

# Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING FEBRUARY 19, 2010

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## THIS WEEK:

- **Ineffective Assistance of Counsel; Courtroom Closure**
- **Miranda**
- **Merger**
- **Jury Oath**
- **Statements; Batson**
- **Search & Seizure**
- **Speedy Trial; Barker v. Wingo**
- **DUI; Probable Cause to Arrest**
- **RICO Indictment; Special Demurrer**
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- **Hearsay; Conspiracy**
- **Juveniles; State's Right to Appeal**

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### ***Ineffective Assistance of Counsel; Courtroom Closure***

*Reid v. State, S09A1684*

Appellant was convicted of malice murder, two counts of felony murder, aggravated assault, criminal attempt to commit armed robbery, and possession of a firearm during the commission of a felony. He contended that his counsel rendered ineffective assistance by failing to object to the trial court temporarily closing the courtroom for the testimony of two witnesses, due to concerns about the safety of the witnesses and security in the courtroom. The court noted that in the recent U. S. Supreme Court decision of *Presley v. Georgia*, 558 U.S. \_\_\_\_, \_\_\_\_, S.Ct. \_\_\_\_, 175 L. Ed. 2d 675

(2010), the U. S. Supreme Court held that trial courts are required to consider alternatives to closure even when they are not offered by the parties. However, our Court noted, *Presley* was distinguishable because here appellant did not object to the closing of the courtroom and the issue of closure was only raised in the context of an ineffective assistance of counsel claim. A showing of ineffectiveness requires both deficient performance and prejudice. The Court held that the closure of the courtroom was not a "structural error" such that prejudice must be presumed. "Indeed, to hold otherwise would encourage defense counsel to manipulate the justice system by intentionally failing to object in order to ensure an automatic reversal on appeal." Consequently, the Court stated, even assuming deficient performance, appellant still must show that he was prejudiced by counsel's decision not to object to the brief closing of the courtroom. Since appellant failed to demonstrate how the failure to object to the partial closure of the courtroom when the two witnesses testified resulted in harm, he had not shown a reasonable probability that the outcome of the trial would have been different had spectators remained in the courtroom during such testimony.

### ***Miranda***

*Hatcher v. State, S09A1856*

Appellant was convicted of murder. He contended that the trial court erred by refusing to suppress his inculpatory statements made to police at the time of his arrest on the basis that they were made without the benefit of *Miranda* warnings. He argued that at the time of his arrest, he faced a "formidable police presence" poised to arrest him, which constituted the functional equivalent of inter-

rogation, requiring *Miranda* warnings prior to any statement he made. The Court disagreed. The evidence showed that when the police, handcuffs in hand, came to appellant's door with the intent to arrest him, appellant stated, without prompting, that he knew they were there "about the fight last night." As the officers proceeded in handcuffing him, appellant continued, stating, "I gave him \$10, and he did not bring it back. I've had a crack problem for seven months. I knew I shouldn't have hit him. . . ." The officers asked appellant no questions during the arrest, other than to confirm appellant's identity, and no guns were drawn at any time during the episode. Under these circumstances, the Court found, appellant's statements were spontaneous, voluntary, and not made in response to custodial interrogation or its functional equivalent.

## Merger

*Lucky v. State, S09A1527*

Appellant was convicted of malice murder, felony murder/aggravated assault, felony murder/armed robbery, aggravated assault (assault with intent to rob), aggravated assault (assault with a deadly weapon), armed robbery, and possession of a firearm during the commission of a crime. He contended the trial court erred when it sentenced him to life imprisonment on one of the two felony murder convictions instead of on the malice murder conviction. Specifically, he argued that, had he been convicted and sentenced on the malice murder conviction, all other convictions except possession of a firearm during the commission of a crime would have merged as a matter of law into the malice murder conviction. The Court analyzed appellant's arguments under OCGA § 16-1-7(a) and *Drinkard v. Walker*, 281 Ga. 211 (2006). The Court determined as follows: 1) the two felony murder convictions should have been vacated as a matter of law upon a sentence being imposed for the malice murder conviction; 2) the conviction for aggravated assault (assault with a deadly weapon) for which appellant received a 20-year sentence merged as a matter of fact into the malice murder conviction; 3) the armed robbery conviction, which had merged into the felony murder/armed robbery conviction for which appellant was sentenced, was now available for imposition of sentence because it did not merge into the malice murder con-

viction as a matter of law or fact; and 4) the conviction for aggravated assault with intent to rob, which the trial court merged into the felony murder/armed robbery conviction was also revived.

