id.* at 437, 807 S.E.2d at 390.

charges. During the trial for stabbing and killing his sister, the defendant requested jury charges on both voluntary manslaughter (for allegedly stealing his social security check) and insanity.⁵⁵ In affirming the Fulton County Superior Court's refusal to give either jury charge, the Georgia Supreme Court first reasoned that arguments over money are not considered serious provocations sufficient to support a voluntary manslaughter charge.⁵⁶ Furthermore, the court reasoned that to overcome the presumption of sanity, the defense has the burden of proving by a preponderance of the evidence that he was insane at the time the crime was committed.⁵⁷

This affirmative defense of insanity may be established by showing that, at the time of the . . . crime, the defendant either (1) "did not have [the] mental capacity to distinguish between right and wrong in relation to such act," or (2) had a mental disease causing "a delusional compulsion as to such act which overmastered his will to resist committing the crime."⁵⁸

On the contrary, the defendant conceded he was not acting under a delusional compulsion and he provided no evidence to show he lacked the mental capacity to distinguish between right and wrong at the time he was stabbing his sister.⁵⁹ Thus, in addition to the charge on voluntary manslaughter, the defendant was likewise not entitled to a charge on insanity.⁶⁰

IV. CONCLUSION

This year was significant for statutory changes as to electronic filing for criminal cases, judicial council collection of data from delinquency cases, citations in lieu of arrest, bail reform, changes to driver's license issuance, community service and alternative sentences, probation termination, changes to treatment of first offenders, enhanced penalties for firearms violations, and creation of the Criminal Case Data Exchange Board. This year was also significant for the addition of several new and improved crimes. The appellate courts additionally issued a number of

55. *Jackson v. State*, 301 Ga. 878, 880–81, 804 S.E.2d 357, 359–60 (2017).

56. *Id.*; see *Gresham v. State*, 289 Ga. 103, 104, 709 S.E.2d 780 (2011); see also *Merritt v. State*, 292 Ga. 327, 331, 737 S.E.2d 673, 677 (2013) ("[Indeed] angry statements alone [cannot] amount to 'serious provocation' within the meaning of O.C.G.A. § 16-5-2(a).").

57. *Jackson*, 301 Ga. at 881, 804 S.E.2d at 360 (citing *Alvelo v. State*, 290 Ga. 609, 724 S.E.2d 377 (2012)).

58. *Id.* (quoting O.C.G.A. §§ 16-3-2, 16-3-3 (2018)).

59. *Jackson*, 301 Ga. at 881, 804 S.E.2d at 360.

60. *Id.*

decisions providing guidance as to the necessary standards for field sobriety tests, what is required for an appeal transcript, and when a co-conspirator's testimony will be hearsay and when it will not be hearsay. The Georgia Supreme Court provided guidance as to when the Gang Statute is violative of the Confrontation Clause and also addressed the propriety of certain jury charges in murder cases and insanity defenses. As in previous years, the evolving laws in this period, both statutory and case law, reflect the times in which we live.