

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JANUARY 24, 2014

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## THIS WEEK:

- **Out-Of-Time Appeals**
- **Sentencing; Credit For Time Served**
- **Sentencing; Void Sentences**
- **Jury Instructions; Bruton**

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### **Out-Of-Time Appeals**

*Faircloth v. State, A13A2389 (1/15/14)*

Appellant appealed from the denial of his motion for an out-of-time appeal. The record showed that appellant pled guilty on May 21, 1999 to possession of cocaine and received a sentence of three years intensive probation. He completed his sentence and was discharged. He argued that the appeal was necessary because it was used to improperly enhance his sentence on a 2010 conviction and that his 1999 plea was fraught with constitutional violations.

The Court stated that the purpose of an out-of-time appeal in a criminal case is to address the constitutional concerns that arise when a defendant is denied his first appeal of right because the counsel to which he was constitutionally entitled to assist him in that appeal was professionally deficient in not advising him to file a timely appeal and that deficiency caused prejudice. So, a motion for an out-of-time appeal must be premised upon an allegation of a deprivation of the right to direct appeal due to trial counsel's ineffective assistance. Since appellant's motion for out-of-time appeal did not allege that his failure to file a timely appeal of his 1999 conviction was due to an ineffective assistance of counsel, the motion was correctly denied.

### **Sentencing; Credit For Time Served**

*Combs v. State, A13A2415 (1/15/14)*

Appellant appealed from the denial of his motion for a nunc pro tunc order to give him credit for time served in confinement awaiting trial. The record showed that he pled guilty to one count of burglary and, pursuant to a negotiated guilty plea, he was sentenced to twenty years, with four to serve in confinement. Appellant contended that the trial court was required to give him credit for time served. The Court disagreed.

Under O.C.G.A. § 17-10-11(a), a convict should be given credit for time spent in confinement awaiting trial. However, under O.C.G.A. § 17-10-12, the amount of credit is to be computed by the convict's pre-sentence custodian, and the duty to award the credit for time served prior to trial is upon the Department of Corrections. A trial court has no authority to interfere in the determination and award of credit for time served. If aggrieved by the calculations in awarding credit, appellant should have sought relief from the Department of Corrections. Dissatisfaction with that relief would not be a part of his direct appeal from his original conviction but would be in a mandamus or injunction action against the Commissioner of the Department of Corrections.

Nevertheless, the Court noted, an exception exists where the trial court in its written sentencing order gives gratuitous misdirection to the correctional custodians. But here, the Court found, no such misdirection was given. Rather, the trial court expressly directed the Department of

Corrections to compute appellant's sentence according to law and gave no further direction. Accordingly, the trial court did not err in denying appellant's motion for a nunc pro tunc order.

## **Sentencing; Void Sentences**

*Kimbrough v. State, A13A1793 (1/14/14)*

Appellant appealed from the denial of his motion to "vacate/correct void sentence." The record showed that in April 1993, appellant was convicted upon charges that: (i) on December 12, 1992, he sold cocaine; and (ii) on December 17, 1992, he was in possession of cocaine with the intent to distribute. Prior to trial, the State filed notice of its intent to introduce two specified prior convictions in aggravation of punishment. Thus, upon the jury's return of the guilty verdicts, the State introduced in evidence at the sentencing hearing certified copies of the two specified prior convictions: (i) a 1991 conviction for drug possession with intent to distribute, for which appellant had received a (probated) five year sentence; and (ii) a 1992 conviction for robbery and possession of a firearm during the commission of that felony, for which appellant had received a (probated) five year sentence. On April 28, 1993, in connection with those charges, the court imposed upon him recidivist punishment of two concurrent terms of life imprisonment.

Appellant contended that the trial court erred by refusing to declare his life sentences void, maintaining that the recidivist punishment was not supported by a requisite predicate drug conviction. The Court disagreed. Citing *von Thomas v. State*, 293 Ga. 569, 571(2) (2013), the Court stated that when a sentencing court has imposed a sentence of imprisonment, its jurisdiction to later modify or vacate that sentence is limited. The sentencing court generally has jurisdiction to modify or vacate such a sentence only for one year following the imposition of the sentence. But a sentencing court has jurisdiction to vacate a void sentence at any time.

Here, the Court noted, appellant conceded that former Code section 16-13-30(d) mandated a life sentence upon a second conviction for violating subsection (b), but asserted that his 1991 drug conviction did not constitute a requisite former conviction for a

violation of subsection (b). Thus, the Court found, by challenging only the existence or validity of the factual or adjudicative predicate for the 1993 recidivist life sentences, appellant's motion presented no claim that a sentence was void as constituting punishment that the law does not allow. Whether a sentence amounts to punishment that the law does not allow depends not upon the existence or validity of the factual or adjudicative predicates for the sentence, but whether the sentence imposed is one that legally follows from a finding of such factual or adjudicative predicates. A defendant can waive a claim that the State failed to prove the existence of a prior conviction by admissible evidence. And because such claim can be waived, it necessarily does not amount to a claim that the sentence imposed was void, inasmuch as a sentence which is not allowed by law is void, and its illegality may not be waived. Accordingly, because appellant's motion presented no cognizable claim that a sentence was void, the trial court should have dismissed the motion for lack of jurisdiction. In accordance with *von Thomas*, the Court therefore vacated the decision of the sentencing court and remanded for dismissal of the motion.

