

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 14, 2011

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THIS WEEK:

- **Voir Dire**
- **Sentencing; Merger**
- **Jury Charges**
- **Evidence Tampering; Merger**
- **Immunity; OCGA § 16-3-21**
- **Right to Bond; OCGA § 17-7-50**
- **Right to Testify; Jurors**
- **Expert Testimony; Prior Inconsistent Statements**
- **Prior Consistent Statements; Special Conditions of Probation**
- **Speedy Trial; *Barker v. Wingo***

Voir Dire

Slaughter v. State S11A1012 (10/3/11)

Appellant was convicted of felony murder while in the commission of aggravated assault and possession of a firearm during the commission of a felony. He contended that the trial court violated his constitutional rights by denying his motion to strike a jury panel, and that the denial resulted in the guilty verdicts at trial. The record showed that during voir dire, a member of the venire reported to the trial court that as he was exiting a crowded elevator, he overheard another member of the venire, whom he believed was Juror No. 13, and whom he described by gender, race, appearance, and dress, remark to a fellow venireman, whose venire badge read Juror No. 14 or contained the numeral 4, and whom he also described by race and gender, that the defendant “needs to just admit that he is guilty so we can get out of

here.” The venireman to whom the comment was made allegedly responded, “Yeah, yeah, that’s right, man, because I don’t want to be down here either.” Defense counsel requested that both veniremen, i.e., Jurors Nos. 13 and 14, be removed for cause. The trial court brought in Juror No. 14 for questioning, and that individual acknowledged that he heard the statement but did not remember who said it; this man was excused for cause after stating that, based solely on the charges against appellant, he believed that appellant was guilty and doubted that he could be fair and impartial and render a verdict based upon the evidence presented. Upon being questioned by the trial court, Juror No. 13 denied making the statement, saying that he went off-site for lunch, purchased cigarettes, and returned. Juror No. 24, who also fit the description of the maker of the alleged statement, was also questioned by the trial court and denied making or overhearing the comment. There was no indication that any other member of the venire could possibly have been involved in the reported exchange. Defense counsel moved orally to dismiss the entire jury panel, and the motion was denied.

In assessing whether the trial court should excuse all members of the jury panel who might have been privy to any unauthorized comments or discussions, the appropriate inquiry is “whether the remarks were inherently prejudicial and deprived [appellant] of [his] right to begin [his] trial with a jury free from even a suspicion of prejudgment or fixed opinion.” Here, the Court found, the trial court took appropriate corrective action by questioning individually all prospective jurors who fit the description of those involved in the alleged unauthorized comments to ascertain whether they had been prejudiced thereby, and there was no indication of any such prejudice.

Furthermore, the seated jurors were instructed not to discuss the case in any way, and they affirmed that they would honor their oaths and render fair and impartial verdicts based upon the evidence presented at trial. Even accepting as fact that the alleged exchange occurred, because of the corrective actions by the trial court and the responses of the veniremen at issue, there was no inherent prejudice to the array but, at most, only the barest possibility of prejudice. Therefore, appellant's arguments were without merit.

Sentencing; Merger

Soilberry v. State, S11A0847 (10/3/11)

Appellant was convicted of malice murder, felony murder, aggravated assault, and aggravated battery of a three-year-old. He contended that the trial court erred by failing to merge one of his convictions for aggravated battery with his conviction for malice murder. The record showed that appellant was indicted for committing malice murder by "inflicting blunt force trauma to [the child's] torso." He was also indicted for aggravated battery by "seriously disfiguring a member of [the child's] body, to wit; [appellant] caused multiple fractures to the ribcage of [the child.]" The evidence showed that both crimes were the result of appellant's beating of the child. The Court held that its recent decision in *Ledford v. State*, 289 Ga. 70 (2011) was controlling. In *Ledford*, the Court explained that the only difference between aggravated battery and murder is that the former requires a less serious injury to the person of the victim, as the injury to a bodily member specified in the aggravated battery statute is obviously less serious than death. Therefore, the Court stated, premitting whether these two offenses met the "required evidence" test, convictions for both offenses established by the same conduct are prohibited by OCGA § 16-1-6 (2). Therefore, the trial court erred by failing to merge appellant's conviction for aggravated battery based on the fracture of the child's ribs into his conviction for murder. As a result, appellant's sentence was vacated, and the case remanded to the trial court for resentencing.

