Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 28, 2011

State Prosecution Support Staff

Stan Gunter
Executive Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Resource Coordinator

Gary Bergman
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Todd Hayes
Traffic Safety Resource Prosecutor

THIS WEEK:

Discretionary Appeals; Ineffective Assistance of Counsel

Gable v. State, S11A1070 (10/17/11)

After appellant's conviction was affirmed on appeal, he filed an extraordinary motion for new trial. Counsel was appointed, and the trial court subsequently denied the motion. Appellant's counsel then filed a direct appeal from the order denying the motion. The Court of Appeals dismissed the direct appeal because under OCGA § 5-6-35 (a) (7), because the proper procedure was to file an application for discretionary appeal. Appellant then filed in the trial court a motion for extension of time to file a discretionary appeal which the trial court granted. The Court of Appeals dismissed this application as untimely and the Supreme Court granted certiorari to consider whether a trial court has the authority to grant an out-of-time discretionary appeal in a criminal case as a remedy for counsel's failure to timely file a discretionary application.

The Court held that unlike the statutory deadline for filing a notice of direct appeal, which trial and appellate courts are authorized to extend once for up to 30 days (so long as the extension request is filed within the original 30 days), the discretionary appeal statute does not authorize any extensions of its 30-day deadline. Accordingly, the filing of a discretionary application to appeal within the statutory 30-day deadline is required to confer jurisdiction on an appellate court. Courts have no authority to create equitable exceptions to jurisdictional requirements imposed by statute. Instead, Georgia courts may excuse compliance with a statutory requirement for appeal only where necessary to avoid or remedy a constitutional violation concerning an appeal, e.g., ineffective assistance of counsel.

Appellant contended that he was he was entitled, due to the effective assistance of counsel, to pursue his discretionary appeal and that the violation of this constitutional right required the granting of an out-of-time appeal. The Court disagreed because there is no constitutional right to counsel, much less the effective assistance of counsel, in filing or litigating a post-conviction extraordinary motion for new trial or a discretionary application to appeal the ruling on such a motion. Therefore, the trial court had no authority to grant appellant an out-of-time discretionary application from the denial of his extraordinary motion for new trial, and the Court of Appeals properly dismissed appellant's application as untimely.

Cruelty to Children; Change of Venue

Walden v. State, S11A0722 (10/17/11)

Appellant was convicted of malice murder of her husband, concealing the death of another, and two counts of cruelty to children in the second degree. Appellant also contended that the evidence was insufficient to convict her of cruelty to children in the second degree. Under OCGA § 16-5-70 (c), "[a]ny person commits the offense of cruelty to children in the second degree when such person with criminal negligence causes a child under the age of 18 cruel or excessive physical or mental pain." The evidence showed that appellant shot her husband in the head and then hid his body in the house and continued to live in the house for almost three days with her two children, ages 3 and 7. Eventually, the victim's family grew concerned and the police were called. When the police arrive at appellant's house to investigate, the stench from the decomposing body was overwhelming.

Appellant contended that the evidence on the cruelty to children convictions was insufficient. The indictment alleged that appellant with criminal negligence caused the children, who were under the age of 18, excessive mental pain by allowing the corpse of the victim, who was one child's father and the other's stepfather, to remain in the children's residence in their presence for an excessive period of time. Appellant argued that there was no testimony that the children witnessed the victim's death, knew of the death, saw the body, or were even bothered by the odor. Appellant also pointed to testimony indicating that the older child did not know what was going on. However, the Court found, several witnesses testified that the stench was pervasive and was strong enough to cause experienced officers to vomit. Although evidence of an unsanitary condition is not enough by itself to prove the malice element of cruelty to children in the first degree, cruelty to children certainly may be committed by keeping a child in an unsanitary condition if the basic elements of the offense are shown. Here, the jury was authorized to conclude that the presence of an unembalmed corpse in the minor children's home for nearly three days was a criminally negligent act constituting an unsanitary condition and to infer from the reaction of the police officers that the resulting stench caused the children excessive mental pain. Neither an incomplete understanding by the children nor an absence of physical symptoms, such as vomiting, would preclude the internal experience of excessive mental pain. Accordingly the evidence was sufficient to support the cruelty to children convictions. (Justices Hunstein and Benham dissented).

Appellant also argued that the trial court erred in denying her motion for a change of venue. The record showed that during voir dire, appellant made an oral motion for a change in venue based on the small size of the community and on the fact that nine of the 47 prospective jurors were excused for cause because they had already formed an opinion and that another 24 had heard about the case. The Court stated that in a motion for a change of venue in a non-death penalty case, the defendant must show (1) that the setting of the trial was inherently prejudicial or (2) that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. As for the first showing, even in cases of widespread pretrial publicity, situations where such publicity has rendered a trial setting inherently prejudicial are extremely rare. The record must establish that the publicity contained information that was unduly extensive, factually incorrect, inflammatory or reflective of an atmosphere of hostility.

