

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JULY 23, 2010

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## THIS WEEK:

- Sentencing; Vindictiveness
- Ineffective Assistance of Counsel
- Sufficiency of Evidence; Similar Transactions
- Search & Seizure; Private Papers
- Conflict of Interest; Right to Counsel of Choice
- Indictments; Special Demurrers
- Speedy Trial; Barker v. Wingo
- Identification; Sufficiency of Evidence
- Indictments; Special Demurrers
- Directed Verdict; Motion to Suppress
- Sentencing; Immigration Status
- Sentencing Agreements
- Ineffective Assistance of Counsel
- Spoilation; Due Process

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### **Sentencing; Vindictiveness**

*Adams v. State, S09G1927*

Appellant was convicted of child molestation, aggravated child molestation, aggravated sodomy, and enticing a child for indecent purposes. He was sentenced to an aggregate of 60 years which included a sentence of 20 years for aggravated child molestation. Appellant moved for a new trial, contending that certain of the offenses merged. The trial court agreed and resentenced him to 50 total years, including 30 years for aggravated sodomy. Appellant contended that the more severe sentence was in violation of *North Carolina v. Pearce*, 395 U. S. 711, 89 SC 2072, 23 LE2d 656 (1969).

In a 4-3 decision, the Court found that the *Pearce* Court created a presumption of

vindictiveness whenever a more severe sentence is imposed after a new trial, which may be overcome only by objective information in the record justifying the increased sentence. The evil sought to be prevented was vindictiveness of the sentencing judge rather than simply enlarged sentences after a new trial. Relying on *Texas v. McCullough*, 475 U. S. 134, 106 SC 976, 89 LE2d 104 (1986), the Court held that since the trial court itself ordered a new sentencing hearing upon a partial grant of the motion for new trial filed by appellant, the *Pearce* presumption is inapplicable and the sentence imposed was proper.

Nevertheless, the Court also addressed the issue of the proper analysis to be used in determining whether a trial court's resentencing of a defendant results in a more severe sentence under *Pearce*. The Court adopted the aggregate approach, which requires a court to "compare the total original sentence to the total sentence after resentencing. [I]f the new sentence is greater than the original sentence, the new sentence is considered more severe." In so holding, it rejected the dissent's choice of the "count-by-count approach" which would have looked at the sentence imposed for each count individually. The Court concluded by stating, "Due to real world considerations and the minimal likelihood of vindictiveness, we hold that the *Pearce* presumption of vindictiveness is not triggered unless the new sentence, in the aggregate, is more severe." Here, appellant's initial sentence would have resulted in a total of 60 years in prison. After the grant of his own request to merge the conviction of child molestation into the conviction of aggravated sodomy, he was resentenced to a total of 50 years in prison. "Under the aggregate approach, the new sentence was significantly less severe and, thus, the *Pearce* presumption does not arise."

## Ineffective Assistance of Counsel

*Henderson v. Hames, S10A0363*

In this habeas appeal, the State sought to overturn a decision that trial counsel was ineffective for failing to challenge the indictment against Hames. Hames was indicted on a number of charges relating to the shooting death of his brother while the two were out hunting. The jury convicted him of misuse of a firearm while hunting and felony murder based on that crime.

OCGA § 16-11-108 provides that it is unlawful “while hunting wildlife, . . . to use[] a firearm or archery tackle in a manner to endanger the bodily safety of another person by consciously disregarding a substantial and unjustifiable risk that his act or omission will cause harm to or endanger the safety of another person and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation.” The indictment against Hames alleged that he did “while hunting wildlife, use a firearm in a manner constituting a gross deviation from the standard of care which a reasonable person would exercise in the situation, to wit: aim and shoot without clearly identifying his target, and did thereby cause serious bodily harm to Samuel Hames by shooting Samuel Hames, in violation of O.C.G.A. § 16-11-108.”