Jury Charges

Elvie v. State, S11A0918 (10/3/11)

Appellant was convicted of malice and felony murder and two counts of possession

of a knife during the commission of a felony. He contended that the trial court violated *Edge v. State*, 261 Ga. 865 (1992) by failing to make clear in its jury instructions that the jurors were to consider voluntary manslaughter before considering whether appellant was guilty of felony murder. However, the Court found, before giving a full instruction on voluntary manslaughter and the requisite elements of passion and provocation, the trial court charged the jury as follows: "After considering all the evidence, before you would be authorized to return a verdict of guilty of malice murder or felony murder, you must first determine whether mitigating evidence, if any, would cause the offense to be reduced to voluntary manslaughter." The Court found that this instruction is nearly identical to the pattern charge and has frequently been relied upon in determining that the jury was not given improper sequential instructions in violation of *Edge*. Furthermore, in analyzing the trial court's charge in this case as a whole, the charge was not impermissibly sequential. The charge regarding voluntary manslaughter was complete, and made no indication that it could be considered only after malice and felony murder had been eliminated as possible verdicts. Similarly, nothing about the portion of the charge regarding the verdict form precluded the jury's consideration of provocation or passion unless and until it found Appellant not guilty of felony and malice murder. The charge was not, therefore, subject to the criticism to which the charge in *Edge* was subject.

Appellant also contended, under *Russell v. State*, 265 Ga. 203, 205 (3) (1995), that the trial court erred in failing to admonish the jurors that if they found that the killing occurred as a result of provocation and passion, then they could not find appellant guilty of felony murder. However, the Court found, *Russell* had been modified to the extent that it required the trial court to state directly that a finding of voluntary manslaughter precludes a conviction for felony murder. As a whole, the instruction in this case did not prevent the jury from fully considering voluntary manslaughter, and was adequate to inform the jury that before they could convict of malice or felony murder, they must first consider whether there was sufficient evidence of passion or provocation to support a conviction for voluntary manslaughter.

Evidence Tampering; Merger

DeLeon v. State, S11A0939 (10/3/11)

Appellant was convicted of felony murder, aggravated battery, reckless conduct (lesser included of aggravated assault), tampering with evidence, and firearms offenses. Appellant argued that the evidence was insufficient to convict him of felony tampering with evidence. The Court found that the evidence was sufficient to convict appellant of tampering with evidence, but that the trial court erred when it sentenced appellant for felony tampering with evidence. Inasmuch as the evidence showed appellant threw the murder weapon away thereby tampering with evidence in his own case and not that of another, he could not be convicted of a felony, but only convicted of a misdemeanor. The sentence for felony tampering with evidence was therefore vacated and the case is remanded for re-sentencing.

Appellant also argued that two of his convictions, reckless conduct and aggravated battery, should have merged and, therefore, are void sentences. Under the required evidence test established in *Drinkard v. Walker*, 281 Ga. 211 (2006), for determining whether convictions merge, the applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Here, the indictment provided in regard to the offense of aggravated assault, which was reduced to reckless conduct, that appellant "did unlawfully make an assault upon the person of Almanida Murilla, with a firearm, a deadly weapon, by shooting Almanida Murilla with said firearm. . . ." The indictment for aggravated battery provided that appellant "did maliciously cause a person, Almanida Murilla, bodily harm by seriously disfiguring her body, by shooting Almanida Murilla causing scarring. . . ." Based on the indictments, both offenses required the State to show appellant shot Murilla. However, the aggravated battery charge also required showings of malice and disfigurement while the reckless conduct charge did not. The reckless conduct charge did not require any more proof beyond showing the appellant shot the victim causing her bodily harm. Therefore, for sentencing, the reckless conduct charge should have merged into the aggravated bat-

tery charge as a matter of fact. Accordingly, the judgment of conviction and the sentence for reckless conduct was vacated and the case remanded to the trial court.

