CRIMINAL LAW

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INTRODUCTION

The number of decisions involving principles of criminal law during this survey period was staggering. However, only a very small percentage of those decisions will receive attention in this article, for several reasons. Many of the decisions simply involved a rehash of familiar criminal law principles. Many of them were too brief for any meaningful analysis. It should be noted, also, that unlike prior criminal law survey articles, the scope of this article does not include decisions resting on a constitutional basis. This limitation includes the many decisions dealing with search and seizure questions. A separate area of this survey edition has been specifically devoted to decisions dealing with constitutional law issues.

As has been done in the past, the cases in this article have been divided up and placed in loosely defined categories. This has been done as much as a matter of convenience for the writers as for the readers and to provide a logical breaking point in the text.

One caveat needs to be made before launching into a discussion of the cases selected for discussion. This article does not purport to provide an in-depth analysis of any of the cases presented. It is only a survey of cases that have been selected to illustrate significant developments in the field of criminal law in Georgia during this particular period.

INTOXICANTS

Intoxicants have from time immemorial played a role in the field of criminal law. Numerous cases decided during this period dealt with intoxicants in one form or another and these cases will be discussed throughout this survey article. Under this particular heading, several cases of a general nature involving intoxicants will receive attention.

In Georgia it is a criminal offense to operate a vehicle while under the influence of intoxicating liquors or drugs.[1] The corpus delecti of this offense is the fact that the defendant was operating the vehicle while under the influence of some intoxicant. As a general rule, the corpus delecti of a crime may be proved by circumstantial evidence. A series of Georgia deci-

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1. GA. CODE ANN. §68-1625 (Rev. 1967).

sions virtually abrogated this rule as applied to the offense of operating a vehicle while under the influence of intoxicants, and imposed a burden of direct proof.[2] An additional restriction that a confession by the defendant had to be corroborated by direct evidence often came into play in these cases.[3] These stringent requirements of direct proof relating to DUI cases have now been abolished by the recent unanimous decision rendered by the court of appeals in *Stephens v. State*.[4] In the opinion, written by Judge Eberhardt, this is made clear:

> All of these cases while apparently recognizing that a confession or an admission may be corroborated and supported and the corpus delecti may be proved by circumstantial evidence, nevertheless erred in applying this correct principle of law to the facts in the respective cases, the effect of which has been to negate the use of circumstantial evidence or reliance thereon in cases such as this, as well as to usurp the province of the jury, and to that extent the cases are disapproved and will not be followed.[5]

One of the defenses which a defendant charged with selling intoxicants might avail himself of under the appropriate factual situation is a defense based on the "conduit theory."[6] This defense would arise in the situation where a defendant, while a part of the overall transaction of selling and buying intoxicants, really acted as no more than a procuring agent for the person buying. The theory is founded on the idea that because the individual acted simply as an agent of the buyer and reaped no benefit from the actual sale, then he may not be found guilty of the offense of selling intoxicants.

In *Brooks v. State*,[7] several undercover police officers joined with some local girls in an attempt to make contact with drug sellers. The defendant was approached but indicated that he had no drugs. Upon the urging of the girls, the defendant contacted a seller and a substantial quantity of drugs was purchased for the undercover police officers. The defendant kept none of the money involved in the transaction. He was prosecuted under Ga. Code Ann. §26-801 (Rev. 1972)[8] for selling marijuana. One of the defenses offered by the defendant was predicated on the "conduit theory." A timely request to charge was submitted by the defendant on this theory,

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2. *See, e.g.*, Parrott v. State, 100 Ga. App. 652, 112 S.E.2d 271 (1959); Ray v. State, 91 Ga. App. 16, 84 S.E.2d 591 (1954).

3. *See* Hitchcock v. State, 96 Ga. App. 18, 99 S.E.2d 175 (1957).

4. 127 Ga. App. 416, 193 S.E.2d 870 (1972); *see also* Townsend v. State, 127 Ga. App. 797, 195 S.E.2d 474 (1972).

5. 127 Ga. App. at 424, 193 S.E.2d at 875.

