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The Decline of the Right to Grand Jury Indictment in Georgia

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Introduction

An indictment is an accusatory instrument, returned by a grand jury, formally charging a defendant with a crime. An information is also an accusatory instrument which formally charges a defendant with crime, but it is brought by a prosecutor without the intervention of a grand jury. At common law a criminal defendant had a right to indictment on the charge before he could be tried for a felony.[1] At common law there was no right to indictment for misdemeanors, which could be prosecuted without an indictment on the basis of an information.[2] In Georgia, an information is known as an accusation.[3]

The grand jury indictment clause of the Fifth Amendment in the Federal Bill of Rights does not apply to state criminal prosecutions,[4] and there is no federal statutory provision guaranteeing a right to indictment to state criminal defendants. Therefore, whether there is a right to indictment by a grand jury in Georgia is a question of Georgia, not federal, law. None of Georgia's ten constitutions has contained a guarantee of the right to indictment;[5] in this state, traditionally the right to indictment has been entirely based on the common law, as modified by statute.[6] Thus, at present the right to grand jury indictment in Georgia is a common law right that subsists to the extent it has not been restricted by statutory law.[7]

The Decline of the Right to Indictment in Georgia

Prior to 1915 a Georgia criminal defendant's common law right to grand jury indictment applied in two circumstances: first, where the defendant was charged with a felony;[8] and second, where a defendant was charged with a misdemeanor in a superior court.[9] This right to indictment was nonwaivable.[10] However, a person charged with a misdemeanor in a city court of a county or city or in some other local court vested with misdemeanor jurisdiction, could, if the statute establishing the court so provided, be tried on the basis of an accusation.[11] Thus, prior to 1915 in Georgia any person prosecuted for either a felony or a misdemeanor in a superior court had a nonwaivable right to be prosecuted on the basis of an indictment; and a person

prosecuted for a misdemeanor in a court other than a superior court had a right to indictment unless a statutory provision authorized the prosecution to be based on an accusation.

In 1915 the General Assembly enacted the first statute in this state's history limiting the use of grand jury indictments in the superior courts. The statute provided that in all misdemeanor cases in a superior court the prosecutor could prefer an accusation and that the defendant could be tried on the basis of the accusation, but only where the defendant waived his right to indictment.[12] It was two decades before the legislature enacted another statute limiting use of indictments in superior court. Therefore, between 1915 and 1935 the right to indictment in Georgia was the same as it had been prior to 1915, except that waiver of indictment in misdemeanor cases in the superior courts was now permissible.

In 1935 a statute was enacted that extended the waiver provisions of the 1915 statute to noncapital felonies. Under the 1935 act, in all noncapital felony cases, as well as all misdemeanor cases, in the superior courts the prosecutor could prefer an accusation and the defendant could be tried on the basis of the accusation, if the defendant waived his right to grand jury indictment.[13] The 1935 statute marked a drastic departure from the previous rule that in all felony prosecutions in the superior courts a grand jury indictment was required. Prior to the 1935 statute, "a court had no jurisdiction to try, or accept a plea of guilty of one charged with a felony until the grand jury had returned an indictment."[14]

After enactment of the 1935 act, therefore, the right to grand jury indictment in Georgia embraced the following: (1) there was a nonwaivable right to indictment in capital felony cases; (2) in a superior court in a misdemeanor or a noncapital felony case there was a waivable right to indictment; and (3) there was a right to indictment in a misdemeanor case prosecuted in a court other than a superior court, unless a statute authorized prosecutions in the particular court to be based on an accusation.

This remained the state of law regarding the right to grand jury indictment in Georgia for the next 37 years. Then, in 1972, the General Assembly abolished the right to indictment for misdemeanors prosecuted in the superior courts.[15] The 1972 statute expressly stated that in a superior court "indictment by a grand jury ... [is] not required in misdemeanor cases."[16] The death blow to the right to indictment in misdemeanors in this state was delivered nine years later, in 1983, when OCGA § 15-7-46 was enacted, abolishing the right to indictment in the state courts of the various counties, where almost all misdemeanor cases have been prosecuted in Georgia for many years.[17] OCGA § 15-7-46 provides: "The accused in criminal proceedings in a state court shall not have the right to indictment by the grand jury of the county."