Immunity; OCGA § 16-3-21 *State v. Green, S11A1037 (10/3/11)*

The victim, Waldon, was killed by Green when appellant stabbed him with a knife during a physical struggle between the two men. Green was indicted for malice murder, felony murder (with aggravated assault as the underlying offense), aggravated assault, and possession of a knife during the commission of a felony. Green filed a motion to dismiss the indictment, arguing that he was immune from criminal prosecution pursuant to OCGA § 16-3-24.2. The trial court granted Green's motion, finding that: (1) Waldon had assaulted appellant by head-butting him in the mouth; (2) at the time of the confrontation, Green was in fear of death, or in fear of having a forcible felony committed against him by Waldon; and (3) Waldon had placed Green in reasonable fear for his life, which indicated that Green had acted in his own self-defense pursuant to OCGA § 16-3-21. The State appealed.

The State argued that the trial court erred in concluding that Green was immune from prosecution because the use of force is a necessary prerequisite under OCGA § 16-3-21 to a finding of justification and there was no evidence that Green used force against Waldon. The Court disagreed. OCGA § 16-3-21 does not require that a person use actual force to support a claim for justification. Pursuant to OCGA § 16-3-21 (a), "[a] person is justified in threatening or using force against another when and to the extent that [he] reasonably believes that such threat or force is necessary to defend [himself] against such other's imminent use of unlawful force." Thus, a mere threat of force is all that is required when one reasonably believes that he must defend himself against another's imminent use of unlawful force. In this regard, a person is justified in going beyond merely threatening to use force and actually "using force which is intended or likely to cause death or great bodily harm . . . if he . . . reasonably believes that such force is necessary to prevent death or great bodily injury to himself." OCGA § 16-3-21 (a).

Viewed in the light most favorable to the

trial court's ruling, the Court determined that the record revealed that Waldon was totally irrational, that Green did not know what Waldon was going to do, and that Green held onto the knife for "protection" and to "scare" Waldon. Waldon knew that Green had the knife, and Waldon nevertheless violently attacked him. By holding onto the knife for his own protection and to scare Waldon, Green was, at the very least, showing a threat of force to Waldon in direct response to an imminent violent attack from Waldon. Moreover, the evidence supported the conclusion that Green reasonably believed that he needed to defend himself from a violent attack from Waldon that could have caused him great bodily injury. Thus, Green would have been justified in using deadly force against Waldon to protect himself, although he was not required to do so in order to be immune from prosecution. Accordingly, the evidence was sufficient for the trial court to determine that Green met his burden of proving that he was entitled to immunity from prosecution pursuant to OCGA § 16-3-24.2. And, because the trial court was authorized to find that Green acted in self-defense pursuant to OCGA § 16-3-21 such that he was entitled to immunity from prosecution, the State's argument that Green somehow was not entitled to immunity because he was engaged in the crime of aggravated assault during the confrontation with Waldon was without merit. Green obviously was not engaged in a crime at the time of Waldon's death because his actions supported the trial court's finding of justification.

Right to Bond; OCGA § 17-7-50

Tatis v. State, S11A1540 (10/3/11)

The Court granted an interlocutory appeal to appellant in order to construe O.C.G.A. § 17-7-50 to determine what constitutes "confinement" that triggers the 90-day period within which the case of an unindicted and confined arrestee must be considered by the grand jury. The evidence here showed that appellant was arrested on warrants for murder and armed robbery on Nov. 23, 2010. Because he injured himself in an attempt to avoid arrest, appellant was handcuffed to a stretcher and transported immediately following his arrest to a hospital, where he received treatment for two broken ankles. After two days

of hospitalization, appellant was taken from the hospital to the county jail where he was booked into the jail on November 25. The grand jury returned a true bill of indictment against appellant on February 22, 2011, 92 days after he was arrested and taken to the hospital and 90 days after he was booked into the county jail. On February 23, appellant filed a motion for a reasonable bond to be set pursuant to § 17-7-50, which the trial court denied. Appellant argued that his confinement began when he was at the hospital where the sheriff's office had a facility for inmates and where, it was undisputed, arrestees in need of medical treatment are handcuffed to hospital beds and guarded by sheriff's deputies.