The Court also determined that with the armed robbery conviction "back in play," it then had to determine under the "required evidence" test of *Drinkard* if the conviction for aggravated assault with intent to rob merged into the conviction for armed robbery. It found that it did because the "assault" element of aggravated assault with intent to rob is contained within the "use of an offensive weapon" element of armed robbery and both crimes share the "intent to rob" element. Consequently, there was no element of aggravated assault with intent to rob that was not contained in armed robbery.

## Jury Oath

*Adams v. State, S09A1998*

Appellant was convicted of malice murder. He contended that even though he did not object at the time, the trial court committed reversible error because it did not read the petit jury oath mandated by OCGA §15-12-139 until after the State closed its case-in-chief. Appellant argued that the oath must be given prior to the opening of evidence. The Court agreed that the oath provided in OCGA § 15-12-139 is mandatory and a trial court's total failure to give the oath to the jury is reversible error. But, it noted, the statute does not prescribe a specific time for the trial court to give the oath. Thus, the Court determined, while the complete absence of the petit jury oath renders the conviction a nullity, in the absence of a showing of actual prejudice, there is no reversible error if a belated oath is given prior to the jury's deliberations. Furthermore, the failure of the defense to object does not constitute a waiver because it would "necessarily dilute the purpose of the oath and solemnity of jury service."

## Statements; Batson

*Belcher v. State, A09A1775*

Appellant was convicted of armed robbery, hijacking a motor vehicle, possession of a firearm during the commission of a felony, obstruction of an officer, and criminal trespass. He contended that the trial court erred by not

suppressing his statement to police admitting he robbed the victim because the statement was induced by the hope of benefit. The evidence showed that after appellant was arrested he offered to help law enforcement on some drug cases. After he signed a *Miranda* form, the officer told appellant, "If you're gonna tell me anything about a drug dealer, you're gonna have to tell me what crime you committed. You gonna need my help?" The Court held that the "slightest hope of benefit" means the hope of a lighter sentence. Here, the officer made no promise of a lighter sentence, and his question asking if appellant would need his help did not render his statement inadmissible.

Appellant also contended that the prosecutor exercised a peremptory strike against a potential juror in a racially discriminatory manner in violation of *Batson*. The State explained that it chose to strike the potential juror, an African-American woman, because she "had been evicted multiple times," and that she had been involved in "some domestic relations cases." The Court held that both reasons were race-neutral and appellant failed to demonstrate that they were a pretext for purposeful discrimination.

## Search & Seizure

*State v. Cosby, A09A1906*

Cosby was charged with burglary. The trial court granted his motion to suppress and the State appealed. The evidence showed that the victim noticed Cosby standing in her driveway. She told him to go away and then she went on an errand. When she returned, she noticed someone had been in her house and stolen jewelry, including rings. She gave a description of Cosby to the police. An officer located Cosby shortly thereafter and conducted a Terry frisk. He felt what he believed to be rings in his pocket and arrested him. The trial court held that the officer exceeded the "plain feel" doctrine and granted the motion.

The Court reversed. First, the Court determined the validity of the Terry frisk. It found that when the officer conducted the pat-down search of Cosby, he knew that a burglary had been reported less than an hour before, that Cosby matched the description of the suspected burglar, and that Cosby was found emerging from behind a house in the vicinity where the suspected burglar was last seen. The officer testified that he believed that Cosby

might be carrying burglary tools that could be used as weapons. A reasonably prudent person under these circumstances would have been warranted in believing that his safety or that of others was in danger. Thus, the officer was authorized to take appropriate self-protective measures, and his act of conducting a pat-down search of Cosby to search for a weapon was constitutionally permissible.

