

# SUPREME COURT OF GEORGIA

## Mohamed v. State, 276 Ga. 706

583 S.E.2d 9 (2003) · No. S03A0083 · Decided June 30, 2003

### SUMMARY

The Supreme Court of Georgia held that OCGA § 16-9-31(d), which made possession of two financial transaction cards prima facie evidence of theft, created an unconstitutional mandatory presumption that impermissibly shifted the burden of proof. The court severed subsection (d), reversed Mohamed's convictions, and held that he could be retried because the remaining evidence was legally sufficient. The court also upheld the Terry pat-down and related seizure of the cards, rejected the cross-examination claim, and disapproved the trial court's unanimity instruction.

### CASE DETAILS

|                       |                                                                                                                                                                                                                                                                                                 |
|-----------------------|-------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------------|
| COURT                 | Supreme Court of Georgia                                                                                                                                                                                                                                                                        |
| WRITING FOR THE COURT | Hines, Justice                                                                                                                                                                                                                                                                                  |
| JURISDICTION          | Georgia                                                                                                                                                                                                                                                                                         |
| DECIDED               | June 30, 2003                                                                                                                                                                                                                                                                                   |
| DOCKET                | S03A0083                                                                                                                                                                                                                                                                                        |
| DISPOSITION           | reversed                                                                                                                                                                                                                                                                                        |
| PROCEDURAL POSTURE    | Mohamed appealed his conviction for financial transaction card theft, challenging the constitutionality of OCGA § 16-9-31(d), the admission of financial transaction cards seized during a pat-down search, limitations on cross-examination, jury instructions, and the unanimity instruction. |
| PRECEDENTIAL VALUE    | published precedential opinion                                                                                                                                                                                                                                                                  |
| PARTIES               | Abdirisak D. Mohamed v. The State                                                                                                                                                                                                                                                               |

### TOPICS

criminal procedure constitutional law statutory interpretation fourth amendment suppression of evidence

### PRACTICE AREAS

Criminal law Constitutional law Criminal procedure Evidence

## QUESTIONS PRESENTED

1. Whether OCGA § 16-9-31(d), which made possession of two or more specified financial transaction cards prima-facie evidence of financial transaction card theft, impermissibly shifted the burden of proof to the defendant.
2. Whether instructing the jury under OCGA § 16-9-31(d) was harmless error.
3. Whether the officer's pat-down and removal of the credit cards violated the Fourth Amendment.
4. Whether the trial court improperly limited cross-examination of the officer concerning the legality of the search.
5. Whether the trial court erred by refusing requested instructions concerning the State's burden to prove deliberate withholding of the cards.
6. Whether the trial court erred by instructing the jury on the consequences of a failure to reach unanimity.

## HOLDINGS

1. OCGA § 16-9-31(d) created an unconstitutional mandatory presumption of guilt because it allowed possession of two qualifying financial transaction cards to establish the offense even though the offense contained additional elements.
2. The unconstitutional instruction was not harmless because Mohamed disputed knowing withholding of the cards and the evidence of guilt was not overwhelming.
3. OCGA § 16-9-31(d) was severable from the remainder of the financial transaction card theft statute, which remained effective.
4. The evidence, even without the invalid presumption, was sufficient for a rational trier of fact to find Mohamed guilty, so he could be retried.
5. The officer's exterior pat-down was constitutionally permissible, and removal of the cards from Mohamed's pocket was lawful under the circumstances.
6. The trial court properly curtailed questions asking the officer to determine whether the search satisfied legal requirements because that legal determination was for the court, not the jury.
7. The trial court did not commit harmful error by failing to give Mohamed's requested instructions in the exact language requested because the principle was adequately covered by the charge as a whole.
8. The trial court should not have instructed the jury on the consequences of failing to reach unanimity because that instruction had been disapproved.

## KEY QUOTATIONS

*“Mandatory presumptions that shift the burden of proof to the defendant are impermissible in criminal cases.” (\*12)*

*“Severing OCGA § 16-9-31(d) from the remainder of the Code section does not affect the purpose of the statute and the remainder of OCGA § 16-9-31 is to be given full effect.” (\*13)*

## FACTUAL BACKGROUND

A vehicle belonging to Treisha Johnson was stolen while she made a bank deposit, and two of her gasoline-company credit cards were taken from her purse inside the vehicle. Police later encountered Mohamed at a restaurant after he had been seen in or near the stolen vehicle; during a protective pat-down, an officer removed a screwdriver, a pocketknife, and the credit cards from Mohamed's pockets. Mohamed claimed that the cards belonged to a friend and later told police that he had found them near Johnson's car, while Johnson testified that she had not consented to his possession or use of the cards.

## PROCEDURAL HISTORY

A trial court convicted Mohamed on two counts of financial transaction card theft. The trial court denied suppression of the cards and rejected Mohamed's challenges to the jury instructions and cross-examination limitations. The Supreme Court of Georgia reversed the conviction because the jury was instructed under the unconstitutional burden-shifting presumption in OCGA § 16-9-31(d), while holding that the evidence was sufficient to permit retrial.

## DISPOSITION

reversed

## REMAND INSTRUCTIONS

The conviction was reversed, and Mohamed could be retried under the remaining valid provisions of OCGA § 16-9-31.

## CASES CITED

- Sandstrom v. Montana, 442 U.S. 510, 99 S.Ct. 2450, 61 L.Ed.2d 39 (1979)
- Isaacs v. State, 259 Ga. 717, 734-735(35)(b), 386 S.E.2d 316 (1989)
- Williams v. Kemp, 255 Ga. 380, 383, 338 S.E.2d 669 (1986)
- Bridges v. State, 268 Ga. 700, 706(2)(f), 492 S.E.2d 877 (1997)
- Wilson v. State, 212 Ga. App. 325, 326(2), 441 S.E.2d 808 (1994)
- Nixon v. State, 256 Ga. 261, 264(3), 347 S.E.2d 592 (1986)
- Jackson v. Virginia, 443 U.S. 307, 99 S.Ct. 2781, 61 L.Ed.2d 560 (1979)
- Dinning v. State, 267 Ga. 879, 485 S.E.2d 464 (1997)
- Terry v. Ohio, 392 U.S. 1, 88 S.Ct. 1868, 20 L.Ed.2d 889 (1968)
- Edwards v. State, 264 Ga. 615, 616(2), 449 S.E.2d 516 (1994)
- McGugan v. State, 215 Ga. App. 535, 537, 451 S.E.2d 460 (1994)
- Pickens v. State, 225 Ga. App. 792, 797(2), 484 S.E.2d 731 (1997)
- Thomas v. State, 176 Ga. App. 771, 774(3)(a)-(b), 337 S.E.2d 344 (1985)
- Parker v. State, 270 Ga. 256, 258(3), 507 S.E.2d 744 (1998)
- Harris v. State, 263 Ga. 526, 528(6), 435 S.E.2d 669 (1993)