The Court found that appellant made no such showing. First, the setting was not shown to be inherently prejudicial. The three newspaper articles on which appellant relied were not in the record. Moreover, they were all published more than a year before the trial. And, appellant's assertion regarding the small size of the community, standing alone, was not a sufficient basis for a change of venue.

The second test involves review of the voir dire examination of potential jurors. As to actual prejudice, the question is not the number of jurors who had heard about the case; rather, the question is whether those jurors who had heard about the case could lay aside their opinions and render a verdict based on the evidence. Here, the Court noted, voir dire was not transcribed. Therefore, the Court assumed that the jurors who were not excused for cause did not have such fixed opinions that they could not be impartial judges of appellant's guilt. Therefore, the Court concluded, the trial court did not abuse its discretion in denying the motion for a change of venue. Moreover, the mere fact that 21 percent of prospective jurors were excused for cause because they already had an opinion that they were unable to lay aside was not indicative of such prejudice as would mandate a change in venue.

Aggravated Battery; Merger

Powell v. State, S11A1842 (10/17/11)

Appellant was convicted of malice murder, felony murder and other crimes, including aggravated battery. Appellant contended that the evidence was insufficient to support his convictions. The Court disagreed with the exception of the aggravated battery count. The evidence showed that the victim's head and face were disfigured by muriatic acid having been poured on her. In order to constitute aggravated battery, the bodily harm to the victim must occur before death. There was no evidence presented at trial from which the jury could conclude that the victim was not dead at the time the muriatic acid was poured on her. Accordingly, the Court reversed the conviction for aggravated battery.

The Court also noted that the trial court "merged" the malice murder conviction into the felony murder conviction and sentenced appellant to life imprisonment for felony murder. However, the Court stated, when a jury returns guilty verdicts on both felony and malice murder charges in connection with the death of one person, it is the felony murder conviction, not the malice murder conviction that is simply surplusage and stands vacated by operation of law. Nevertheless, citing *Williams v. State*, 270 Ga. 125 (4) (1998), appellant suffered no harm from the trial court's action in vacating the malice murder conviction and retaining the felony murder conviction since the sentence imposed, life imprisonment, is appropriate for both crimes.

Jury Charges; Accident

Sears v. State, S11A1194 (10/17/11)

Appellant was convicted of felony murder in connection with the death of a 16-month-old girl. Appellant argued that the evidence was insufficient to demonstrate that he acted with malice, as required to support a felony murder conviction based on first-degree cruelty to children or aggravated battery. The evidence showed that the victim died from head trauma —a "very severe brain injury" of the

type normally associated with a car wreck or a fall of at least three stories. The Court, after review of the evidence, found the evidence sufficient to support his conviction.

Nevertheless, appellant argued the trial court erred in refusing his request to give the jury the pattern instruction on the defense of accident. Under OCGA § 16-2-2, a "person shall not be guilty of a crime committed by misfortune or accident where it satisfactorily appears there was no criminal scheme or undertaking, intention, or criminal negligence." Appellant argued that his statements, claiming that he found the victim unresponsive and then shook and hit her in an innocent effort to revive her, provided the evidentiary support for an accident instruction. The Court stated that assuming without deciding that the evidence supported giving a specific instruction on accident, which did not appear to have been appellant's sole defense, the trial court's decision not to do so did not require reversal under the circumstances presented. Here, the jury was properly and fully instructed that the State had the burden of proving beyond a reasonable doubt that appellant acted with the requisite malicious intent to commit each of the crimes charged. The jury's conclusion that appellant acted with malice thus necessarily meant that it would have rejected any accident defense, which was premised on the claim that he acted without any criminal intent. (Justices Benham, Hunstein and Melton dissented).

Appeals; Sentencing

Pierce v. State, S11A1232 (10/17/11)

Appellant was indicted in 1999 for two murders and other offenses. The State sought the death penalty. In 2003, appellant pleaded guilty to the two murders and other crimes and was sentenced to consecutive sentences of life without parole and consecutive terms of years for other offenses. In 2007, appellant filed a motion to vacate a void and illegal sentence and requested appointment of counsel. In 2008, he filed a motion for out-of-time appeal which was denied in February, 2008. In January of 2010, he moved to set aside the February 2008 order pursuant to *Cambron v. Canal Ins. Co.*, 246 Ga. 147, 148-149 (1) (1980). The trial court denied all his motions and appellant appealed.

Appellant argued that the trial court erred in failing to appoint him counsel to prosecute the motions for out-of-time appeal and to vacate a void and illegal sentence. The Court noted that a final decision refusing to appoint post-conviction counsel generally is itself directly appealable. However, because a motion for an out-of-time appeal cannot be construed as part of a criminal defendant's first appeal of right, appellant was not entitled to the assistance of appointed counsel.

