

# Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MARCH 9, 2018

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## THIS WEEK:

- **Massiah Violations; Co-conspirator Statements Of Gang Members**
- **Criminal Trespass; Notice Requirements**
- **Double Jeopardy; OCGA § 16-1-8 (c)**
- **Cross-Examination; Scope**
- **Jury Charges; Harmless Error**
- **Statements; Miranda**
- **Habeas Corpus; Retroactivity of Supreme Court Decision**
- **Right to Speedy Appeal; DNA Evidence**

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## Massiah Violations; Co-conspirator Statements Of Gang Members

*Kemp v. State, S17A1646, S17A1647, S17A1648 (2/19/18)*

Appellants Kemp, Watkins and Hogans were convicted of malice murder and other crimes in connection with the shooting death of Gray. The evidence showed that In July 2011, Kemp and Watkins were gang members associated with the Loyal to the Gang (“LTG”) faction of Gangster Disciples (“GD”). Although not a member of the gang, Hogans associated with Watkins and other GD members. Grey intended to buy marijuana from Watkins; appellants intended to rob Grey instead. However, the plan apparently went awry; Hogans got shot and Grey was fatally wounded from multiple gunshots. Grey’s body was dumped and found sometime later.

Not long after the crimes, Watkins told fellow gang member Steve Lewis that Kemp and “his guy” messed up, but did not

elaborate; unbeknownst to Watkins, Lewis had been working as a police informant for more than a year. By December 2011, Watkins had been arrested and shared a jail pod with Lewis, who had been arrested on unrelated charges and was no longer working as a police informant. Watkins made a jailhouse confession to Lewis.

Appellants contended that the trial court erred in admitting or refusing to strike Lewis’s testimony about conversations he had with Watkins in which Watkins discussed the defendants’ participation in the crimes. Hogans and Watkins specifically argued that Lewis was acting as a government agent at the time Watkins discussed the defendants’ participation in the crimes, and that, as a result, Watkins’s statements were inadmissible under *Massiah v. United States*, 377 U. S. 201 (84 SCt 1199, 12 LE2d 246) (1964). The Court noted that under *Massiah*, the Sixth Amendment right to counsel is violated by the admission of incriminating statements that a government agent deliberately elicits in the absence of counsel after judicial proceedings have been initiated against the defendant. An informant may be classified as a government agent only if there is both (1) an agreement between the informant and government authorities to exchange incriminating information for payment, lenient treatment, or some other benefit and (2) some action by the informant designed deliberately to elicit incriminating information.

The Court found no *Massiah* violation. Watkins made the incriminating statements in December 2011, by which time Lewis’s status as a confidential informant had been terminated. There was no evidence that the police promised Lewis any benefit

whatsoever in exchange for obtaining information from Watkins. Indeed, the police handler stated that he did not initiate contact with Lewis after his arrest and said he could not help Lewis in exchange for any information Lewis had. Thus, Lewis was not a government agent. Moreover, there was no evidence supporting Watkins's claim that Lewis deliberately elicited information from Watkins while they shared the same jail pod or did so under the direction of the police. As a result, the Court concluded, Hogans's and Watkins's Sixth Amendment claims failed.

Kemp and Hogans argued that the trial court erred in admitting Lewis's testimony about Watkins's statements against them under OCGA § 24-8-801 (d) (2) (E), because the hearsay statements were not made "during the course and in furtherance of" a conspiracy. The Court disagreed. To admit evidence under Rule 801 (d) (2) (E), the State is required to show by a preponderance of the evidence that a conspiracy existed, the conspiracy included the declarant and the defendant against whom the statement is offered, and the statement was made during the course and in furtherance of the conspiracy.

