

# Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MAY 14, 2010

## Legal Services Staff Attorneys

**Lalaine Briones**  
Legal Services Director

**Chuck Olson**  
General Counsel

**Joe Burford**  
Trial Services Director

**Laura Murphree**  
Capital Litigation Director

**Fay McCormack**  
Traffic Safety Coordinator

**Gary Bergman**  
Staff Attorney

**Tony Lee Hing**  
Staff Attorney

**Donna Sims**  
Staff Attorney

**Jill Banks**  
Staff Attorney

**Al Martinez**  
Staff Attorney

**Clara Bucci**  
Staff Attorney

**Brad Rigby**  
Staff Attorney

## THIS WEEK:

- **Speedy Trial**
- **Habeas Corpus**
- **Kidnapping; Garza**

---

---

---

### *Speedy Trial*

*Robinson v. State, S10A0428; S10A0429*

Appellants were indicted for murder and related offenses. They contended that the trial court erred in denying their motion contending that their constitutional right to a speedy trial was violated. The evidence showed that there was an 18 month delay between arrest and the date set for trial. A defendant's constitutional speedy trial claim must be analyzed under *Barker v. Wingo's* four-part balancing test: (1) the length of the delay; (2) reasons for the delay; (3) defendant's assertion of the right to a speedy trial; and (4) the prejudice to the defendant. Standing alone, none of these factors are necessary to a finding of deprivation of the right to a speedy trial, but they should be considered together in a balancing test.

Here, the Court found that the 18 month delay was presumptively prejudicial. The reasons for the delay primarily concerned the State's motion to disqualify the Circuit Defender's Office from representing both appellants. The Court examined the issues and found both sides equally responsible for the delay. The Court further found that the appellants' assertion of their rights must be weighted against them because they waited until the 16<sup>th</sup> month before making such an assertion.

Finally, the Court found that the appellants failed to show prejudice. First, they failed to show that they were subjected to oppressive

pre-trial incarceration. Second, they likewise failed to show that they suffered from any unusual level of anxiety beyond that which is normally associated with incarceration in general. Most importantly, they failed to show the possibility of harm to their defense: No witnesses have died or disappeared; there was no evidence that witnesses have lost their memories; and the defense strategy remained unchanged. Therefore, the trial court did not err in denying their motions.

### *Habeas Corpus*

*Barrow v. Barker, S10A0611*

Barker was convicted of possession of cocaine with intent to distribute. As a result of the admission of five prior convictions based on guilty pleas, Barker was sentenced to life imprisonment without parole pursuant to OCGA §§ 16-13-30 (d) and 17-10-7 (c). He filed a habeas petition alleging his sentence was illegal because three of the underlying convictions were invalid because they were made without proper notification of his *Boykin* rights. The habeas court agreed and the warden appealed.

The Court held that Barker was procedurally barred from raising the invalidity of the underlying sentences because he failed to do so in the trial court when he was sentenced and did not raise it on his direct appeal. Under the "procedural default" rule, the habeas court could have considered Barker's defaulted claim only if there was cause and prejudice or in order to avoid a miscarriage of justice where there has been a substantial denial of constitutional rights. Here, Barker claimed in his habeas petition that appellate counsel rendered ineffective assistance when she failed to raise the ineffectiveness of trial counsel in failing to inquire into and challenge the al-

legedly invalid prior convictions. A sufficient showing in support of that claim could satisfy the “cause and prejudice” test applied to procedurally defaulted claims. The Court therefore reversed and remanded to the habeas court for a determination of his ineffective assistance of counsel claim.

## ***Kidnapping; Garza***

*Leverette v. State, A10A0925*

Appellant was convicted of two counts of kidnapping with bodily injury, aggravated assault with an object likely to cause serious bodily injury, and robbery. He argued that the evidence of asportation was insufficient to support the convictions for kidnapping with bodily injury and the trial court erred in failing to instruct the jury on the element of asportation. The evidence showed that appellant approached the victim, who was sitting with her car door open in a parking lot. The victim was talking on her cell phone. Appellant requested use of the phone and when the victim said no, appellant attacked her. He pushed her farther into the car and attempted to drive off. He drove approximately 150 feet when a witness used his car to block appellant from driving off with the victim. When the appellant stopped, the victim was able to get out of the car. Appellant then drove off in the victim’s car.

The Court held that the evidence was sufficient. Here, the evidence showed that appellant beat the victim, causing both bruising and a facial fracture. He then abducted her when he drove off with the victim until another car forced him to stop and the victim escaped. While the movement of the victim was only 150 feet, the evidence showed that the victim’s abduction was not an inherent part of the aggravated assault or robbery. Rather, it occurred after the offense of aggravated assault and before the offense of robbery had been completed. Additionally, the abduction of the victim through the parking lot created an additional danger to the victim independent of the assault or robbery. The movement isolated her from rescue or protection by the other people in the parking lot who came forward as witnesses. “The kidnapping statute is intended to address movement serving to substantially isolate the victim from protection or rescue, thereby increasing the danger faced by the victim.” Therefore, the Court found, the element

of asportation was sufficiently established. Appellant also contended that the trial court erred in giving his requested charge regarding asportation requiring only “slight movement.” The Court held that because it was requested and not objected to by appellant, it was waived. Nevertheless, it is well-established that the trial court erred in charging the jury that “slight movement” is sufficient to prove asportation. The standard for weighing nonconstitutional error in criminal cases is known as the “highly probable test,” i.e., is it highly probable that the error did not contribute to the judgment. Under that test, a reversal is not required if the evidence of guilt is overwhelming in that there is no reasonable probability that the verdict would have been different in the absence of this error. Here, the evidence of asportation was overwhelming and undisputed. Therefore, the trial court’s error did not require reversal.