Appellant also contended that the trial court erred in denying the motion to set aside the February 2008 order denying an out-of-time appeal. Under *Cambron*, when notice of the entry of an appealable order is not given, the losing party should file a motion to set aside, and the trial court should grant the motion and re-enter the judgment, whereupon the 30-day appeal period would begin to run again. The trial court is to take such action upon a finding that notice was not provided as required by OCGA § 15-6-21 (c). To implement the procedure set out in *Cambron*, the trial court must first make a finding regarding whether the duty imposed by OCGA § 15-6-21 (c) was met. Here, the order denying the motion to set aside made no findings of fact whatsoever. Furthermore, in his unrefuted and verified motion to set aside, appellant stated that he never received the trial court's February 2008 order until January 14, 2010, that he had made numerous written inquiries and several telephone calls concerning the status of the motion for out-of-time appeal, and that on December 29, 2009 he filed a motion for a ruling thereon, a copy of which the Court noted, was in the record. Therefore, because the Court was unable to determine whether the trial court's denial of the motion to set aside was proper under *Cambron*, the trial court's order denying the motion to set aside and re-enter order was vacated, and the case remanded to the trial court with direction that it make the necessary findings under *Cambron*.

Appellant finally contended that the trial court erred in denying his motion to vacate a void and illegal sentence. Specifically, he argued, in sentencing him to life imprisonment without the possibility of parole, the trial court violated former OCGA § 17-10-32.1 by failing to make a specific, express finding of a statutory aggravating circumstance beyond a reasonable doubt. The Court agreed. Prior to its repeal in 2009, OCGA § 17-10-32.1 (b) provided in relevant part that, in cases where notice of intent to seek the death penalty has been given and the defendant enters a plea of guilty, the judge may sentence the defendant to life without parole only if the judge finds beyond a reasonable doubt the existence of at least one statutory aggravating circumstance as provided in Code Section 17-10-30. Accordingly, because the crimes were committed in 1999 while OCGA § 17-10-32.1 was in effect and the court imposed sentences of life without parole without contemporaneously specifying any statutory aggravating circumstance beyond a reasonable doubt, the sentences were void and must be vacated. On remand, however, appellant can be resentenced to life without parole if, at the time of resentencing, the judge complies with the requirements of OCGA § 17-10-32.1.

Confrontation Clause; Crawford

Miller v. State, S11A0752; S11A0914 (10/17/11)

Appellants, Tonya and Jabaris (mother and son) were convicted of malice murder of Tonya's roommate, Miranda. The evidence showed that Tonya and Miranda lived in Florida, although the murder occurred in Georgia. At trial, a Florida trial court judge was allowed to testify, over objection by both appellants, to the contents of three petitions for temporary protective injunctions that were filed in the Florida court in which he presided. The first two petitions were filed by Miranda in May 2004 and sought protective injunctions against Tonya. The third petition was filed by Tonya in June 2004 and sought an injunction against Miranda. These included Miranda's claims that Tonya "threatens to kill me, threatens to stab me, beat me, [and] I'm in fear, great fear of my life." Miranda also alleged that Tonya had "broken into [Miranda's apartment] through back sliding glass doors," that she "came at [her] striking [her] in the back," and that Tonya is known to possess "knives, swords, guns, five stars."

In *Crawford v. Washington,* 541 U. S. 36 (2004), the US Supreme Court declared that statements which are testimonial in nature and made by an unavailable declarant are inadmissible in criminal proceedings against a defendant who has had no prior opportunity to cross-examine that declarant. *Crawford* defined testimony as typically a solemn declaration or affirmation made for the purpose of establishing or proving some fact. The Court

identified a core class of testimonial statements, to include ex parte in-court testimony or its functional equivalent —that is, material such as affidavits, custodial examinations, prior testimony that the defendant was unable to cross-examine, or similar pretrial statements that declarants would reasonably expect to be used prosecutorially. Here, Miranda's verified petitions were read into evidence by the Florida judge to show the violent history between Tonya and Miranda, with the intention of establishing or proving past events potentially relevant to later criminal prosecution. Thus, the sworn statements were testimonial in nature. Because Miranda was an unavailable declarant, and because Tonya had no opportunity to cross-examine her, the trial court violated Tonya's Sixth Amendment right to confront the witnesses against her by allowing the statements to be read into evidence.