6. *See* Vandiver v. State, 81 Ga. App. 756, 59 S.E.2d 763 (1950); Black v. State, 112 Ga. 29, 37 S.E. 108 (1900); Evans v. State, 101 Ga. 780, 29 S.E. 40 (1897).

7. 125 Ga. App. 867, 189 S.E.2d 448 (1972).

8. GA. CODE ANN. §26-801(a) (Rev. 1972) provides: "Every person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime."

but the trial court refused to give the charge. On appeal, the decision of the trial court was affirmed, with three judges dissenting. This decision signals the demise of the "conduit theory" in such cases despite its prior recognition in Georgia and, as pointed out by Judge Evans in his dissent, in federal courts as well.

LESSER INCLUDED OFFENSES

It is a well recognized principle of criminal law in Georgia that an accused who is prosecuted for a particular offense may be found guilty of a lesser included offense that makes up a part of the greater offense.[9] Another principle declares that an accused may not be convicted of more than one crime if that crime is included in the other.[10] These principles, though well entrenched in Georgia law, are not free of complications.

In *Wells v. State*,[11] the defendant was indicted and convicted of possession of LSD and of selling and distributing LSD. The offenses occurred at the same time and place. On appeal the defendant asserted that the trial court committed reversible error in charging the jury that he could be found guilty of both offenses "although the charge of possession of the same drugs alleged to be sold was necessarily included in the latter charge (selling) when committed at the same time and place."[12] The court of appeals, relying on Ga. Code Ann. §26-506(a) (Rev. 1972), agreed with the accused, declaring that it was permissible to indict and try the defendant for both offenses but not to convict for both offenses. In *Burns v. State*,[13] another drug case, the question was again raised as to whether the sale of certain drugs included the offense of possessing the drugs. Again it was held that it did.

Both *Wells* and *Burns* were decided in the face of *Gee v. State*[14] where it was specifically held by the Supreme Court of Georgia that the possession of drugs and the selling of the same drugs are separate punishable offenses. The decision rendered in *Wells* was rendered by a three judge panel. In *Burns* the full bench participated but the decision was dissented to by four members of that bench. One thing which becomes clear as a result of the decisions in this particular area of Georgia criminal law is that the matter is indeed very unclear.

Before completely departing from the *Wells* case, there is one additional proposition which that case deals with that deserves comment. Under the provisions of Ga. Code Ann. §27-101.2 (Rev. 1972) allowance has been made whereby an individual may partake of a reward if he provides infor-

9. *See* GA. CODE ANN. §26-505 (Rev. 1972).
10. *See* GA. CODE ANN. §26-506 (Rev. 1972).
11. 126 Ga. App. 130, 190 S.E.2d 106 (1972).
12. *Id.* at 130-31, 190 S.E.2d at 107.
13. 127 Ga. App. 828, 195 S.E.2d 189 (1973).
14. 225 Ga. 669, 171 S.E.2d 291 (1969).

mation on drug sellers. In *Wells*, one of the defendant's fellow students had supplied information to the police about him concerning drugs. Consequently, the defendant submitted a request to charge setting out the provisions of Ga. Code Ann. §27-101.2 (Rev. 1972). The trial court refused to give the charge requested. On appeal, the defendant asserted that this refusal amounted to reversible error.

The court of appeals agreed with the defendant, relying on the principle that the bias of a witness is always relevant. However, the court pointed out that the defendant's complaint here was not meritorious in that he had failed to comply with the formalities relating to requests to charge.

The doctrine of lesser included offenses reared its head again during this period in *Gearin v. State*.[15] One of the questions the court undertook to resolve in this case was whether or not the crime of receiving stolen goods[16] was a lesser included offense of burglary,[17] as those two offenses are defined under the provisions of the Criminal Code of Georgia. Relying on the proposition that in order for a crime to be a lesser included offense, the greater offense must embody all the essential ingredients of the lesser offense, the court held that receiving stolen property is not a lesser included offense of burglary.

STATUTES

Several decisions which were forthcoming during this survey period addressed themselves specifically to determining the meaning of language contained in certain statutes.