From passage of the 1935 statute until 1983, therefore, there was no change in the law regarding the right to indictment in felony cases, whereas the right to indictment in misdemeanor cases was abrogated in part in 1972 and then abrogated completely in 1983. There were no further statutory modifications of the right to grand jury indictment in Georgia until 1992 when, for the first time in this state's history, the General Assembly abolished the right to grand jury indictment with respect to certain enumerated felonies. Under the 1992 legislation, these specified felonies could be prosecuted without indictment and without a waiver of indictment by the defendant.

The 1992 statute[18] enacted OCGA § 17-7-70.1 into law. Under § 17-7-70.1(a), in felony cases where a defendant had expressly waived a commitment hearing or had been bound over at a commitment hearing, a district attorney was authorized to proceed against the defendant on the basis of an accusation, and without indictment, with respect to violations of (1) OCGA § 16-8-2 (theft by taking), (2) § 16-8-3 (theft by shoplifting), (3) § 16-8-18 (entering automobile), (4) § 16-9-1 (first degree forgery), (5) § 16-9-2 (second degree forgery), (6) § 16-9-20 (deposit account fraud), (7) § 16-9-31 (credit card theft), (8) § 16-9-33 (credit card fraud), (9) § 16-9-33 (unauthorized use of credit card), (10) § 16-10-52 (escape), and (11) § 40-5-58 (habitual violator). Under OCGA § 17-7-70.1(d), however, a district attorney could not file an accusation in a case where a grand jury had heard evidence or conducted an investigation or where a no true bill had been returned.

A 1996 statute[19] amended § 17-7-70.1 to add OCGA § 16-13-30 (purchase, possession, manufacturing, distribution or sale of controlled substances or marijuana) to the list of felonies which could be prosecuted on the basis of an accusation and without an indictment.[20]

A 1998 statute[21] entirely rewrote OCGA § 17-7-70.1(a), but left the rest of § 17-7-70.1 intact. The 1998 revision made two major changes in § 17-7-70.1(a).

First, the number of felonies which now can be prosecuted based on an accusation, and without an indictment, has been increased by 131. Whereas prior to 1998 only 12 felonies could be prosecuted without indictment, the 1998 act catapults that number to a whopping 143. OCGA § 17-7-70.1 now permits the following felonies to be prosecuted on the basis of an accusation without the necessity of an indictment: (1) the 12 felonies previously enumerated in the 1992 and 1996 statutes;[22] (2) the felony theft offenses in article I of chapter 8 of Title 16 of the OCGA, comprising 18 more felonies;[23] (3) the felony forgery and fraudulent practices offenses in chapter 9 of Title 16 of the OCGA, comprising 106 more felonies;[24] (4) the felony escape and other offenses in article 3 of chapter 10 of Title 16 of the OCGA, comprising 6 more felonies;[25] and (5) the felony offense of possession of a firearm by a convicted felon, in violation of OCGA § 16-11-131.[26]

Second, whereas under the 1992 statute a prosecutor could not proceed by accusation instead of indictment unless the defendant had either been bound over at a commitment hearing or had expressly waived a commitment hearing, under the 1998 act an accusation now may form the basis of a prosecution for any of the numerous felonies enumerated in OCGA § 17-7-70.1(a) if the defendant was bound over at a commitment hearing or if the defendant expressly or by operation of law waived a commitment hearing. Authorizing use of accusations where the commitment hearing has been waived by operation of law significantly increases the likelihood that the prosecutor will be able to dispense with grand jury indictments with respect to prosecutions for the 142 felonies enumerated in § 17-7-70.1(a).

