**Judicial Comment Podcast**

**6/3/2020**

**Introduction/Welcome (Wade/Tain)**

* Welcome to another episode of the Good Judge-ment Podcast. I am Wade Padgett.
* *And I am Tain Kell. We want to take a moment and thank all of our listeners for the amazing support we have received for this podcast. Every day it seems we get a kind word of encouragement from listeners. We appreciate the support more than you know.*
* The only thing more we could ask of our listeners is some suggested topics. We have tried to let everyone know of our e-mail address, **goodjudgepod@gmail.com** in every way we know how. We tried serious versions *[play a reading of the e-mail address in regular voice]*, we tried repeating it over and over again *[play recording from that episode where we said it again and again]*, we have tried funny *[Tain – let’s record a very of you with your “wide range” of voices]* and we just cannot seem to get our listeners to share all of their great ideas with us for topics they would like to hear discussed on the podcast.
* *[Tain – be funny but ask for some ideas from listeners – we are Superior Court judges and we know some of our listeners are from other classes of court or not even within the court system (like Wade’s Mom) so….]*
* So Tain, tell the folks what we are talking about today.
* *Judicial comments. Comments from the trial judge that have the potential to cause a reversal on appeal or a mistrial.*
* O.C.G.A. §17-8-57 is the primary code section which is addressed to judicial comments

**§ 17-8-57. Expression of opinion on facts, guilt; remedies**

(a)(1) It is error for any judge, during any phase of any criminal case, to express or intimate to the jury the judge's opinion as to whether a fact at issue has or has not been proved or as to the guilt of the accused.

(2) Any party who alleges a violation of paragraph (1) of this subsection shall make a timely objection and inform the court of the specific objection and the grounds for such objection, outside of the jury's hearing and presence. After such objection has been made, and if it is sustained, it shall be the duty of the court to give a curative instruction to the jury or declare a mistrial, if appropriate.

(b) Except as provided in subsection (c) of this Code section, failure to make a timely objection to an alleged violation of paragraph (1) of subsection (a) of this Code section shall preclude appellate review, unless such violation constitutes plain error which affects substantive rights of the parties. Plain error may be considered on appeal even when a timely objection informing the court of the specific objection was not made, so long as such error affects substantive rights of the parties.

(c) Should any judge express an opinion as to the guilt of the accused, the Supreme Court or Court of Appeals or the trial court in a motion for a new trial shall grant a new trial.