Next, the Court determined if the “plain feel” doctrine of *Minnesota v. Dickerson* was applicable to these facts. The Court held that “[a]n item may be seized under the plain view doctrine if the officer has probable cause to believe it was stolen, and we find nothing in *Dickerson* to suggest that the Supreme Court established a different rule for the seizure of items detected under the plain feel doctrine.” Here, the officer explained that he immediately determined the items in Cosby’s pocket were rings through the pat-down, without further manipulation of the items, because they were not “solid” and because they had “objects on top” that felt like “stones or gems.” Thus, the Court determined, had the rings been in the officer’s plain view when he detained Cosby, the officer clearly could have seized them under the plain view doctrine. Accordingly, the seizure was authorized under the plain feel doctrine.

### **Speedy Trial; *Barker v. Wingo***

*Over v. State, A09A2357*

Appellant was charged with DUI. He contended that the 22-month delay between his arrest and motion violated his constitutional right to a speedy trial. Constitutional speedy trial claims must be analyzed under the four-part balancing test of *Barker v. Wingo*. Under this test, a trial court considers: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant’s assertion of the right to speedy trial; and (4) the prejudice to the defendant. First, the Court found that the delay was over a year, thus triggering the *Barker v. Wingo* analysis. The trial court found that the schedule of the defense counsel and the overcrowding of its own docket caused the delay. The Court however, stated that the State bears the burden for an overcrowded docket. “The issue is not whether the delay could be attributed to the defendant, the State, or the trial court, however, but whether it could be attributed

to the defendant or *the government*.” A delay due to crowded dockets resulting from “the government’s failure to provide for sufficient numbers of judges, prosecutors, or indigent defense counsel,” is a delay caused by the government, albeit unintentional, and must be weighed against the State. Since 14 months of the delay was due to the overcrowded docket, this must weigh against the State.

The third factor, the defendant’s assertion of his rights, was weighted against him. The accused bears the responsibility for putting the government on notice he does not want a delay, and failure to do so weighs strongly against him. Appellant’s demands for a jury trial were not, as he contended, sufficient as a demand for a speedy trial.

Finally, appellant did not show that he was harmed by the delay. Appellant was not incarcerated pretrial and did not contend he was unduly anxious about the pending accusations. Instead, he argued his defense was impaired due to the passage of time because his four witnesses had moved or become unavailable. But, the Court found, all four would have testified to essentially the same facts and one was available and two probably available. Therefore, the loss of one witness was minimally prejudicial. In balancing the factors, the Court determined that the trial court did not abuse its discretion in denying the motion.

### **DUI; Probable Cause to Arrest**

*State v. Damato, A10A0274*

Damato was charged with DUI. The trial court granted her motion to suppress finding that the officer lacked probable cause to arrest. The evidence showed that Damato was involved in a one-car accident at 4:00 a.m. The officer on the scene smelled a strong odor of alcohol on her breath and noticed that Damato’s eyes were bloodshot and her skin was “slightly pale.” She admitted having a couple of drinks “earlier in the evening.” The officer did not do field sobriety evaluations and an alco-sensor test registered positive.

The Court stated, “[W]e have repeatedly held that the odor of alcohol on a driver’s breath or a positive result on an alco-sensor test shows only the presence of alcohol and does not support an inference that the driver is intoxicated and it is less safe for her to drive.” Here, the odor of alcohol on Damato’s breath,

her admission that she had a few drinks earlier in the evening, and a positive result on an alco-sensor test did not provide probable cause to arrest her for DUI several hours after the consumption of alcohol. Similarly, bloodshot eyes and slightly pale skin may support a finding of impairment, but such evidence does not require a finding of impairment. The Court noted that while the officer testified that he believed Damato was a less safe driver, the trial court obviously chose not to believe the officer’s opinion, and it could not second-guess the trial court or use the officer’s opinion in its analysis of whether probable cause existed to arrest Damato. Therefore, the Court upheld the trial court’s finding that the evidence was insufficient to support Damato’s arrest for DUI (less safe).