Kemp and Hogans argued that Watkins's statements were not made in the course of a conspiracy, because the conspiracy ended with Gray's death. But, the Court found, the defendants were alleged to have been part of a *larger criminal conspiracy*. Namely, in addition to the allegations that they committed specific criminal acts against Gray, appellants also were charged with one count of violating the Georgia Street Gang Terrorism and Prevention Act by committing the aggravated assault and armed robbery as part of the Gangster Disciples, an alleged criminal street gang. To establish a violation of that Act, the State had to show that appellants were involved in a criminal street gang and that the enumerated acts were intended to further gang activity. *Establishing that a group of people associated to engage in criminal gang activity is essentially proof of a conspiracy*. And here, the Court found, the fact that Watkins would discuss his participation in crimes with Lewis, an admitted gang member, helped establish that Watkins was also associated with the gang. Thus, the fact that appellants accomplished the specific acts charged — the crimes against Gray —

did not necessarily end the involvement or association with the Gangster Disciples; nor did the criminal street gang's purpose necessarily end with those crimes. As a result, the trial court was authorized to conclude that the State made a sufficient showing that Watkins's statements were made in the course of a conspiracy. Moreover, this analysis is unaffected by the fact that appellants were acquitted of the gang charge.

Nevertheless, Kemp and Hogans argued, mere idle chatter or a narrative of past conduct is generally not considered to be in furtherance of the conspiracy. But, the Court stated, narratives of past events are admissible under Rule 801 (d) (2) (E) if they serve some present purpose in the conspiracy. Here, the Court found, the trial court was authorized to conclude that Watkins's statements to Lewis were in furtherance of the conspiracy. The State sought to prove that appellants were part of, or associated with the same criminal street gang as Lewis. Watkins's statements to Lewis could be interpreted as fostering cohesiveness with another gang member or as providing information to a fellow co-conspirator (of the criminal street gang). The trial court was thus authorized to determine that the State established by a preponderance of the evidence that Watkins's statements about his involvement in the crime were in furtherance of the criminal street gang conspiracy.

## Criminal Trespass; Notice Requirements

*State v. Harper, S17G0199 (2/19/18)*

In *Harper v. State*, 338 Ga. App. 535 (2016), the Court of Appeals held that David Harper, a bail recovery agent, could not be found guilty of trespass under OCGA § 16-7-21 (b) (2) as a matter of law after he entered the residence of Tina McDaniel through a locked door from her backyard without McDaniel's knowledge or permission to arrest Collier, a man whose criminal bond had been forfeited. The Court granted certiorari to decide whether a locked entry door to a homeowner's residence provides sufficient notice to a would-be trespasser that he or she is forbidden from entering the premises under OCGA § 16-7-21 (b)(2).

The Court noted that for over forty

years, the Court of Appeals has held that, "[e]ssential to establishment by the state of [criminal trespass under OCGA § 16-7-21 (b) (2)] against [a] defendant [is] a showing that his entry into the [premises] had previously been *expressly* forbidden." (Emphasis supplied.) *Scott v. State*, 130 Ga. App. 75, 78 (3) (1973). However, notice need only be *explicit*, not express. Thus, the Court stated, while giving a person express notice through spoken or written words that his or her entry is prohibited *can* be sufficiently explicit and reasonable for purposes of OCGA § 16-7-21(b) (2), this does not mean that spoken and written words are the *only* means by which reasonable notice could be given to a would-be trespasser that would explicitly notify that person that his or her entry is prohibited.

In general, there is nothing subtle about encountering a locked door to a home when one has not been invited into or given permission to enter that locked home. The reasonable notice given and the explicit (but not express) message sent is that the uninvited person who is met by the locked door is forbidden from entering until such time as informed otherwise. Here, it was undisputed that Harper was not given a key to the home or given any sort of permission by McDaniel to enter her residence. And McDaniel testified that she kept the door locked. Accordingly, viewed in the light most favorable to support the verdict, the record showed that Harper had been given reasonable and sufficiently explicit notice by the owner of the premises under the circumstances to be made aware that his entry into McDaniel's home was forbidden. Consequently, the evidence was sufficient to show that Harper had received sufficiently explicit notice to support a finding of guilt under OCGA § 16-7-21(b) (2), and the Court of Appeals erred in concluding otherwise.