Insofar as it authorizes district attorneys to prosecute certain noncapital felonies on the basis of an accusation, without indictment and without waiver of indictment, OCGA § 17-7-70.1 is undoubtedly constitutional.[27]

Conclusion

At present the scope of the common law right to grand jury indictment in Georgia is as follows. First, there is an absolute, nonwaivable right to indictment in capital cases.[28] Second, there is a waivable right to indictment with respect to noncapital felonies.[29] Third, there is no longer any right to indictment with respect to either misdemeanors[30] or the noncapital felonies enumerated in OCGA § 17-7-70.1, as amended in 1998.[31]

Since the early years of the 20th century, therefore, there has been a marked decline of the right to grand jury indictment in Georgia, except in capital felony cases. In noncapital felony cases the right to indictment has been transformed from a nonwaivable right into a waivable one, and there are now a number of noncapital felonies for which there is no longer any right to indictment whatever. The right to indictment for misdemeanors, once a nonwaivable right (at least in the superior courts), was transformed into a waivable right and then partially and later entirely abolished (except that under a 1997 statute police officers charged with a misdemeanor in either a superior or a state court have a right to grand jury indictment if the crime is alleged to have occurred while in the performance of the officers's official duties).

Despite this waning of the common law right to grand jury indictment in Georgia, there are still situations where a violation of the right to indictment will invalidate a conviction. Thus, a Georgia conviction is void for lack of subject matter jurisdiction if (1) the defendant was prosecuted for a capital felony on the basis of an accusation, regardless of whether he waived indictment,[32] or (2) the defendant was prosecuted on the basis of an accusation for a noncapital felony not one of the felonies enumerated in

OCGA § 17-7-70.1, and there was no valid waiver of indictment.[33] Although there are not yet any reported cases on point, it also appears that, in the absence of a valid waiver of indictment, a conviction arising out of a prosecution based of an accusation charging one of the felonies enumerated in § 17-7-70.1 would be invalid if the district attorney had violated the procedural requirements of § 17-7-70.1, as in a case where the defendant had not been bound over at a commitment hearing and had not waived the commitment hearing, or where the grand jury had heard evidence or conducted an investigation or returned a no true bill.

Footnotes

[1.] Gordon v. State, 102 Ga. 673, 29 S. E. 444 (1897); Crowder v. State, 218 Ga. App. 630, 462 S. E. 2d 754 (1995).

[2.] Gordon v. State, 102 Ga. 673, 29 S. E. 444 (1897).

[3.] Wright v. Davis, 120 Ga. 670, 48 S. E. 170 (1904); Gordon v. State, 102 Ga. 673, 29 S. E. 444 (1897); Brown v. State, 82 Ga. App. 673, 62 S. E. 2d 732 (1950).

[4.] Alexander v. Louisiana, 405 U. S. 625 (1972); Hurtado v. California, 110 U. S. 516 (1884); Lamberson v. State, 265 Ga. 764, 462 S. E. 2d 706 (1995); Gordon v. State, 102 Ga. 673, 29 S. E. 444 (1897).

[5.] Gordon v. State, 102 Ga. 673, 29 S. E. 444 (1897) (examining Georgia's constitutions of 1777, 1789, 1798, 1861, 1865, 1868, and 1877); Hopkins v. State, 5 Ga. App. 699, 63 S. E. 718 (1909) (there is no constitutional provision in this state giving the defendant the right to demand indictment by a grand jury). The constitutions of 1945, 1976, and 1982 also contain no guarantee of the right to grand jury indictment.

[6.] Roberson v. Balkcom, 212 Ga. 603, 94 S. E. 2d 720 (1956); Webb v. Henlery, 209 Ga. 447, 74 S. E. 2d 7 (1953), overruled on other grounds, Garmon v. Johnson, 243 Ga. 855, 257 S. E. 2d 276 (1979); Gordon v. State, 102 Ga. 673, 29 S. E. 444 (1897).

[7.] Id.

[8.] Id.