OCGA § 17-7-50 provides that "[a]ny person who is arrested for a crime and who is refused bail shall, within 90 days after the date of confinement, be entitled to have the charge against him or her heard by a grand jury having jurisdiction over the accused person; . . . In the event no grand jury considers the charges against the accused person within the 90 day period of confinement . . . , the accused shall have bail set upon application to the court." The Court found that as far as OCGA § 17-7-50 is concerned, "confinement" is a situation in which the defendant may not leave official custody of his own volition i.e. a situation where one is under arrest and in a facility pursuant to governmental authority where he is guarded or restrained in some manner. Since it was undisputed that appellant was under arrest, was taken to the hospital pursuant to governmental authority, and was physically restrained during his two-day hospital stay as he was handcuffed to the hospital bed under the watchful eye of a deputy sheriff in an area of the hospital that contained jail cells, appellant was "in confinement" during his hospital stay, and the 90-day period in which his case was required to be presented to the grand jury commenced on November 23. Accordingly, the trial court erred when it denied appellant's motion for bail on the charges for which appellant was arrested and held for 90 days without grand jury action.

In so holding, the Court rejected the State's argument that appellant's period of confinement did not begin until he was "incarcerated," i.e., restrained in a jail, prison, or penitentiary. While one who is incarcerated is in confinement under § 17-7-50, one need not be incarcerated to be confined under § 17-7-50.

Right to Testify; Jurors

Gibson v. State, S11A1330 (10/3/11)

Appellant was convicted of murder and other related crimes. He contend the trial court erred by failing to affirmatively place on the record his decision to testify in his own behalf. The Court noted that because he failed to make this objection at trial, he waived the right to assert this alleged error on appeal. But, even assuming the issue was properly before the Court, the decision whether to testify in one's own defense is a tactical decision to be made by the defendant himself after consultation with trial counsel, and there is no general requirement that a trial court interject itself into the decision-making process. Courts thus have no duty to advise a defendant of the right to testify or to determine on the record whether the defendant's decision is voluntary, knowing, and intentional. Thus, contrary to appellant's assertion, courts are under no obligation to place a defendant's decision whether to testify on the record and it was not error for the trial court to fail to do.

Appellant also contended that the trial court erred by removing a juror after concluding the juror slept through the presentation of portions of the evidence. OCGA § 15-12-172 provides: "If at any time, whether before or after final submission of the case to the jury, a juror dies, becomes ill, upon other good cause shown to the court is found to be unable to perform his duty, or is discharged for other legal cause, the first alternate juror shall take the place of the first juror becoming incapacitated." The Court held there must be some sound basis upon which the trial judge exercises his discretion to remove the juror. However, a sound basis may be one which serves the legally relevant purpose of preserving public respect for the integrity of the judicial process. Here, early on the first day of trial the judge noted his concern that a particular juror had been sleeping during the presentation of the evidence. At the start of the next trial day, the juror was warned he would be held in contempt if he did not stay awake. After an overnight recess, the trial judge informed counsel he had again observed the juror sleeping and that he intended to determine if the juror had a medical problem. The juror ultimately admitted to the court he was taking medications, one of the side effects of which made it difficult for him to stay awake. Before closing argument

and over defense counsel's objection, the trial judge announced he was removing the juror because he felt the juror had missed much of the presentation of evidence during the first two days of trial. The Court found that the trial court conducted an investigation into the juror's inability to perform his duties and developed a factual basis for its decision to remove the juror for a legally relevant purpose. Based on this evidence, the trial court did not abuse its discretion in removing the juror.