The Court also upheld the trial court’s finding that the evidence was insufficient to support Damato’s arrest for DUI (per se). No evidence was presented that her blood alcohol concentration exceeded .08 grams.

### **RICO Indictment; Special Demurrer**

*State v. Pittman, A10A0277, A10A0278*

The trial court granted the special demurrers of two co-defendants, finding that the indictment provided insufficient detail to allow them to prepare their defense. The indictment alleged two RICO counts: 1) that Pittman and Collins violated OCGA § 16-14-4 (a) by acquiring money through a pattern of racketeering activity, and 2) that they conspired to violate OCGA § 16-14-4 (a) by devising and executing a fraud scheme, which conspiracy was a violation of OCGA § 16-14-4 (c). The indictment specified 60 predicate acts to support the violation of OCGA § 16-14-4 (a).

The Court stated that due process is satisfied where an indictment puts a defendant on notice of the crimes with which he is charged and against which he must defend. The true test of the sufficiency of the indictment is not whether it could have been made more definite and certain, but whether it contains the elements of the offense intended to be charged and sufficiently apprises the defendant of what he must be prepared to meet and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. The defendants, citing,

*State v. Delaby*, 298 Ga. App. 723 (2009), argued that the indictment, because it alleges offenses in general terms, must descend into particulars and must meet a more strict analysis. The Court held that even under such a strict analysis, the indictment was sufficient. Thus, the indictment sufficiently described the RICO crimes and related predicate acts so as to inform the defendants of the charges against them and so as to protect them against another prosecution for the same offense. Therefore, the trial court erred in granting the special demurrer.

## **Kidnapping: Indictments**

*Smith v. State*, A10A0056

Appellant was convicted of two counts of armed robbery, two counts of kidnapping, one count of aggravated assault, and one count of possession of a firearm during the commission of a crime. He contended there was insufficient evidence of asportation to convict him of kidnapping. The evidence showed that appellant and his co-defendant approached the victims as one victim was getting into the vehicle of the other victim. This event occurred in the parking lot of a restaurant where one of the victims was employed. They forced the victims at gunpoint to drive to a secluded dirt road where they robbed the victims. Courts must assess four factors when determining whether the movement at issue constitutes asportation: (1) the duration of the movement, (2) whether the movement occurred during the commission of a separate offense, (3) whether such movement was an inherent part of that separate offense, and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. Here, the armed robbers pushed one victim into the car, they held guns to the victims' heads; the robbers demanded that the other victim drive away from the restaurant; the robbers commanded the second victim to make numerous turns; and the robbers forced the vehicle to stop on a dark dirt road. Although the armed robbery could have been completed at the restaurant, the robbers forced the victims to drive to a dark deserted road to substantially isolate the victims from protection or rescue. The Court concluded that this case involved much more than slight movement and the evidence supported the kidnapping convictions.

The evidence showed that during the

armed robbery one victim unsuccessfully attempted to wrestle a gun from his attacker and in the process, was hit in the mouth with the gun. The trial court sentenced appellant to life for the offense of kidnapping with bodily injury. However, the indictment only charged appellant with simple kidnapping. The State conceded that the sentence was improper and that the case must be remanded for the trial court to resentencing appellant for simple kidnapping.