[9.] Gordon v. State, 102 Ga. 673, 29 S. E. 444 (1897), held that it was permissible to try an accused for a misdemeanor on the basis of an accusation instead of an indictment, but only where use of the accusation was authorized by legislation. The General Assembly did not enact a statute authorizing prosecutions for misdemeanors in the superior courts on the basis of accusations until 1915, see 1915 Ga. Laws 32, and even then the defendant had to waive indictment. Not until 1972, see 1972 Ga. Laws 624, did statutory law abolish the right to grand jury indictment in misdemeanor cases prosecuted in a superior court. See Garmon v. Johnson, 243 Ga. 855, 257 S. E. 2d 276 (1979) (prior to 1972, due to a quirk in Georgia law, all criminal cases tried in a superior court, including misdemeanors, had to be tried upon indictment unless waived); Hopkins v. State, 5 Ga. App. 699, 63 S. E. 718 (1909) (in the superior courts

there is uniform statutory provision for indictment in all cases).

[10] Waiver of indictment in misdemeanor cases in the superior courts was not authorized until 1915; see 1915 Ga. Laws 32.

Waiver of indictment in noncapital felony cases was not authorized until 1935; see 1935 Ga. Laws 116. See Roberson v. Balkcom, 212 Ga. 603, 94 S. E. 2d 720 (1956); Webb v. Henlery, 209 Ga. 447, 74 S. E. 2d 7 (1953), overruled on other grounds, Garmon v. Johnson, 243 Ga. 855, 257 S. E. 2d 276 (1979).

[11] Gordon v. State, 102 Ga. 673, 29 S. E. 444 (1897); Darden v. State, 74 Ga. 842 (1885). Compare Scroggins v. State, 55 Ga. 380 (1875) (prosecution for misdemeanor on accusation in Sumter county justice of peace court where statute permitted a defendant prosecuted in that court to waive indictment and be tried on accusation).

[12] 1915 Ga. Laws 32.

[13] 1935 Ga. Laws 116.

[14] Webb v. Henlery, 209 Ga. 447, 449, 74 S. E. 2d 7, 8 (1953), overruled on other grounds, Garmon v. Johnson, 243 Ga. 855, 257 S. E. 2d 276 (1979). Accord: Roberson v. Balkcom, 212 Ga. 603, 94 S. E. 2d 720 (1956).

[15] 1972 Ga. Laws 623.

[16] 1972 Ga. Laws 624.

[17] 1983 Ga. Laws 1419.

[18] 1992 Ga. Laws 1808. This statute applied to arrests made on or after July 1, 1992. See Crowder v. State, 218 Ga. App. 630, 462 S. E. 2d 754 (1995).

[19] 1996 Ga. Laws 678.

[20] OCGA § 17-7-70(a.1). Under the 1996 amendment, accusations may form the basis of a prosecution for a violation of § 16-13-30 not only where a defendant has expressly waived a commitment hearing or has been bound over at a commitment hearing, but also where the defendant has waived the commitment hearing by operation of law. In Georgia, a defendant waives commitment hearing by operation of law when after arrest he is released on appearance bond within the time prescribed by law. See, e.g., Watts v. Pitts, 253 Ga. 501, 322 S. E. 2d 252 (1984); Lynn v. State, 236 Ga. App. 600, 512 S. E. 2d 695 (1999); State v. Gilstrap, 230 Ga. App. 281, 495 S. E. 2d 885 (1998); State v. Ruff, 176 Ga. App. 303, 335 S. E. 2d 687 (1985).

[21] 1998 Ga. Laws 208.

[22] OCGA § 17-7-70.1(a)(A); OCGA § 17-7-70(a.1).

[23] OCGA § 17-7-70.1(a)(B).

[24] OCGA § 17-7-70.1(a)(C).

[25] OCGA § 17-7-70.1(a)(D).

[26] OCGA § 17-7-70.1(a)(E).

[27] Lamberson v. State, 265 Ga. 764, 462 S. E. 2d 706 (1995); Lynn v. State, 236 Ga. App. 600, 512 S. E. 2d 695 (1999); State v. Gilstrap, 230 Ga. App. 281, 495 S. E. 2d 885 (1998); Hood v. State, 223 Ga. App. 573, 479 S. E. 2d 400 (1996); Crowder v.

State, 218 Ga. App. 630, 462 S. E. 2d 754 (1995).

