

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING SEPTEMBER 17, 2010

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THIS WEEK:

- **Marijuana Possession; Search**
- **Double Jeopardy**
- **Conflict of Interest**
- **Entrapment**
- **Search & Seizure**
- **Speedy Trial**
- **Right to Remain Silent; Effective Assistance of Counsel**

Marijuana Possession; Search

Daniel v State, A10A0882 (9/1/2010)

Appellant was convicted of trafficking in cocaine and possession of marijuana and sentenced as a recidivist. The evidence showed that police officers obtained a search warrant for appellant's residence after using a confidential informant to conduct a controlled purchase of 3.5 grams of cocaine. During the search, appellant was detained and advised of his Miranda rights. He invoked his right to have an attorney and questioning was terminated. Then, after he expressed concern that the female with him would be charged with a crime, the police informed him that if contraband was found they intended to arrest both of them in absence of a claim of ownership of the drugs. In response, he proceeded to show the officers where the cocaine and marijuana were hidden.

Appellant contended that the application for the search warrant was not based on probable cause. Additionally, he contended that

his act of showing the officers the location of the narcotics was the result of unlawful interrogation after he had invoked his right to counsel. To justify the issuance of a search warrant, the state must set forth sufficient facts to show that there is a fair probability that contraband or evidence of a crime will be found in a particular place. "An affidavit is presumed valid in the absence of evidence that it contained deliberate falsehoods, was made with reckless disregard for the truths, or that the affiant consciously omitted material facts that, if included, would have indicated the absence of probable cause." Here, the Court found that the controlled buy alone was sufficient to establish probable cause to justify a warrant. Even though appellant alleged the application contained material misstatements, the warrant application presented more than a "substantial basis for concluding that probable cause existed," even in the absence of those challenged comments.

An accused who has invoked his right to counsel is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further conversations with the police. The trial court, however, is not required to exclude voluntary statements that are not part of a custodial interrogation or express questioning by the police that would elicit an incriminating response from the subject. The Court found that appellant re-initiated the conversation by asking an officer about the fate of his female friend. After receiving an answer, appellant "freely and voluntarily" showed the officers the location of the narcotics out of concern for his friend, not as a response to questioning seeking to elicit an incriminating response. Thus, the statement was not a product of a custodial interrogation.

Double Jeopardy

Jackson v State, A10A1735 (8/27/2010)

Appellant was indicted on a single count each of criminal attempt to commit burglary and possession of tools for the commission of a crime. The evidence showed that after the State called two witnesses, the State asked the court for a recess because two material witnesses, who were not under subpoena, were unavailable. Because the district attorney was not willing to pay the juror expenses for the delay, the court sua sponte declared a mistrial. Defense counsel objected, noted that double jeopardy had attached, and moved for a directed verdict. The trial court denied the motion. Appellant thereafter moved for discharge and acquittal on the grounds that a retrial would violate his constitutional right against double jeopardy. He argued that the State's failure to secure the witnesses necessary to prove its case did not constitute grounds for a mistrial. The Court agreed and reversed.

"If a mistrial is declared...over [a defendant's] objection, the defendant may be retried only if there was a 'manifest necessity' for the mistrial." However, pursuant to *Arizona v Washington*, 434 U.S. 497, manifest necessity cannot be found where, as here, the mistrial results from the State's decision to proceed without taking the necessary steps to secure the availability of its witnesses. This rule applies even in the absence of any bad faith by the prosecutor. Here, the district attorney took a risk that he would be unable to obtain a conviction when he impaneled the jury before first ascertaining whether his witnesses were present. Thus, the mistrial did not arise from manifest necessity and therefore, the trial court erred in denying appellant's motion for discharge and acquittal.