Finally, the Court held, to the extent that prior cases from the Court of Appeals have held that express notice is required to satisfy the terms of the statute, those cases are disapproved.

## Double Jeopardy; OCGA § 16-1-8 (c)

*Calloway v. State, S17A2019 (2/5/18)*

Appellant was convicted in a federal

court of several crimes related to manufacturing methamphetamine. She then was convicted in a state court of felony murder predicated on manufacturing meth. The State charges arose from the same conduct as the federal charges. Appellant contended that the State's prosecution was barred by OCGA § 16-1-8 (c).

The Court noted that states are sovereigns separate from the federal government, and a state's power to undertake criminal prosecutions is derived from its own inherent sovereignty. Under the dual sovereignty doctrine, where a single act violates the law of two sovereigns (e.g., the United States and a state), an individual may be prosecuted and punished by each sovereign without violating double jeopardy.

However, under OCGA § 16-1-8 (c), the legislature has imposed a statutory limitation to some successive prosecutions. For the statute to bar a state prosecution, three elements must be met: (1) a "threshold" requirement that the crime is within the State's concurrent jurisdiction; (2) the federal prosecution resulted in a conviction or acquittal; and (3) the state and federal prosecutions are for the same conduct and do not require proof of a fact not required by the other (or the state crime was not complete at the time of the federal trial).

Applying this test to appellant's felony murder conviction, the Court found that because there are Georgia statutes equivalent to the federal crimes for which appellant was convicted, the threshold element of OCGA § 16-1-8 (c) was satisfied. As to the second element, there was no doubt that appellant was convicted in federal court. And as to the third element, the Court found it too was met because the predicate felony of manufacturing meth was a lesser included offense in the State's prosecution of felony murder, and that predicate felony criminalizes the same conduct as the federal charge of attempt to manufacture meth. And, although the Georgia charge of felony murder predicated on manufacturing meth requires proof of an additional fact that the federal offense of attempting to manufacture meth does not, the federal charge does not require proof of any additional facts. Therefore, the Court concluded, the State's prosecution for felony murder was barred by OCGA § 16-1-8 (c), and the Court reversed Calloway's felony murder conviction, as

well her unmerged felony conviction for manufacturing meth.

However, the Court stated, appellant's convictions for possession and possession with intent to distribute also become unmerged as a result of the reversal of the felony murder conviction, and the next question was whether the State's prosecution for these offenses was also barred by OCGA § 16-1-8 (c). The Court noted that the possession of a controlled substance is a lesser included offense of possession with the intent to distribute, so it focused only on the greater charge. As with the analysis of the felony murder conviction, the first two elements of OCGA § 16-1-8 (c) are satisfied, so the Court considered the "required evidence test" element.

The proof necessary to establish possession with intent to distribute is (1) possession of a controlled substance and (2) the intent to distribute it. Proving these elements is unnecessary to establish a federal conspiracy to manufacture meth, which requires only proof of an agreement to manufacture meth — not the actual manufacture of meth — between two or more people, and the State possession offense can be committed alone without proof of an agreement with another party. Thus, the evidence required for the federal conspiracy offense was different from the evidence required for the State possession offense.

Likewise, the federal offense of attempt to manufacture and the State possession offense each require proof of facts different from the other. One may possess a controlled substance intending to distribute it without being involved in an attempt to manufacture the drug. And attempting to manufacture a drug does not require proof of possession. Similarly, the possession of a drug with intent to distribute does not require proof of creating a substantial risk of harm during an attempted manufacture of the drug, and the latter offense does not depend on a showing of possession. Therefore, the Court concluded, the State's prosecution for possession with intent to distribute was not barred by OCGA § 16-1-8 (c). Consequently, the Court remanded for resentencing on this unmerged count.