* We need to break this down a bit. There are two kinds of comments that the judge might make that are at issue:
  + Comments on what has been proved (*Tain, you are the grammar police - is it proven or proved? Statute says proved)*
  + Comments on the guilt of the accused
* This code section only relates to comments made in presence of jury
* 2015, the legislature changed the statute to add (a)(2) and (b). So if the judge makes a comment on what has been proved, there must be a timely objection made and either a curative instruction made or a mistrial declared
  + UNLESS, it qualifies as “plain error” and affects the substantive rights of the parties
* But any comment on the guilt of the accused (the second class of comments a judge might make) requires a new trial and apparently cannot be cured by a curative instruction.
* In *Anthony v. State*, 303 Ga. 399, n. 12 (2018), Supreme Court of Georgia noted that under the prior version of §17-8-57, if no objection was made to either type of comment by the trial judge, that the appellate courts could review such a comment, even when no timely objection was made during trial. But the Supreme Court noted that the new version of §17-8-57 changed that. “Today, in the absence of a timely objection, a judicial comment—other than a comment on the guilt of the accused,…amounts to reversible error under the statute only to the extent that it is ‘[a] plain error which affects substantive rights.’” (citing *Pyatt v. State*, 298 Ga. 742, 747 (2016).
* It makes sense that the judge should not make any comments that signal to the jury what has/has not been proved in a case
* Also makes complete sense that the judge should not comment on the guilt of the defendant during a trial
* Admittedly, there are some egregious examples of judges making improper comments during a trial.
  + *Paul v. State*, 272 Ga. 845, 848-849 (2011) (judge asked questions that tended to challenge witnesses or discredit experts).
  + The trial court does have some authority to ask questions “aimed at fully developing the truth of the case” *Eubanks v. State*, 240 Ga. 544, 547 (1978) (cited in *Paul*) but the judge can clearly and easily go too far.
  + “Extreme anxiety to develop the truth as to facts which, if proved, will be peculiarly beneficial to one of the parties in the case and correspondingly detrimental to the other can easily be mistaken by the jury for a manifestation of the judge's conviction that one party rather than the other should prevail. [Cits.]” *Paul*, at 848.
* But sometimes judges get a bit lazy in the words they use during a trial and innocently make a comment that can be construed as a comment on the evidence or on the guilt of the accused.
* Let’s look at some examples from more recent appellate decisions:
  + *Anthony v. State*, 303 Ga. 399, 406-407 (2018):
    - During opening statement, prosecutor told jury they would not have police reports out with them during their deliberations and would only be used to refresh memories of witnesses, if at all. Defense objects that the State was “explaining the law.” In ruling on the objection, the judge said, “he’s talking about what’s evidence and what’s not evidence.” On appeal, defendant claimed that the judge’s ruling was a comment on the evidence by the trial judge. The Supreme Court quickly rejected this as a comment on the evidence or on the guilt of the accused. *[This one seems kind of obvious]*
  + *Jones v. State*, 304 Ga. 594, 601-602 (2018)
    - After the attending physician testified in a child abuse case, the judge said, “Let’s take a quick break. I think that was weighty testimony, we deserve a stretch break; do we not? Let’s do that.” – this comment was examined extensively on appeal but was found not to be error. *[This one also seems obvious]*
  + *Brown v. State*, 302 Ga. 454, 463 (2017)
    - In describing the redaction of a video confession, the judge told the jury that the statement had been reduced to only the “relevant portions” – not error because the comment was not an expression of opinion of guilt or on a disputed issue of fact.
  + *Smith v. State*, 297 Ga. 268, 270 (2015)
    - Eyewitness became noticeably upset during her testimony. Judge sent jury out and asked the witness questions about her demeanor which revealed she did not feel well and had an ongoing medical condition. The judge asked if the witness needed a break and she indicated that she did not, that she just wanted to get this over and go home.
    - When the jury came back into the courtroom, the judge told them the following:
      * [The witness] doesn't feel well this morning. She's having some personal medical issues. And she's not upset with any of the lawyers, but she doesn't feel well. But we're going to try to finish asking her questions. *But I just wanted y'all to know that the stress is not really related to this case*. So we're going to try to get her out of here as soon as we can.
    - The Supreme Court found that this comment by the judge was not an improper judicial comment but Chief Justice Melton dissented. He noted that the judge’s comment might have impacted the jury’s consideration of the demeanor of the witness which is an important part of making a credibility determination.
  + *Pyatt v. State*, 298 Ga. 742, 747-748 (2016)