## **Merger**

*Allen v. State*, A09A2107

Appellant was convicted of aggravated battery, aggravated assault, and two counts of third degree cruelty to children. The evidence showed that appellant struck the victim with a golf club in the presence of the victim's two children. The aggravated assault charged that appellant "with a golf club, an object which, when used offensively against a person, is likely to result in serious bodily injury, ma[d]e an assault upon the person of [the victim], by striking him in the chest and head with said object, in violation of OCGA [§] 16-5-21 (a) (2)." The aggravated battery charge alleged that appellant "maliciously cause[d] bodily harm to another, to wit: [the victim], by depriving him of a member of his body, to wit: certain cognitive functions, including short term memory loss, long term memory loss, and his ability to concentrate, as well as his ability to speak clearly, all resulting from the skull fracture he sustained, in violation of OCGA § 16-5-24." Appellant argued that the two merged for sentencing purposes. The State argued that because the aggravated assault charged appellant with hitting the victim with the golf club in the chest, the two did not merge.

The Court reviewed the charges under the "required evidence" test of *Drinkard v. Walker*, 281 Ga. 211 (2006). It determined that the two merged. Although the aggravated battery statutory provision required proof that the victim was deprived of a member of his body—which was not a required showing under the applicable aggravated assault provision, the aggravated assault provision did not require proof of any fact that was not also required to prove the aggravated battery, as that offense could have been proved under the indictment in this case. The Court also rejected the State's contention concerning the hit in the chest. Because OCGA § 16-5-21 (a) (2) requires proof

of only one act, the inclusion in the indictment of more than one such act is mere surplusage, which is unnecessary to constitute the offense, need not be proved, and may be disregarded. Moreover, when an indictment alleges that an aggravated assault was committed by two means, the State need prove only one of the two acts constituting the crime of aggravated assault to sustain the conviction.

## **Hearsay; Conspiracy**

*Dennis v. State*, A09A1895

Appellant was convicted of forgery of a check on his female roommate's bank account. He argued that the trial court erred by excluding evidence of a statement made by his co-defendant. At trial, appellant sought to testify that his absent co-defendant told him that the victim had changed her mind about paying appellant and pointed out a check on the kitchen counter written to appellant. Appellant asserted that it was admissible under the conspirator exception to the hearsay rule. The Court disagreed. It held that the conspirator exception to the hearsay rule (OCGA § 24-3-5) may only be used to admit statements "against a conspirator and is not a means by which a conspirator may introduce exculpatory evidence."

## **Juveniles; State's Right to Appeal**

*In the Interest of D.L.*, A10A0187

The State appealed from the denial of its motion in juvenile court to dismiss a petition charging D.L., a 16 yr. old, with armed robbery. The juvenile court denied the State's motion because it had not filed a motion to transfer the case to superior court. The Court stated that under OCGA § 15-11-28 (b) (2) (A) (vii), the superior court has exclusive jurisdiction over the trial of any child 13 to 17 years of age who is alleged to have committed armed robbery with a firearm. The state may commence a delinquency proceeding in juvenile court by causing a petition to be filed and once such a petition is filed in a case charging armed robbery with a firearm, a juvenile court acquires concurrent jurisdiction over the juvenile. However, the fact that the juvenile court obtained concurrent jurisdiction does not mandate that the State must file a motion to transfer and follow the transfer provisions of OCGA § 15-11-30.2 (a) and (b) before the

juvenile court is required to transfer the case to the superior court. Subsection (f) of the Code section addressing transfers specifically provides that “[t]his Code section shall not apply to any proceeding within the exclusive jurisdiction of the superior court pursuant to subparagraph (b) (2) (A) of Code Section 15-11-28,” which includes armed robbery with a firearm. Thus, the state legislature mandated that cases involving armed robbery with a firearm are not subject to the transfer provisions delineated in OCGA § 15-11-30.2.

Nevertheless, the Court also held that the State could not appeal from the erroneous denial of its motion to dismiss. OCGA § 5-7-1 (A) (5) permits the State to appeal “[f]rom an order, decision, or judgment of a court where the court does not have jurisdiction or the order is otherwise void under the Constitution or laws of this state.” A judgment is not void so long as it was entered by a court of competent jurisdiction and here, the juvenile court had concurrent jurisdiction with the superior court. Therefore, the State was not authorized to appeal the juvenile court’s erroneous decision pursuant to OCGA § 5-7-1 (A) (5) because the order was entered by a court having competent jurisdiction and was not void.