[28.] OCGA § 17-7-70 (waiver of indictment authorized in all felony cases other than capital felonies). See, e.g., Weatherbed v. State, 271 Ga. 736, 524 S. E. 2d 452 (1999) (without indictment, the superior court had no jurisdiction to accept defendant's guilty plea to charge of murder contained in accusation); Jones v. Hopper, 233 Ga. 531, 212 S. E. 2d 367 (1975); Keener v. MacDougall, 232 Ga. 273, 206 S. E. 2d 519 (1974); Webb v. Henlery, 209 Ga. 447, 74 S. E. 2d 7 (1953), overruled on other grounds, Garmon v. Johnson, 243 Ga. 855, 257 S. E. 2d 276 (1979).

[29.] OCGA § 17-7-70 (waiver of indictment authorized in all felony cases other than capital felonies). See, e.g., Smith v. Wilson, 268 Ga. 38, 485 S. E. 2d 197 (1997) (defendant may waive indictment to noncapital felony charge); Walker v. Hopper, 234 Ga. 123, 214 S. E. 2d 553 (1975) (waiver of indictment to noncapital felony charge).

[30.] OCGA § 15-7-46 (the accused in criminal proceedings in a state court shall not have the right to indictment by the grand jury of the county); OCGA § 17-7-71(a) (in all misdemeanor cases in superior, state, or county courts, the defendant may be tried upon an accusation framed and signed by the prosecuting attorney). See, e.g., Sanderson v. State, 217 Ga. App. 51, 456 S. E. 2d 667 (1995) (where criminal proceedings are brought in state court, the accused is not entitled to be indicted by a grand jury).

There is, however, one situation where there is a right to grand jury indictment in a misdemeanor case. Under a 1997 statute, 1997 Ga. Laws 879, codified at OCGA § 17-7-52(b), any peace officer is afforded a statutory "right to be prosecuted only upon a grand jury indictment" if the officer is "charged with committing a crime alleged to have occurred while in the performance of the peace officer's duties." Dudley v. State, 273 Ga. 466, 466, 542 S. E. 2d 99, 100 (2001). The 1997 statute applies "to all prosecutions, whether for misdemeanors or felonies," and to prosecutions "either in state or superior court ...." OCGA § 17-7-52(b).

[31.] OCGA § 17-7-70.1(a), (a.1). See, e.g., Lamberson v. State, 265 Ga. 764, 462 S. E. 2d 706 (1995); Brackins v. State, 249 Ga. App. 788, 549 S. E. 2d 775 (2001); Lynn v. State, 236 Ga. App. 600, 512 S. E. 2d 695 (1999); Hood v. State, 223 Ga. App. 573, 479 S. E. 2d 400 (1996); Crowder v. State, 218 Ga. App. 630, 462 S. E. 2d 754 (1995).

[32.] See, e.g., Weatherbed v. State, 271 Ga. 736, 524 S. E. 2d 452 (1999); Webb v. Henlery, 209 Ga. 447, 74 S. E. 2d 7 (1953), overruled on other grounds, Garmon v. Johnson, 243 Ga. 855, 257 S. E. 2d 276 (1979).

See also Wilkes, Postconviction Habeas Corpus Relief in Georgia: A Decade After the Habeas Corpus Act, 12 Ga. L. Rev. 249, 257-58 (1978) (habeas corpus attacks on Georgia criminal convictions based on claims that there was no valid waiver of right of indictment); Wilkes, A New Role for an Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part II), 9 Ga. L. Rev. 13, 62 (1974) (same); Wilkes, A New Role for An Ancient Writ: Postconviction Habeas Corpus Relief in Georgia (Part

I), 8 Ga. L. Rev. 313, 342-43 (1974) (same).

[33.] See, e.g., Balkcom v. McDaniel, 234 Ga. 470, 216 S. E. 2d 328 (1975); Roberson v. Balkcom, 212 Ga. 603, 94 S. E. 2d 720 (1956); Brackins v. State, 249 Ga. App. 788, 549 S. E. 2d 775 (2001); Chadwick v. State, 236 Ga. App. 199, 511 S. E. 2d 286 (1999); Groom v. State, 212 Ga. App. 133, 441 S. E. 2d 259 (1994).