    - During trial, prosecutor called detective to the stand and had him read aloud a statement made by a witness who had previously testified. Defense objected (made a “continuing witness” objection???) which the court overruled but then asked the prosecutor why it was necessary to have the officer read the prior statement of the witness again. The prosecutor indicated that this was “the critical statement, critical evidence.” In response, the trial judge said, “*It is*. But it’s admitted on some basis [already]….”
      * This case raises an important issue in regard to judicial comments.  “OCGA § 17–8–57 ‘does not generally extend to colloquies between the judge and counsel regarding the admissibility of evidence. Furthermore, we have previously determined that remarks of a judge assigning a reason for his ruling are neither an expression of opinion nor a comment on the evidence.’” citing *Ellis v. State*, 292 Ga. 276, 282 (2013) and *Ridley v. State*, 290 Ga. 798, 800 (2012); See also *Redd v. State*, 240 Ga. 753 (1978), *Linson v. State*, 287 Ga. 881(2) (2010); *Paslay v. State*, 285 Ga. 616 (2009).
      * Appellate court noted it would have been better for the trial judge to avoid the “it is [critical evidence]” comment but not a comment on the evidence.
  + *Smith v. State*, 292 Ga. 588, 589-590 (2013)
    - During direct examination of a crime scene investigator, the judge interjected “are you going to tie in how this is relevant to the issues in the case pretty soon?” The prosecutor responded that she was attempting to give the jury a good understanding of the size of the parking lot in question. The judge responded:
      * Because of my experience is that Special Agent Davis *is a very thorough investigator*, and I don’t think that everything he found that day is relevant…..”
      * Court ruled that was an explanation of the judge’s ruling.
* **[cases which were overturned]**
  + *Murphy v. State*, 290 Ga. 459, 460-461 (2012)
    - Detective on the stand, testifying about the defendant’s custodial statement. Objection was made. In response, judge said, “’You're asking this Detective, who *is a good detective*, what is in someone, somebody else's head.’” Further, the trial court stated, ‘[T]his man has worked a lot of cases and he's got a recollection and he's got a written memorandum and hopefully between the two of those and his good efforts we're going to find the truth of the matter.’”
    - Court ruled this was a violation of §17-8-57 – because it was disclosure of the judge’s opinion regarding the credibility of witnesses. (citing *Callaham v. State*, 305 Ga. App. 626(1) (2010)). ***[Note – commenting on credibility of witnesses is not covered by the statute – but appellate court noted that credibility is intertwined with determining facts of case and is, therefore, implicitly included within the prohibition of §17-8-57]***
      * There was no objection during trial but Supreme Court labeled this as “plain error.”
  + *Jones v. State*, 352 Ga. App. 380, 384 (2019)
    - Defendant is pro se (always seems to be a tricky issue for judges). In a rape case, defendant repeatedly asks the same questions over and over again. Prosecutor objects. In response, defendant says he is “just trying to get to the truth.” The judge responded, “Sir, *all of this is truth*. Move on to your next question.”
    - Court of Appeals reversed rape conviction based upon that comment of the trial judge. Judge was clearly trying to communicate, “all of this testimony is under oath” but instead said, “all of this is truth.”
* Two exceptions (provided judge does not lose his/her mind and go too far)
  + Ruling on objections
    - *Pyatt*, above; *Willis v. State*, 304 Ga. 686 (2018).
  + Comments made in attempt to regulate proceedings
    - *Ledford v. State*, 289 Ga. 70, 84-85 (2011), disapproved on other grounds by *Willis v. State*, 304 Ga. 686 (2018).
      * In *Ledford*, the judge approved of a jury view of the location where the victim’s body was discovered. It was a wooded area. “In preparing the jury for its visit to the crime scene, the trial judge stated, ‘I'll ask the Sheriff to go because in the woods there are all kinds of critters, snakes and dogs and cats and whatever that might be out there.’” That comment was made as part of “a proper exercise of the trial court's duty to manage the trial proceedings and to ensure the well-being of the jury.” *Ledford*, at 85.
* If you make a misstatement, if it was part of ruling on objection, make curative instruction and deny motion for mistrial;
  + Same if it was simply an attempt to regulate the proceedings
* But if it could be seen as a comment on the defendant’s guilt, you will have to grant the mistrial request with apologies to all involved
* Remember that an alleged comment on the evidence requires a timely objection unless your comment could be construed as affecting the “substantive rights of the parties”
* But a comment on the defendant’s guilt does not require a timely objection.

**WRAP UP**

If it is your habit to question witnesses, stop it!

You can rule on objections but keep it within the bounds of actually ruling on objections.

Do not be lazy with your words.

Do not get frustrated or exasperated, particularly with pro se defendants. Just rule without any sarcasm or biting retorts.