An indictment is void to the extent that it fails to allege all the essential elements of the crime or crimes charged. Section 16-11-108 (a) has two components of the mens rea necessary to violate the statute. As relevant here, there could be no violation unless Hames, while hunting wildlife, used a firearm in a manner endangering the bodily safety of his brother “[1] *by consciously disregarding a substantial and unjustifiable risk* that his act or omission w[ould] cause harm to or endanger the safety of another person *and* [2] *the disregard constitute[d] a gross deviation from the standard of care* which a reasonable person would exercise in the situation.” A review of the indictment showed that it omitted entirely any reference to the statutory requirement that Hames “consciously disregard[] a substantial and unjustifiable risk that his act or omission will cause harm to or endanger the safety of another person.” This omission allowed the State to argue in closing that recklessness or

even negligence would suffice for a conviction as long as the conduct constituted a gross deviation from the standard of care. The Court held that “[t]he decision not to raise the issue was not a reasonable tactic or trial strategy by Hames’s counsel. The uncharged component of the mens rea for a conviction under OCGA § 16-11-108 was not difficult to discern or the product of esoteric or unpredictable judicial decisions. Instead, it is found in the plain language of the statute.” Therefore, the trial court was correct in finding counsel was ineffective. Moreover, because the State did not prove at trial that Hames would have been found guilty if the correct mens rea had been used, Hames was entitled to be released from prison.

## Sufficiency of Evidence; Similar Transactions

*Bell v. State, S10A0173*

Appellant was convicted of malice murder, armed robbery, and burglary arising from the stabbing death of a 79-year-old victim in the victim’s home. The evidence showed that the victim was found by his housecleaner. There was no sign of forced entry into the residence, the victim was lying dead on the floor with multiple stab wounds, his front and back pockets had been turned inside out and no wallet was found in the pockets. There was also evidence that the victim was acquainted with appellant.

The Court held that the evidence was insufficient to support the armed robbery charge. The State alleged that appellant took a billfold and credit card by use of a knife. But the State presented no evidence that the victim ever owned a billfold or a credit card, that he had those items or any cash on his person or in his home at the time of the crime, or that any such property was missing from the home after the crime. Nor was there any evidence that, after the crime, appellant possessed a billfold, credit card, or money that did not belong to him. The fact that the victim’s pants’ pockets were found inside out was evidence that appellant *intended* to commit a theft from the victim, but there was no evidence in the record showing or supporting a reasonable inference that he actually *took* any property.

The Court also held that the evidence was insufficient to prove the burglary. Even assuming that the evidence at trial showed that Bell intended to commit a theft when he

first entered the victim’s residence, there was no evidence that appellant entered the home “without authority.” The evidence that, once inside the apartment, appellant assaulted the victim and sought to rob him would support a conviction for “remain[ing]” in the dwelling without authority, OCGA § 16-7-1 (a), but that portion of the burglary statute was neither charged in the indictment nor included in the jury instructions in this case.

Finally, the Court held that the trial court properly admitted a certified copy of the jury verdict in a case admitted as a similar transaction. While the trial court could have admitted the certified copy of that conviction, it decided to permit the introduction of only the verdict form so that the jury would not learn of the sentences imposed on appellant in the similar transaction. Under these circumstances, the Court treated the certified copy of the verdict form like a certified conviction.

## Search & Seizure; Private Papers

*Brogdon v. State, S09G2058*

Appellant was convicted of DUI. He contended that the trial court erred in not suppressing the medical records obtained by the State through the use of a search warrant. Specifically, he contended that the medical records were exempt from seizure because the records were “private papers” under OCGA § 17-5-21(a)(5). OCGA § 17-5-21(a)(5) authorizes a judicial officer to issue a search warrant for the seizure of tangible evidence of the offense for which probable cause has been shown, excepting private papers; subsection (a) (1) authorizes the issuance of a search warrant for instrumentalities, including private papers, of the offense in connection with which the warrant was issued; and subsection (b) authorizes the seizure during a lawful search of tangible evidence of the commission of a crime, excepting private papers, and the seizure of any item, including private papers, that is an instrumentality of a crime regardless of whether it is named in the search warrant. Thus, the statute authorizes seizure pursuant to a warrant or during the execution of a lawful search, of private papers that are instrumentalities of the crime in connection with which the search warrant was issued, but the statute does not permit the seizure pursuant to a warrant or during the execution of a lawful search of pri-