## Cross-Examination; Scope

*Lucas v. State, S17A1911 (2/19/18)*

Appellant was convicted of murder, armed robbery, and other crimes. A. L., an eyewitness, testified at trial and positively identified appellant as the shooter. Appellant contended that the trial court erred when it prohibited him from cross-examining A.L. about his immigration status. At the time of trial, A.L. was not lawfully present in the United States. As a result, appellant argued, A.L. might have been inclined to shade his testimony in favor of the prosecution to avoid deportation. By barring any cross-examination about A.L.'s immigration status, appellant contended, the trial court violated his right to establish the bias of an important witness for the prosecution. The Court disagreed.

The Court noted that an accused is entitled to a reasonable cross-examination on the relevant issue of whether a witness entertained any belief of personal benefit from testifying favorably for the prosecution. The right to inquire into partiality and bias is not without limits. And here, the Court noted, before the trial court disallowed that line of cross-examination, it permitted appellant to examine A.L. outside the presence of the jury. And, after reviewing that testimony, the Court found that the notion that A.L. was influenced in any way with respect to his testimony by his immigration status was simply speculative, and evidence of his immigration status — if relevant at all to his bias and partiality — had very little probative value. Moreover, the trial court did not prohibit appellant from cross-examining A.L. generally about bias or partiality towards the prosecution. Appellant was not prevented from asking, for example, whether A.L. hoped to receive any benefit as a result of his testimony. Only his immigration status was off-limits. Thus, the Court held, under these circumstances, the trial court was within its considerable discretion to disallow cross-examination of A.L. about his immigration status.

Appellant also contends that the trial court also erred when it limited his cross-examination of Sapee, who was appellant's girlfriend at the time of the incident and was driving the vehicle used in the crimes. Sapee was not indicted by the State and was a witness for the prosecution.

The record showed that prior to trial, the State made an oral motion in limine to exclude any mention of a potential sentence that appellant would face if convicted.

Appellant responded, among other things, that he wanted to explore the potential penalties that Sapee would have faced if she had been charged as a party to appellant's crimes. The trial court granted the State's motion in part and denied it in part, allowing appellant "to probe generally into any potential biases, prejudices, or ulterior motives" of a witness, but prohibiting him from "any cross-examination that may call for legal conclusions or addresses sentences specifically."

The Court state that where a State's witness is testifying in exchange for a reduction in prison time, the defendant must be allowed to question the witness about the witness's belief concerning the amount of prison time he is avoiding by testifying against the defendant. But where the State's witness has not been charged with any crime, the trial court may prohibit the defendant from speculating about the punishment that could be imposed upon the witness should the State decide to prosecute him for the criminal conduct he had admitted in his testimony. Here, at the time of trial, Sapee had not been charged with any crimes in connection with victim's death. Nor was there evidence that she had made any deal with the State to testify in exchange for not being charged. Any questions about potential sentencing would be mere speculation, irrelevant to Sapee's credibility or appellant's guilt. Moreover, as with A.L., the trial court did not prohibit appellant from exploring Sapee's potential bias by asking her if she hoped to avoid being indicted in exchange for her testimony. As it happens, the State preemptively questioned Sapee about such potential bias, asking her whether she had been threatened with arrest in connection with the case, whether she had failed to cooperate at any point, and whether anyone from the prosecutor's office had made any threats or promises to her in exchange for her testimony. To each of these questions, Sapee answered in the negative, and appellant had the opportunity to test further these answers on cross-examination. Accordingly, the Court concluded, the trial court did not abuse its discretion when it limited appellant's cross-examination of Sapee.

## Jury Charges; Harmless Error

*Leeks v. State, S17A1585 (2/19/18)*

Appellant was convicted of malice murder and other charges from the robbery and fatal shooting of a convenience store clerk. Appellant's mother, Roberts, and a store employee, Moore, were charged as co-indictees. The evidence showed that appellant was the one who shot the victim.