Expert Testimony; Prior Inconsistent Statements

Cade v. State, S11A1059 (10/3/11)

Appellant was convicted of malice and felony murder, aggravated assault, and concealing the death of another. He contended that the trial court erred in allowing an expert witness to "invade the province of the jury" during his testimony. The record showed that the prosecutor questioned the medical examiner as to whether, if the evidence showed that appellant applied pressure with his hands to the victim's neck as they moved around the room with her clawing and fighting and with him pushing her down on a bed, such evidence was consistent with the medical examiner's findings in the autopsy. Defense counsel objected on the ground that the question went to the ultimate issue for the jury, and the trial court overruled that objection. The prosecutor then asked similar questions with regard to the consistency of his observations during the autopsy with other evidence.

The Court found that expert medical testimony regarding the medical circumstances of a death is admissible where, as here, those circumstances are beyond the ken of the average layman. The fact that such expert testimony may also indirectly, though necessarily, involve the other witnesses' credibility does not render it inadmissible. Although an expert witness may not testify as to his opinion of the other witnesses' truthfulness, the expert witness may express an opinion as to whether medical or other objective evidence in the case is consistent with the other witnesses' story. Here, the expert did not state his opinion as to the veracity of any witness or the appellant. He testified that the victim's injuries, or lack thereof, were either consistent or inconsistent with the physical evidence or their testimony. Thus, his testimony was not objectionable

as impermissible bolstering. Moreover, the medical examiner's testimony did not go to the ultimate issue, because appellant admitted strangling the victim and his sole defense was that he was justified in doing so. The ultimate issue, which the medical examiner did not address, was whether Appellant, who presented a justification defense, was culpable for the killing of the victim.

Appellant also contended that an audio recording of a prior inconsistent statement made by a witness was admitted over appellant's objection that the witness had not been given an opportunity to listen to it. Specifically, the trial court erred in admitting the recording, because the State failed to comply with OCGA § 24-9-83 by giving the witness an opportunity to hear the recording and then respond to cross-examination.

The record showed that the prosecutor questioned the witness in detail about the time, place, person, and circumstances attending the former statement, including the specific inconsistency at issue. The Court found that this line of questioning established an ample foundation for introduction of the prior inconsistent statement. Although OCGA § 24-9-83 provides that written contradictory statements that are in existence shall be shown or read to the witness, there is no similar language requiring audio recordings of statements to be played for the witness prior to their use for impeachment purposes. Accordingly, the trial court did not err.

Prior Consistent Statements; Special Conditions of Probation

Stephens v. State, S10G1958 (10/3/11)

The Supreme Court granted certiorari to consider two questions: 1) should a trial court give a jury instruction on prior consistent statements; and 2) did the Court of Appeals err in upholding the trial court's amendments to appellant's sentence to include special conditions of probation?

At trial, the court gave, over appellant's objection, the pattern jury instruction on prior consistent statements: "Should you find that any witness has made a statement prior to trial of this case that is consistent with that witness's testimony from the witness stand and such prior consistent statement is material to the case and the witness's testimony, then you

are authorized to consider the other statement as substantive evidence.” The Court found that unlike some other states, Georgia admits prior consistent statements as substantive evidence and not solely to rehabilitate a witness’s trial testimony. As a result, in ordinary cases the instruction adds nothing to the deliberative process and may instead lead to juror confusion. Thus, the Court stated, “We now hold that an instruction on prior consistent statements should no longer be given except where the circumstances of an unusual case suggest that the jury may have the mistaken impression that it cannot consider a prior consistent statement as substantive evidence. For example, the jury might send a note during deliberations asking whether it can consider a prior consistent statement as regular evidence, or an attorney might make an improper statement in closing argument suggesting to the jury that a prior consistent statement is not a valid type of evidence. When a charge on prior consistent statements is needed because of such circumstances, the charge should be adjusted to address the issue that requires it.” The Court found that no such circumstances were present in this case, and so the Court of Appeals correctly determined that the pattern instruction should not have been given. Nevertheless, the Court determined that “[t]he Court of Appeals also correctly held that giving the pattern instruction on prior consistent statements was harmless in this case, as it will be in most cases.”