vate papers that are merely tangible evidence of the commission of the crime in connection with which the search warrant was issued. The Court held that the “private papers” that were subject to OCGA § 17-5-21 (a) (5)’s exemption from a search warrant’s coverage were those papers that belonged to the accused or were, at the least, in his possession. Since the medical records that were the subject of the search warrant were neither the personal property of appellant nor were they seized from his possession, they did not constitute the “private papers” that are exempt from coverage of a search warrant in Georgia under OCGA § 17-5-21 (a) (5). In so holding, the Court reviewed its holding in *Sears v. State*, 262 Ga. 805 (1993), determined that it had “deficiencies” in its approach and “disavow[ed] its result.”

### **Conflict of Interest; Right to Counsel of Choice**

*Registe v. State*, S10A0533, S10A0534, S10A0535

Appellant, appealed from an order disqualifying his counsel, former ADA Jackson, from representing him in a murder case and two other felony cases. The evidence showed that Jackson appeared to have no court-related participation in the two other felony cases. But, he met twice with officials from the U. S. Marshals Service regarding federal assistance in locating appellant for prosecution in the murder case. Jackson signed three substantially identical search warrant applications for presentation to the Superior Court to obtain records related to three telephone numbers linked to appellant. The applications, which were signed by Jackson alone in his capacity as an ADA, stated as follows: “Applicant certifies that the information sought is relevant and material to an ongoing criminal investigation to locate [appellant]...” Jackson then left the DA’s Office for private practice. Appellant was subsequently arrested in a foreign country and returned to the U.S. Jackson thereafter filed a notice of appearance on his behalf and the State successfully moved to disqualify him.

The Court affirmed the disqualification. The Court held that Jackson’s representation clearly violated Georgia Rules of Professional Conduct 1.7 (Conflict of Interest: General Rule) and 1.9 (Conflict of Interest: Former Client). It also stated that Rule 1.6 (Confidentiality of Information) and 1.11 (Successive

Government and Private Employment) supported this conclusion.

### **Indictments; Special Demurrers**

*State v. Marshall*, A10A0686

Marshall was indicted for attempt to entice a child for indecent purposes. The indictment alleged that he “did attempt to commit the crime of enticing a child for indecent purposes (OCGA § 16-6-5), in that said accused did knowingly and intentionally perform an act which constituted a substantial step toward the commission of said crime, to wit: said accused did drive up to [the victim], a child less than 16 years of age, and did attempt to entice said child into his vehicle for the purpose of indecent acts[,...]” Marshall filed a special demurrer alleging that the indictment was flawed because it failed to inform him of the “indecent acts” that the State expected to prove, thus depriving him of sufficient information upon which to base his defense. The trial court agreed and the State appealed.

The Court reversed. A special demurrer is an attack upon the form, as opposed to the substance, of an indictment. Thus, the true test of the sufficiency of an indictment to withstand a special demurrer 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 Court held that the indictment was sufficient to survive Marshall’s special demurrer because it contained the elements of the crime, informed Marshall of the charges against him, and was specific enough to protect him from double jeopardy. Furthermore, the words “indecent acts” in the context of OCGA § 16-6-5 (a) are not so vague and undefined as to prevent a person from recognizing the conduct they forbid. The language in the challenged indictment tracks the legislative language used in and cites directly to OCGA § 16-6-5 (a). And, the crime charged in and of itself alerted Marshall to the fact that he was being accused of acting with the intent of engaging in illicit sexual conduct with a minor because Chapter 6 of Title 16 of the

Official Code of Georgia is entitled, “Sexual Offenses,” and OCGA § 16-6-5 (a) proscribes the “solicitation of a minor to engage in sexual conduct or conduct which, by its nature, is a sexual offense against a minor.”