Appellant contended that the trial court erred in instructing the jury on party to the crime. He argued that that the instruction was improper because the State did not rely upon a party to a crime theory in presenting its case to the jury. The Court noted that the defense was one of mistaken identity, and the State maintained that appellant was the shooter. But appellant cited no authority for the notion that a trial court may instruct on only the particular theories of liability on which the prosecution relied at trial. Indeed, trial courts regularly instruct on lesser included offenses and may do so without either party requesting such an instruction. And here, there was at least slight evidence supporting a theory that appellant was guilty of murder under a party to a crime theory. Appellant was indicted with Roberts and Moore. No witnesses testified that they actually saw him shoot the victim, but there was testimony that he discussed the possibility of robbing the store with Roberts and Moore, as well as testimony that he gathered money from the victim's booth after the shooting and fled with Roberts. Thus, the Court concluded, the party to a crime instruction was not erroneous under the evidence.

Appellant also argued that the trial court erred by instructing the jury that the level of certainty shown by a witness about the witness's identification of an alleged perpetrator was among the factors that the jury might consider in assessing the reliability of the witness's identification. Since appellant made no objection at trial, the Court found that its review was limited to whether the instruction amounted to plain error.

The Court noted that the State did not dispute that the trial court committed a clear or obvious error. Instead, the State argued that any error was harmless and therefore did not amount to plain error. After reviewing the evidence, including the

fact that two eyewitnesses at first identified a different person than appellant in a photo line-up, the Court agreed with the State that appellant could not demonstrate that the outcome of his trial would have been different absent the level of certainty instruction. Thus, the Court concluded, any error in giving the instruction was harmless and therefore not plain error.

## Statements; Miranda

*Norwood v. State, S17A1354 (2/19/18)*

Appellant was convicted of malice murder and other crimes related to the death of her newborn child. The evidence showed that unbeknownst to her family and the father of the child, appellant was 40 weeks pregnant (full term). Appellant was living at her parents' house along with her two sisters, Ginger and Bethany. Appellant apparently gave birth during the early morning hours, stabbed the baby repeatedly and then put the baby, along with the placenta and the umbilical cord, inside a garbage bag. Appellant's sister noted that appellant was bleeding and got appellant to go to the hospital. After, appellant left for the hospital, one of her sisters found the garbage bag and the newborn inside.

Appellant contended that her two statements to the police, made while she was still in the hospital, were not freely and voluntarily made. The record showed that the first interview was conducted by a police sergeant just after 4:00 p.m. and lasted 17 minutes. At that time, appellant provided a general overview of the incident. Appellant was not advised of her *Miranda* rights prior to this interview.

The second interview was almost four hours later. Two detectives went to appellant's hospital room with an arrest warrant. Upon entering the room, they advised appellant she was under arrest and immediately read her the *Miranda* rights. Appellant said she understood her rights and agreed to speak to the detectives without having an attorney present. She then gave a detailed statement.

The Court stated that even assuming that appellant was in custody when the first statement was given, the statements were freely and voluntarily made. An officer's failure to read the *Miranda* warnings to a suspect who is in custody does not mean that the statements received have actually

been coerced, but only that courts will presume the privilege against compulsory self-incrimination has not been intelligently exercised. Indeed, there is no warrant for presuming coercive effect where the suspect's initial inculpatory statement, though technically in violation of *Miranda*, was voluntary, because a suspect who has once responded to unwarned yet noncoercive questioning is not thereby disabled from waiving his rights and confessing after he has been given the requisite *Miranda* warnings. Thus, because the *Miranda* presumption does not necessarily constitute a finding that the statement was coerced, statements obtained in violation of the procedural requirements of *Miranda* may be found otherwise voluntary under due process standards. In order to determine whether the second statement was voluntary, courts are not to presume that the existence of the earlier unwarned statement compelled the defendant to give another one, but instead should assume that ordinarily giving proper *Miranda* warnings removes the effect of any conditions requiring suppression of the unwarned statement.