Appellant also contended that his constitutional rights were violated when the trial court imposed special conditions of probation after the sentencing hearing. The record showed that pursuant to OCGA § 17-10-2 (a), the trial court held a presentence hearing after the verdicts were read and appellant was found guilty of incest against his step-daughter. The trial court heard from both sides and then imposed a sentence of 20 years, with the first 10 to be served in confinement, the balance on probation. The court also stated, “Obviously we are going to impose the sexual offender conditions as part of the sentence.” Four days later, the trial court filed both a “Final Disposition Jury Trial Felony Sentence” (the “Final Disposition”) and an “Addendum to Sentence Special Conditions of Probation and Parole” (the “Addendum”). The Final Disposition imposed several special conditions of probation, and the Addendum added many more. Appellant contended that the special conditions of

probation contained in the Final Disposition and the Addendum impermissibly varied from the trial court’s oral pronouncement of his sentence at the sentencing hearing, imposed additional punishment in violation of double jeopardy, and violated his due process rights.

The Court first addressed the double jeopardy argument. The Court stated that the extent to which a defendant’s formal sentence, entered by a filed written order, can clarify or vary from the oral pronouncement of sentence can be a complicated issue, particularly if the clarification or variation affects the *length* of the sentence. But the Final Disposition and Addendum did not alter the length of the sentence orally pronounced to appellant. As for modifying the conditions of probation, the trial court has specific statutory authority to modify probation conditions not just between the oral pronouncement and the filing of the written sentence but throughout the period of the sentence. But here, the trial court did not modify the length of the sentence, but imposed special condition of probation. Thus, his double jeopardy argument failed because the special conditions of probation he challenged did not, individually or in the aggregate, constitute additional punishment.

Appellant also contended that he was denied his constitutional right of due process because he lacked notice of what the special conditions of probation would be and was given no opportunity to object or discuss them with the trial court. The Court found from the record that appellant did in fact have an opportunity to address the court but failed to do so. Nevertheless, while it may violate due process for a court to revoke a defendant’s probation for violating a special condition of probation of which the defendant never had notice, it does not follow, however, that it violates due process to impose a special condition of probation unless the court first orally reads it to the defendant at a hearing.

Speedy Trial; *Barker v. Wingo*

Harrison v. State, A11A1279 (9/27/11)

Appellant appealed from the denial of his plea in bar alleging a violation of his constitutional right to a speedy trial. Utilizing the four-factor balancing test of *Barker v. Wingo*, the trial court denied the plea. The Court found that the delay of approximately 22 months

was presumptively prejudicial. The reasons for the delay were attributed to the negligence of the State (overworked prosecutor as a result of turnover in the office) and plea negotiations with appellant for which appellant must bear part of the responsibility. Thus, it was weighed against the State, but not heavily. As to the assertion of the right, the Court found that appellant waited almost two years before making his assertion and this must weigh heavily against him.

Finally, as to the prejudice prong, the Court noted that the trial court correctly considered three interests comprising the types of prejudice that may be associated with an unreasonable delay before trial: 1) preventing oppressive pretrial incarceration; 2) minimizing anxiety and concern of the defendant; and 3) limiting the possibility that the defense will be impaired. The trial court found that although appellant had been in jail for over 22 months, this did not automatically establish prejudice in the defendant’s favor for purposes of the *Barker* analysis absent proof of sub-standard conditions or other oppressive factors beyond those that necessarily attend imprisonment. The trial court also found that appellant was not suffering any degree of anxiety or concern other than that normally associated with an accused and found this to be relatively neutral. As to the impairment of his defense, the trial court weighed this heavily against the defendant because he showed no impairment. Appellant argued that he had a difficult time staying in touch with people who could serve as character witnesses and that with the passage of time, “memories fade.” However, he did not identify any specific character witnesses, nor indicate whether or not they were available or in what way their testimony might be material to his defense. To prevail on this assertion, the Court stated that he “must show that the unavailable witnesses could supply material evidence for the defense.”

In balancing the factors, the Court stated that while it did not condone the State’s delay in this action, appellant’s own tardiness in raising his right to a speedy trial weighs heavily against him, as does his failure to show prejudice in light of such delay. This was particularly true here because there was no evidence that the delay was the result of a deliberate attempt by the State to hamper the defense. Thus, the trial court did not abuse its discretion in denying the plea in bar.