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

*State v. Ivory*, A10A0659

The State appealed from an order granting Ivory’s motion to dismiss his indictment on constitutional speedy trial grounds. The record showed that he was arrested in Dec. 2005 on numerous counts including armed robbery, aggravated assault. He was indicted Jan. 2006. In March, 2006, the trial court ordered the State to provide discovery within 30 days should Ivory “opt-in” to discovery. Ivory “opted in” in April, 2006. Thereafter, he filed motions to compel discovery, claiming that he had not received hospital records, a 911 recording, and other forensic evidence. Ivory filed his motion to dismiss in Nov. 2008. In May, 2009, the State responded to the Order to compel discovery, stating why the medical records and 911 recording could not be provided. The trial court granted the motion in Sept. 2009.

The time between the date of the original arrest and the September 2009 order granting Ivory’s motion to dismiss was approximately three years and nine months. This delay was presumptively prejudicial, triggering a *Barker v. Wingo* analysis. The Court found that the length of the delay was presumptively prejudicial and the trial court properly weighed this factor against the State. The reason for the delay was not weighed heavily against the State, but still weighed against it. The trial court found that although Ivory’s failure to assert his right to a speedy trial normally would be weighed heavily against him, that weight was mitigated here because Ivory was still attempting to receive discovery from the State and was still attempting to collect evidence from the Hospital and the police department.

Finally, the Court looked at the prejudice to Ivory. The Court found prejudice because the trial court determined that it was not only the failure to provide the medical records that impaired Ivory’s defense, but the fact that the State apparently waited in excess of two years to notify Ivory that the medical records could not be located and did so then only in response

to a second motion to compel and an order of the trial court. Further, the trial court found that the State still had not accounted for some of the requested items. Moreover, the trial court determined that the missing medical records were critical to Ivory's defense since he claimed that they would demonstrate he was heavily intoxicated and under the influence of medication at the time he made his statement to police, and because the records were needed to show whether the type of wounds he received were consistent or inconsistent with the type of ammunition which was fired from the gun of the patron at the club. The trial court also found that the missing 911 call records were important to corroborate certain aspects of the defense. Based on this, the Court held that the trial court did not abuse its discretion in granting the motion to dismiss.

### **Identification; Sufficiency of Evidence**

*Worsham v. State, A10A0530*

Appellant was convicted of speeding. At trial, the officer said he could not identify appellant but testified that he identified appellant at the time of the traffic stop with a photograph on appellant's Georgia driver's license. Appellant contended that the evidence was insufficient because the officer failed to identify him at trial as the speeder or to tender into evidence a copy of his driver's license, and did not remember to whom the car was registered.

The Court disagreed. Identity is an essential element of the crime, which the State must prove beyond a reasonable doubt. Although the officer could not positively identify appellant in court, the State presented direct evidence of his guilt with the officer's testimony that he had positively identified appellant as the speeder when he stopped him by examining the photograph on his driver's license.

### **Indictments; Special Demurrers**

*Fyfe v. State, A10A0487, A10A0488*

Appellant and her boyfriend were convicted of trafficking in methamphetamine. She, her boyfriend and others were all charged in the same indictment. The evidence showed she and her boyfriend lived in the home. Prior to the execution of a search warrant, she sold methamphetamine to a CI in a controlled buy.

At the time of the execution of the warrant, she, her boyfriend and other codefendants were all occupying the home.

Appellant contended that the trial court erred in denying her special demurrer. Specifically, she contended that 1) the indictment failed to specify the date of the offense; 2) the indictment failed to notify her of the place of the offense; and 3) the indictment failed to distinguish between the methamphetamine possessed by the other co-defendants who had been charged with possession of methamphetamine. The Court held that the indictment alleged a date of the offense and the indictment was not required to state the exact time of day to be sufficient. The indictment also was not required to include additional facts specifying the locations where the methamphetamine was found inside the residence. Finally, the Court held that the separate counts against her codefendants specified that the drugs possessed by those defendants were "not . . . the same Methamphetamine as alleged in any other count of th[e] indictment." Thus, the language set forth in the counts against the codefendants separately designated the drugs upon which those charges were based and made clear that her drug charges were not based upon the drugs allegedly possessed by those individual codefendants.