And here, the Court found, the entire 17 minute exchange of the first interview was calm and civil; there was no evidence that appellant was threatened, coerced, or given a hope of a benefit in exchange for this statement. The second statement was taken almost 4 hours later by a different set of officers. Prior to asking any questions, and without any reference to the first interview, the officers informed appellant that she was under arrest and read the *Miranda* warnings. Thereafter, appellant indicated that she understood her rights and wished to voluntarily waive her rights in order to speak with law enforcement. Thus, the Court found, whatever the reason for the Sgt.'s oversight, the first interview had none of the earmarks of coercion. Nor did the second set of officers exploit the unwarned admission to pressure appellant into waiving her right to remain silent. Accordingly, the Court held, because both statements were voluntarily made, the second statement was properly admitted at trial.

Nevertheless, appellant contended, her statement was inadmissible because it was the product of the "question first" or "two-step" interrogation tactic disapproved of by the United States Supreme Court in *Missouri v. Seibert*, 542 U.S. 600 (124 S.Ct.

2601, 159 LE2d 643) (2004). In deciding whether the officers used the "question first" tactic, the Court stated it must consider the totality of the circumstances including the timing, setting and completeness of the pre-warning interrogation, the continuity of police personnel and the overlapping content of the pre- and post-warning statements. And here, the Court found, here was no evidence that the Sgt. deliberately withheld reading appellant her *Miranda* rights in order to solicit a full confession from appellant, then read her the *Miranda* rights and asked her to repeat the pre-*Miranda* admission. Moreover, based upon the thorough questioning by the detectives, which took place approximately 4 hours after appellant gave her original statement, appellant provided more details and information in her second statement than what was covered in her brief pre-*Miranda* conversation with the Sgt. Consequently, the Court held, the trial court did not abuse its discretion in admitting appellant's second statement at trial. Furthermore, the Court stated, because the second statement was properly admitted, any error that may have occurred by admitting the first statement would be harmless beyond a reasonable doubt, and therefore would not require reversal.

## Habeas Corpus; Retroactivity of Supreme Court Decision

*Kennedy v. Kohnle*, S17A1419 (2/19/18)

Kohnle pled guilty to felony murder in December 2010. In *Alexander v. State*, 297 Ga. 59 (2015), our Supreme Court held that an attorney's failure to counsel his client about parole eligibility may give rise to a claim of ineffective assistance of counsel. In so holding, the Court relied on *Padilla v. Kentucky*, 559 U. S. 356 (130 S.Ct 1473, 176 LE2d 284) (2010). Kohnle's plea was before *Alexander*, but after *Padilla*. In 2014, Kohnle filed a petition for a writ of habeas corpus, alleging that her plea counsel was ineffective because he failed to inform her of the parole eligibility implications of a life sentence. The habeas court granted Kohnle's petition, relying on *Alexander* to conclude that Kohnle's counsel had rendered ineffective assistance. The Warden appealed.

The Court noted that the Warden appealed only the finding of deficient

performance, and did not challenge the finding of prejudice. Moreover, the Warden did not challenge the habeas court's factual determination that counsel did not inform Kohnle that she would be required to serve 30 years in prison before being eligible for parole. The sole question raised by the Warden was whether the habeas court properly applied *Alexander*, a case decided more than four years after Kohnle entered her plea, to find deficient performance. In other words, does *Alexander* apply retroactively to Kohnle's conviction, which became final before *Alexander* was decided.

The Court stated that the answer depends on whether *Alexander* announced a "new rule" or was instead dictated by *Padilla*. A new rule generally applies only to cases that are still on direct review when the new rule is announced. A case announces a new rule if the result was not dictated by precedent existing at the time the defendant's conviction became final. A decision applies to all cases on direct and collateral review if it is merely an old rule applied to new facts. For this reason, "garden-variety" applications of the test in *Strickland v. Washington* for assessing claims of ineffective assistance of counsel do not produce new rules.