Ga. Code Ann. §38-415 (Supp. 1972) prohibits any comment upon the failure of a defendant to testify in a case. The statute containing this prohibition was originally the same one that allowed the unsworn statement.[18] The statute was amended during the 1973 legislative session and the provisions dealing with the unsworn statement were eliminated.[19] The prohibitions directed at commenting on the defendant's failure to testify were retained intact.

It has been specifically held that a failure to adhere to this rule is grounds for reversible error.[20] Some confusion has come about recently as to whether or not this statute is concerned with comments which are of a direct nature or if indirect comments are sufficient to fall within its prohibitions. In *Spann v. State*,[21] the question was presented to the court of

15. 127 Ga. App. 811, 195 S.E.2d 211 (1973).
16. GA. CODE ANN. §26-1806 (Rev. 1972).
17. GA. CODE ANN. §26-1601 (Rev. 1972).
18. Ga. Laws, 1962, p. 133.
19. Ga. Laws, 1973, p. 292.
20. *See* Spann v. State, 126 Ga. App. 370, 190 S.E.2d 924 (1972), and the cases cited therein.
21. *Id.*

appeals and they resolved it by declaring an indirect comment is sufficient. In so holding, the court recognized that language contained in a recent 5 to 4 Georgia Supreme Court decision, had indicated that direct comment was required.[22] Nevertheless, the court of appeals in *Spann* declined to follow this decision and declared itself bound by an earlier full bench decision of the supreme court.[23]

In 1970, the Georgia Legislature enacted a statute instituting presentence hearings in felony cases in Georgia.[24] This legislation provided that where an accused was found guilty in a felony case, a separate hearing was to be had in order to determine the sentence to be imposed. As part of this hearing "evidence in extenuation, mitigation, and aggravation of punishment"[25] may be presented. Such evidence in aggravation is only admissible, however, to the extent that the "State has made known [such evidence] to the defendant prior to this trial."[26] Exactly when such evidence is "made known" was determined in *Gates v. State*,[27] wherein the court declared that these words required "that notice of each specific conviction to be introduced in evidence by the State . . . should be given to the party on trial or his attorney."[28]

In *Beckman v. State*, the defendant, a councilman of the city of Warner Robins, was indicted under the provisions of Ga. Code Ann. §26-2302 (Rev. 1972).[29] On appeal the defendant, relying on the committee notes of the Criminal Law Study Committee, which was responsible for preparing the new criminal code for submission to the General Assembly, advanced the argument that this particular code section had no applicability to municipal officers. The court refused to accept this argument and pointed out that the particular code section had been amended by the General Assembly so as to apply to any public officer and that a city councilman falls within such a category. However, the case was reversed on another ground.

In *Scott v. State*,[30] the defendant was charged with armed robbery and aggravated assault. He was so charged on the theory that, although he had not directly participated in the commission of these crimes, he did conspire with those who did. He was not charged under any of the conspiracy provisions of the criminal code.[31] At the trial, the prosecutor outlined the

22. Mitchell v. State, 226 Ga. 450, 175 S.E.2d 545 (1970).

23. Salisbury v. State, 221 Ga. 718, 146 S.E.2d 776 (1966).

24. GA. CODE ANN. §27-2534 (Rev. 1972).

25. *Id.*

26. *Id.*

27. 229 Ga. 796, 194 S.E.2d 412 (1972).

28. *Id.* at 797, 194 S.E.2d at 414.

29. GA. CODE ANN. §26-2302 (Rev. 1972) provides: "Any public officer who wilfully and intentionally violates the terms of his oath as prescribed by law shall upon conviction be punished by imprisonment for not less than one nor more than five years."

30. 229 Ga. 541, 192 S.E.2d 367 (1972).

31. GA. CODE ANN. ch. 26-32 (Rev. 1972).

theory of conspiracy to the jury and the trial judge later submitted to the jury the theory of conspiracy. The question presented on appeal was whether or not the provisions of Ga. Code Ann. §26-801 (Rev. 1972), which defines parties to a crime, embodies a theory of conspiracy in such a case. The supreme court declared that the section does indeed embody such a theory, "insofar as it renders one not directly involved in the commission of the crime responsible as a party thereto."[32] The court went on to point out that the separate conspiracy provisions of the code were directed at those cases where a crime had not been consummated and would not apply in a case such as *Scott* where the crimes had reached fruition.