Conflict of Interest

Thomas v State, A10A1664 (9/1/2010)

Appellant appealed his conviction for possession of a firearm by a convicted felon claiming that his defense counsel had a conflict of interest. The evidence showed that officers approached a group of men outside an apartment complex after observing one man, White, sell something to people in several cars. As they approached, appellant was seen pulling an object from his waistband and putting it on the ground. The object was a loaded handgun.

The officers arrested appellant for carrying a concealed weapon, and two others, White and Lee, for possession of drugs. Because both his and Lee's attorneys worked for the same county defenders office, appellant contended his counsel worked under an inherent conflict of interest. The Court disagreed.

Pursuant to *Burns v State*, 281 Ga. 338, a criminal defendant who raises the question of conflict of interest after conviction based on the fact that his and a co-defendant's attorneys were employed in the same public defenders office must prove that "his attorney represented conflicting interests and that an actual conflict of interest adversely affected his lawyer's performance." Here, the Court found that appellant failed to articulate any basis for concluding that his lawyer would have done anything differently if his co-defendant's attorney had not worked for the same office. There was no evidence that appellant's lawyer slighted his defense in favor of Lee's defense and therefore, no basis for reversal.

Entrapment

Graham v State, A10A1228 (8/31/2010)

Appellant was convicted of the sale of cocaine and ecstasy. He argued that his convictions should be reversed because the trial court refused his request to charge the jury on the defense of entrapment. The Court disagreed. The evidence showed that, after learning a confidential informant had been arrested on firearms charges, officers told the CI that if he provided information on a gang, or bought drugs from someone in the gang, they would ask the District Attorney about a possible lighter sentence. The CI then initiated three drug transactions with the appellant, telling appellant that he was buying the drugs from him because the CI was in financial distress and needed to make money for his family. At trial, appellant requested a charge on the defense of entrapment. Citing *Norley v State*, 170 Ga. App. 249 (1984) and *Robinson v State*, 296 Ga. App. 561 (2009), appellant contended that there was evidence of undue persuasion and deceit because the CI used his fictional and actual financial distress and personal relationship to convince appellant to sell him the drugs.

The Court held that *Norley* and *Robinson* were inapplicable and did not support appellant's argument of undue persuasion, since in both cases, the defendant was in financial

distress, and here the CI was in distress, not the appellant. "Entrapment consists of three distinct elements: 1) the idea for the commission of the crime must originate with the state agent; 2) the crime must be induced by the agent's undue persuasion, incitement, or deceit; and 3) the defendant must not be predisposed to commit the crime." Here, the State did not contest that the idea originated with the state agent, however, there was no evidence of undue persuasion to induce appellant to commit a crime he was not predisposed to commit. The Court found no undue persuasion warranting a charge on entrapment where, as here, the CI told the defendant of his own financial distress and that he needed to sell drugs for money. Additionally, no evidence showed appellant was anything other than a willing participant. Accordingly, the trial court did not err in failing to charge on entrapment.

Search & Seizure

State v Carter, A10A0954 (9/2/2010)

The State charged appellant, Mitchell and White with trafficking in cocaine, possession of marijuana with intent to distribute, theft by receiving stolen property, and possession of a firearm during the commission of a felony. The evidence showed that at the request of rental property manager Shirah, the police arrived at the home of Shondorrea Smith, White's girlfriend. The officers smelled marijuana and then knocked on the door. After speaking with appellant and White, who denied living there, Shirah gave the police permission to enter the house. The police found drugs and a handgun. They also conducted an "inventory search" of appellant's car and found two handguns. Appellant successfully moved to suppress the drugs and guns found at the scene arguing that the police were not authorized to search either the home or the vehicle. The State appealed, and the Court affirmed in part and reversed in part.

The status of landlord does not in itself give one the authority to consent to a search of a tenant's residence unless that property manager had mutual use or joint access to the house at issue. Here, the State presented no evidence that Shirah had that control. However, pursuant to *Atwater v State*, 233 Ga. App. 339, the person claiming the Fourth Amendment violation has the burden of demonstrating that they had a legitimate expectation of privacy in

the premises searched. Here, appellant failed to demonstrate any evidence of how long they had been in the house or whether the renter or anyone else had authorized them to stay there. Thus, the Court found they did not have a reasonable expectation of privacy in the house, and therefore lacked standing to contest the search.