The Court noted that in considering the retroactivity of its own decision in *Padilla*, the Supreme Court concluded that *Padilla* was not a mere "garden-variety application[]" of *Strickland*. Instead, the Court considered and decided the threshold question of whether failure to advise on a risk of deportation is categorically removed from the auspices of *Strickland* as a mere collateral consequence of a conviction. *Padilla*'s holding that *Strickland* applied to this particular collateral consequence thus created a new rule. In the same way, the Court found, its decision in *Alexander* — that ineffective assistance claims over failure to advise of another collateral consequence of a guilty plea, parole eligibility, "must be evaluated under the two-prong test set forth in *Strickland*" — created a new rule. Only after the *Alexander* Court made that threshold determination, answering an unsettled question that was hardly a garden-variety application of *Strickland* (or *Padilla*), did the *Alexander* Court proceed to consider whether counsel's failure to advise on parole eligibility constituted deficient performance under *Strickland*. Therefore, the Court

found, the habeas court erred in applying *Alexander* to conclude that Kohnle's counsel performed deficiently in 2010.

Nevertheless, the Court found, because the habeas court assumed that *Alexander* applied and thus granted relief based on Kohnle's claim that her counsel failed to advise her on parole eligibility at all, it did not consider her related claim that her counsel gave her *bad* advice on parole eligibility. Consequently, the Court remanded the case to the habeas court for consideration of this claim.

## Right to Speedy Appeal; DNA Evidence

*De La Cruz v. State*, S17A1887 (2/5/18)

Appellant was convicted of murder. He argued that the twenty-one year delay between his conviction and the hearing on his motion for new trial violated his right to due process. The Court recognized that substantial delays during the criminal appellate process implicate due process rights. Assessment of such claims are made pursuant to the four factor analysis utilized for speedy trial claims set forth in *Barker v. Wingo*.

As to the length of the delay, the 21 years was excessive and weighed against the State. The trial court attributed the reason for the delay to appellant. The Court disagreed. In looking at the 21-year procedural history, the Court found that the record indicated that both parties were at fault for the delay. And, after weighing all of the evidence in the record, this factor counted against the State, though with less weight as the delay did not appear to have been designed to deliberately sabotage appellant's case.

As to the defendant's assertion of the right, the Court agreed with the trial court that appellant failed to assert his appellate rights for much of the 21-year delay. Accordingly, this factor, as the trial court properly found, weighed heavily against appellant.

As to the prejudice prong, the Court found that even assuming that the first three *Barker* factors weighed in favor of appellant, his due process claim nevertheless failed because appellant failed to show that he was prejudiced by the delay. The record supported the trial court's finding that appellant failed to adduce any evidence to show actual prejudice to appellant's ability

to assert his arguments on appeal so that there was a reasonable probability that, but for the delay, the result of this appeal would have been different. Therefore, this factor also did not weigh in favor of appellant. Accordingly, the Court held, while it did not approve of the 21-year delay, the trial court did not abuse its discretion in denying appellant's due process claim.

Almost twenty years after his conviction, appellant filed a motion for post-conviction DNA testing requesting that the victim's fingernail clippings, the hair collected from the victim's body at the scene, and a conduit pipe be tested for "touch DNA," or DNA recovered from skin cells that may be left by a person after touching an item. Following a hearing, the trial court denied the motion. Appellant argued that this was error. The Court disagreed.

Appellant may be entitled to post-conviction DNA testing if he meets all of the statutory requirements listed in OCGA § 5-5-41 (c) (3), (4) and (7). Here, the Court found, the trial court properly denied appellant's motion because he failed to meet OCGA § 5-5-41 (c) (3) (D). At trial, the jury was informed that: all of the blood collected and tested from the crime scene was traced back to the victim; the fingerprint found on the conduit pipe did not match appellant's fingerprint; and the hair obtained from the scene was determined to be unsuitable for comparison. Because the jury was informed that there was no physical evidence linking appellant to the crime scene, and in light of all of the evidence presented at trial, the trial court properly found that appellant failed to show a reasonable probability that he would have been acquitted had the DNA results been available at the time of trial. Consequently, the trial court did not err in denying appellant's post-conviction motion for DNA testing.