## **Jury Instructions; Bruton**

*Coleman v. State, A13A2476 (1/14/14)*

Appellant was convicted of bank robbery. The evidence showed that he entered a bank, had the teller put money in a bag and then left. He got into a car driven by his co-defendant. Unbeknownst to either of them, the teller put a "track pack" into the bag. The "track pack" contained a GPS tracking device. The device led police to appellant and his co-defendant. At trial, appellant testified in his own defense. On cross-examination, he admitted that he had previously pled guilty to robbery in New York, where he had committed eight or nine robberies over a span of about three months. According to appellant, he had been incarcerated for 12 years, and he had been out of prison for less than a year when the bank robbery occurred here.

Appellant contended that the trial court's charge to the jury on impeachment of a witness by a prior conviction amounted to an improper comment on the evidence. The record showed that the trial court charged the jury on several aspects of impeachment, including

the following: "To impeach a witness is to prove that the witness is unworthy of belief. A witness may be impeached by, (A), disproving the facts to which the witness testified; (B), by proof that [appellant] has been convicted of the offense of Robbery in the First Degree in the State of New York; or (C), by proof of contradictory statements previously made by a witness about matters relevant to the witness's testimony and to the case."

Appellant argued that by naming him and describing his prior conviction in its charge on impeachment of a witness by a prior conviction, the trial court told the jury that he had, in fact, been convicted of the New York offense and it should be used as a basis for disbelieving him and inferring his guilty in the present case. As such, appellant argued, the trial court's charge constituted an impermissible expression of opinion regarding what had been proven in the case and thus, was reversible error under O.C.G.A. § 17-8-57.

The Court stated that O.C.G.A. § 17-8-57 is violated when the court's comment assumes certain things as facts and intimates to the jury what the judge believes the evidence to be. However, a statement by a trial court concerning a fact that is uncontested or is not in dispute does not constitute a violation of this statute. Thus, the Court found, the trial court's charge on impeachment of a witness by a prior conviction was not an impermissible expression of opinion because the fact that appellant had been convicted of Robbery in the First Degree in New York was undisputed and never contradicted by any evidence.

Likewise, the Court rejected appellant's argument that the trial court violated O.C.G.A. § 17-8-57 because the charge on impeachment of a witness by a prior conviction expressed an unfavorable opinion of his credibility and essentially told the jury the only inference they could draw was that he was guilty of the bank robbery in this case. It is well established that jury instructions must be read and considered as a whole in determining whether the charge contained error. Taken as a whole, the trial court's charge on impeachment did not require the jury to disbelieve appellant's testimony based on proof of his prior New York conviction. Rather, the trial court charged jurors that appellant "may be impeached" by his prior New York conviction and that it was for

them to determine whether any given witness had been impeached, whether the witness was credible, and what weight to assign the witness's testimony. The trial court further charged jurors that none of its comments had been intended to express an opinion regarding the credibility of the witnesses or the guilt or innocence of the defendants. Thus, taking into account the jury charge as a whole, the Court discerned no violation of O.C.G.A. § 17-8-57.

Appellant also contended that the introduction of his co-defendant's out-of-court statement, which was redacted in part but still included the reference to appellant, violated his Sixth Amendment right of confrontation under *Bruton v. United States*, 391 U.S. 123 (1968) because the co-defendant did not testify. Again, the Court disagreed. The record showed that the trial court admitted into evidence the portions of the statement that the co-defendant made to the police in which he stated that the car in which the stolen money was found belonged to his mother, that he had been driving the car on the day of the bank robbery, and that he knew appellant because his girlfriend was appellant's niece. The trial court thereafter charged the jurors that an out-of-court statement by one defendant could only be considered as evidence against that defendant.

The Court stated that *Bruton* only excludes statements by a non-testifying co-defendant that directly inculcate the defendant, and that *Bruton* is not violated if a co-defendant's statement does not incriminate the defendant on its face and only becomes incriminating when linked with other evidence introduced at trial. Here, the Court concluded, the trial court did not err under *Bruton* by admitting portions of the co-defendant's statement to the police. The only reference in the police statement to appellant was when the co-defendant indicated that he knew appellant because his girlfriend was appellant's niece. But that reference, standing alone, did not directly inculcate appellant; rather, it became incriminating only when linked with other evidence presented at trial. Because the co-defendant's statement was not facially, powerfully incriminating of appellant, the Court presumed that the jury followed the trial court's limiting instruction and only considered the statement as evidence against the co-defendant. Therefore, the co-

defendant's out-of-court statement was not "against" appellant and accordingly, did not violate the Confrontation Clause.