However, though police may inventory a vehicle that has been lawfully impounded, they “may not use an impoundment or inventory as a medium to search for contraband.” Impoundment of a vehicle is valid only if it was reasonably necessary for the police to take charge of the property. Here, there was no testimony showing the officer legally impounded the car, nor was evidence presented that the car was illegally parked, the owner of the house requested the car be moved, or that the police even asked appellant if anyone could retrieve his car. Thus, the Court affirmed the suppression of evidence found in the car because the inventory search was improper and not reasonably necessary.

Speedy Trial

Meder v State, A10A0986 (8/27/ 2010)

Appellant appealed from the trial court’s denial of her motion for judgment and acquittal based on her claim that there was a violation of her constitutional right to a speedy trial. The evidence showed that appellant was arrested on April 27, 2007. She filed her motion for discharge and acquittal on October 14, 2009. Between these two dates, there were delays, including conflicts and motions, attributable to both the State and the defendant. Appellant contended that she asserted her right to a speedy trial when she filed a demand for a jury trial in her pleading waiving formal arraignment and that her defense was prejudiced because one of her witnesses was no longer available to testify on her behalf because they had quarreled during the delay. The Court disagreed.

The test for determining whether the Sixth Amendment right to speedy trial has been violated is set forth in *Barker v Wingo*, 407 U.S. 514. *Barker* provides that courts must engage in a balancing test of the following factors: 1) the length of the delay; 2) the reason for the delay; 3) the defendant’s assertion of the right to a speedy trial; and 4) prejudice to the defendant. The delay here was 30 months from the time of arrest, but much of that time

was attributable to motions filed by defense counsel and conflicts in defense counsel’s schedule. Additionally, because a demand for a jury trial does not invoke the right to a speedy trial, appellant’s failure to assert her right until she filed her motion to dismiss weighed heavily against her. As to prejudice, the Court agreed that appellant’s witness was available to testify under subpoena and would presumably testify truthfully at trial. Balancing all four of these factors, the Court found that there had been no violation of appellant’s constitutional right to a speedy trial.

Right to Remain Silent; Effective Assistance of Counsel

Scott v State, A10A1661 (8/27/2010)

Appellant was convicted of voluntary manslaughter, felony murder, a firearm’s offense and possession of cocaine. The evidence showed that during closing arguments, the prosecutor argued that appellant’s failure to turn himself in, even after his family was informed the police were looking for him, should be regarded as evidence of his guilt. Defense counsel did not object, noting he did not believe the comments implicated appellant’s right to remain silent. Appellant claimed that this failure to object constituted ineffective assistance of counsel. The Court agreed.

To prevail on a claim of ineffective assistance of counsel, a defendant must show both that trial counsel was deficient, or that his counsel’s performance fell below an objective standard of reasonableness, and that he was prejudiced by the deficiency. A defendant must overcome the strong presumption that counsel’s decisions were made in the exercise of reasonable professional judgment based on the circumstances of the case and counsel’s perspective during trial. Here, though counsel testified he did not view these comments as objectionable, “the Supreme Court has held that the State may not comment at trial upon a defendant’s silence or failure to come forward...because such comments would be more prejudicial than probative.” Counsel’s failure to object constituted deficient performance. Moreover, they prejudiced appellant’s case because the State’s comments about his silence were not inadvertent or incidental, but a deliberate argument that the jury should use his silence against him. Because the

other evidence against the appellant was not overwhelming, and alibi witnesses refuted the State’s case, there was a reasonable probability that the improper inferences of guilt regarding appellant’s failure to come forward influenced the jury’s decision. The Court therefore reversed the convictions.