### **Directed Verdict; Motion to Suppress**

*Van Auken v. State, A10A0462*

Appellant was convicted of DUI and violating OCGA § 40-6-16 (a), Georgia's "move over" statute. Appellant contended that because the trial court found, in denying his motion to suppress, that he did not violate the "move over" statute, the trial court subsequently erred when, at the close of evidence in his jury trial, it failed to direct a verdict on the count alleging this traffic violation. The Court disagreed. A motion to suppress and a motion for a direct verdict of acquittal involve different evidentiary frameworks. In ruling on a motion to suppress, the trial court sits as the trier of fact and thus is charged with resolving any conflicts in the evidence and assessing the credibility of the witnesses. In contrast, in ruling on a motion for a directed verdict of acquittal, the trial court does not assume the role of factfinder. Rather, the trial court must view the evidence in the light

most favorable to the State, and the court can grant the motion only where there is no conflict in the evidence and no rational trier of fact could find the essential elements of the crime beyond a reasonable doubt. Thus, the Court held, given these different modes of analysis, the trial court's finding regarding the "move-over" violation made in the context of the suppression order cannot be treated as the equivalent of a finding that the evidence demanded a verdict of acquittal on that count as a matter of law.

### **Sentencing; Immigration Status**

*Trujillo v. State, A10A0338*

Appellant, an illegal immigrant, was convicted of burglary and sentenced to three years confinement with no fine imposed. He contended that the trial court violated his constitutional rights by impermissibly basing its decision to deny him probation solely on his status as an illegal alien. The record showed that at the sentencing hearing the trial court was reluctant to place him on probation because he could not order appellant to obtain suitable employment—a standard condition of probation—without ordering him to violate the law and/or be an accessory to any employer who would hire him in violation of the law. He also was hesitant to give him significant community service hours and a fine because he would be sentencing him to "slave labor" without any ability to support himself or his family and a fine would require the court to rely on the assurances of third-parties for payment. Thus, despite his lack of criminal history, the trial court sentenced him to a term of confinement.

The Court held that trial courts are vested with broad discretion when determining the appropriate sentence to impose upon a criminal defendant and it is the duty of the trial court to exercise that discretion as to all aspects of the sentence that it imposes. That discretion must nonetheless be exercised within the boundaries of the Fourteenth Amendment, which protects all "persons, "including those residing in this country illegally, from invidious governmental discrimination based solely upon their immigration status." Nevertheless, the Court concluded that the trial court did not violate appellant's constitutional rights by considering his illegal alien status a relevant

factor in formulating an appropriate sentence. Standard conditions of probation include requirements that the probationer “[w]ork faithfully at suitable employment,” “[v]iolate no local, state, or federal laws,” and “be of general good behavior.” Indeed, the Court stated, “the trial court would have been remiss had it ignored the practical realities presented by [appellant]’s immigration status and the obstacles that it would have presented to [his] ability to comply with the imposed conditions of probation. And, since the sentence fell within the statutorily authorized range, the sentence was lawful. Finally, the Court rejected appellant’s claim that the trial court failed to exercise its discretion by imposing an inflexible rule that no illegal alien could be placed on probation. To the contrary, the Court found, the trial court went to great lengths to consider other available options in sentencing appellant.

## Sentencing Agreements

*McClam v. State, A10A0197*

Appellant was convicted of aggravated stalking and sentenced to 10 years, 7 to serve. He appealed from the denial of his motion to enforce agreement, arguing under contract law that he and the State entered into a binding contract of sentence reduction in exchange for testimony favorable to the State. The record showed that appellant sought to enter into a post-conviction agreement with the State under which he offered to testify against a fellow inmate in exchange for a lesser sentence of seven years, two to serve. The prosecutor met with appellant, and concluded that he lacked credibility and would therefore likely not be an effective witness for the State. The fellow inmate allegedly discovered appellant’s identity as a potential informant against him and allegedly the inmate caused appellant to be subjected to threats and violence.