Fowler v. State,[33] was a case decided during this period which involved Ga. Code Ann. §79A-9917 (Supp. 1972). This particular code section sets forth provisions aimed at alleviating the harshness of other provisions of the code dealing with the possession of drugs. It makes allowances for first offenders. As part of the former provisions of the act,[34] a judge could, at his discretion, impose a sentence not to exceed one year or a $1,000.00 fine, or both.

In *Fowler*, the defendants were convicted for possession of less than one ounce of marijuana. The sentence of $800.00 and 30 days confinement was imposed. They sought an appeal bond and were refused by the trial court. An appeal bond in misdemeanors is a matter of right in Georgia.[35] In vacating an order previously granting a mandamus requiring the issuance of an appeal bond, the supreme court in *Fowler* based at least part of its decision on the notion that the offense involved constituted a felony. The decision was dissented to by three justices. Mr. Justice Gunter in a well reasoned dissent demonstrates why the events involved constituted only a misdemeanor.

During the 1973 legislative session the Georgia Senate undertook to make it clear that Ga. Code Ann. §79A-9917 (Supp. 1972) should be construed as interpreted by Mr. Justice Gunter. The section was specifically amended making an offense under it a misdemeanor.[36]

LEGISLATIVE ENACTMENTS

During the survey period, a number of statutes were enacted by the legislature which are worthy of note. Some of these enactments have been touched on in the preceding textual material and will not be discussed again. An in-depth analysis of the statutes discussed will not be undertaken, but a general discussion of more important statutes passed will be

32. 229 Ga. at 544, 192 S.E.2d at 370.
33. 229 Ga. 884, 194 S.E.2d 923 (1972).
34. Ga. Laws, 1971, p. 271.
35. GA. CODE ANN. §27-901 (Rev. 1972).
36. Ga. Laws, 1973, p. 688.

set forth, primarily for informational purposes.

In *Doe v. Bolton*,[37] the United States Supreme Court virtually annihilated Georgia's abortion statute.[38] The Georgia Legislature was quick to respond during the 1973 legislative session and undertook to amend the provisions of that statute, attempting to bring it within the guidelines laid down by the United States Supreme Court in the *Doe* case.[39]

The death penalty provisions of Georgia were treated similar to the abortion provisions, by the United States Supreme Court in *Furman v. Georgia*.[40] The legislature undertook to enact new death penalty provisions during this last session.[41]

The quandary which a defendant is placed in when the court refuses bail was somewhat ameliorated by a recent enactment.[42] A new provision allows an individual who is denied bail to have the charges or accusation against him heard by a grand jury within 90 days. If a grand jury does not consider the charges within 90 days, the statute indicates that bail then must be set by the court.

A rather novel innovation pertaining to certain traffic arrests has been enacted in Georgia.[43] For example, in most instances if an individual is arrested for speeding, he proceeds to the local constable's office and posts a cash bond. The new provisions allow a driver, upon agreement with the arresting officer, to deposit his driver's license with the officer in lieu of this form of bail. The officer than issues a summons to the driver and then gives him a receipt for his license. The receipt can be substituted for the driver's license in the event the driver is again stopped. Such a procedure definitely displays originality and would benefit travelers short on cash. The practicality of such procedures in a basically rural state is, however, questionable.

Finally, it should be noted that the sport of hockey has fully arrived in Georgia, assuming its place among the other sports in a Georgia statute which prohibits "scalping" tickets.[44]

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37. ___ U.S. ___, 93 S.Ct. 739 (1973).
38. *See* GA. CODE ANN. ch. 26-12 (Rev. 1972).
39. Ga. Laws, 1973, p. 635.
40. 408 U.S. 238 (1972).
41. Ga. Laws, 1973, p. 159.
42. Ga. Laws, 1973, p. 291.
43. Ga. Laws, 1973, p. 435.
44. Ga. Laws, 1973, p. 96.