The Court stated that a sentencing agreement, like a plea agreement, may constitute a binding contract under Georgia law. Here, however, there was no binding agreement as the State engaged in no negotiations with him and simply rejected appellant’s offer. Nevertheless, appellant argued, he was equitably entitled to a reduced sentence under an unjust enrichment theory because with the information he provided the State, it was allegedly able to get the “upper hand” in negotiations

with the other inmate and force a guilty plea. The Court held that “[a]side from the fact that [appellant] cites no legal authority for his proposition, his contentions are not supported by the record.” The State derived no benefit from appellant’s unilateral, unsolicited offer to testify and appellant failed to produce any evidence beyond mere speculation to show that the inmate’s knowledge of his identity as a potential informant motivated the inmate to plead guilty.

## Ineffective Assistance of Counsel

*Higgins v. State, A10A0206*

Appellant was convicted of rape and aggravated sodomy. He contended that he received ineffective assistance of counsel. The Court agreed and reversed. The record showed that trial counsel failed to object to the State’s admission of the unredacted juvenile disposition order that the State used to prove a similar transaction despite having raised the need for redaction of the sentence in a pre-trial hearing and having obtained an agreement from the State to do so. Counsel also failed to object to an officer reading portions of the disposition order to the jury. The officer read that the community needed to be protected from appellant; that all children younger than appellant need to be protected from him and that he should not be allowed any unsupervised contact with children. Additionally, trial counsel failed to object to the unredacted disposition order going out with the jury during their deliberations. The order contained even more prejudicial statements (e.g., he “shall not reside in the same household with his 12-year-old sister” or “any other child who is younger than he;” and he is required to “attend an outpatient sex offender treatment program.”).

The Court held that counsel’s failure to object specifically to admission of the sentencing portions of the juvenile court disposition order at trial constituted deficient performance. The Court found that appellant’s arguments satisfied the prejudice prong of the *Strickland* test because the evidence in this case was not overwhelming and because evidence was introduced that the encounter may have been consensual. Thus, a reasonable probability existed that the outcome would have been different had this damaging information been excluded from the jury’s consideration.

## Spoilation; Due Process

*Mussman v. State, A10A0607*

Appellant was indicted for vehicular homicide following a single car accident during which the other occupant died. The evidence showed that appellant, initially believed to be a passenger riding with the victim, was in a convertible car when it slid and rolled, landing upside down. When police investigated, they determined that the driver had not been wearing a seatbelt, but the passenger had. Appellant was released with no indication he was a suspect of criminal activity. The vehicle was impounded, biological evidence was taken from the interior, and then the car was released to a towing service. Six months later, after further investigation, appellant was arrested on the grounds that he had caused the victim’s death by recklessly speeding and failing to maintain his lane. When appellant’s counsel tried to find the car for purposes of an independent examination to exonerate appellant, an investigator determined the car was useless for examination because it had been cleaned, repainted and resold.

Appellant contended that the court erred in denying his motion to suppress and dismiss the indictment on the grounds that the State failed to preserve constitutionally material evidence which he needed to defend himself, and that both failing to preserve the car and waiting six months to inform him he was a suspect constituted bad faith. The Court agreed.

OCGA 17-5-56(a) requires the State to “maintain any physical evidence collected at the time of the crime that contains biological material” for a period of time after a conviction. This Court ruled that the State violated the statute because this evidence, which potentially could have exonerated appellant, is not limited to the biological samples, but includes all physical evidence, including the car itself. Further, citing to *California v Trombetta*, 467 U.S. 479 (1984) and *Arizona v Youngblood*, 488 U.S. 51 (1988), the Court stated that “when the State fails to preserve evidence which might have exonerated the defendant, the court must determine both whether the evidence was constitutionally material of apparent exculpatory value and incomparable and whether the police acted in bad faith in failing to preserve it.”

Here, the Court found that this evidence was constitutionally material because it was

apparently exculpatory and simply inspecting the State's photographs or a similar car would not yield comparable evidence. To determine whether the destruction of this potentially exculpatory evidence rose to a due process violation, the Court considered whether the State acted in bad faith. Because the State not only violated its statutory duty to maintain the evidence, but also released the car after gathering evidence and then waited six months to notify appellant that he was suspected of criminal activity, the Court ruled that the State acted in bad faith. Thus, the State violated appellant's due process rights and the trial court should have excluded any evidence related to the car which the State failed to preserve. The judgment was reversed.