Moreover, the Court found, the violation was not harmless. The contents of the sworn affidavits supporting Miranda's petitions were similar to other properly admitted evidence —Miranda was sufficiently afraid of Tonya to seek a protective injunction, and Miranda's relationship with Tonya had been violent at times. However, the detail contained in the affidavits, the lengthy statements read to the jury by an officer of the court, and the fact that they were written by Miranda herself and not merely attributed to her, made these statements highly prejudicial and of a different grade than the properly admitted evidence. Thus, the contents of the affidavits were not merely cumulative of other sufficient evidence. Nor could the Court characterize the non-offending evidence against Tonya as overwhelming or so compelling as say that the Florida judge's testimony did not contribute to Tonya's verdict. Therefore, the confrontation clause violation was not harmless as to Tonya and she was entitled to a new trial.

However, the same could not be said of her son, Jabaris. The improperly admitted testimony referred only to Tonya and did not implicate Jabaris. Furthermore, the evidence of Jabaris's direct involvement as a principle to the crimes was overwhelming, including admissions of his own participation to the police and to his cousin, along with extensive physical evidence tying him to the crimes. Under the circumstances, the Court found no reasonable possibility that the error contributed to the guilty verdicts against him. Accordingly, the Court held that admission of this testimony was harmless beyond a reasonable doubt as to him.

Res Gestae; Crawford

Bonilla v. State, S11A0936 (10/17/11)

Appellant was convicted of murder. The evidence showed that he stabbed his victim, who upon being stabbed, exclaimed, "He got me!" Appellant contended that the evidence was inadmissible as a dying declaration, as res gestae and was a violation of his confrontation rights under *Crawford v. Washington*, 541 U. S. 36 (2004). The Court found that it need not discuss whether the statement was a dying declaration because it was a declaration accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought and therefore, admissible in evidence as a part of the res gestae. Thus, the Court stated, "He got me" bore two hallmarks of such a declaration, as the victim made the statement while the events were actually happening and before he had time to deliberate.

The Court also held that the admission of the statement did not violate *Crawford*. The victim's statement was not made to an investigating police officer or even a 911 operator, but informally to bystanders as events were actually happening and just after he had suffered a serious stabbing. He was telling the bystanders what had occurred and seeking help, not making a statement in contemplation of its use at a later trial. Thus, the victim's statement was not testimonial, and the Confrontation Clause did not prohibit the introduction of the witness's testimony recounting it.

Search & Seizure; Medical Records

Bowling v. State, S11A1014 (10/17/11)

Appellant was convicted of felony murder and aggravated assault. He contended that the trial court erred in denying his motion to suppress the medical records obtained from the emergency room on the night that he killed the victim. The records were obtained pursuant to a search warrant. Appellant argued that the privacy guarantees inherent in the Fourth Amendment to the U.S. Constitution and Art. I, Sec. I, Para. XIII of the Georgia Constitution prohibited the search and seizure of his personal medical records, even pursuant to a valid search warrant. The Court disagreed. The Court found that his attempt to establish a reasonable expectation of privacy in his medical records under the particular circumstances of this case foundered by virtue of the fact that he invited two law enforcement officers into the room where he was being treated and appellant cannot claim an expectation of privacy in the medical records to the extent that they contain information he disclosed to medical personnel or they disclosed to him in those two officers' presence.

Appellant argued, nevertheless, that disclosure of personal medical records pursuant to a search warrant is contrary to contemporary standards of privacy under the Health Insurance Portability and Accountability Act of 1996 ("HIPAA") and the HIPAA Privacy Rule. But, the Court found, appellant failed to acknowledge that the Privacy Rule authorizes disclosure of protected health information without notice, consent, or opportunity to object "[i]n compliance with and as limited by the relevant requirements of: (A) A . . . court-ordered warrant." 45 CFR § 164.512 (f) (1) (ii) (A). Although appellant also suggested that 42 USC § 290dd-2 and its implementing regulations establish a standard for law enforcement to obtain private medical records, the Court found that in fact, 42 U.S.C. § 290dd-2 designates as confidential and limits disclosure only of records: "of the identity, diagnosis, prognosis, or treatment of any patient which are maintained in connection with the performance of any program or activity relating to substance abuse education, prevention, training, treatment, rehabilitation, or research, which is conducted, regulated, or directly or indirectly assisted by any department or agency of the United States." Even assuming the applicability of 42 USC § 290dd-2 and regulations promulgated thereunder, a court is authorized to order disclosure of confidential communications on the ground that "[t]he disclosure is necessary in connection with investigation or prosecution of an extremely serious crime . . . including homicide." 42 CFR § 2.63 (a) (2). And, the Court found, appellant's reliance on Georgia statutes was equally unavailing. While OCGA § 24-9-40 (a) establishes the confidentiality of medical information concerning a patient, it also authorizes release of information "on appropriate court order."

Appellant also asserted that his medical records enjoy immunity from disclosure un-

der *Warden v. Hayden*, 387 U.S. 294 (1967). The Court disagreed again. As it explained in *Brogdon v. State*, 287 Ga. 528, 532-533 n.7 (2), in *Hayden*, the U.S. Supreme Court repudiated the "mere evidence" rule, under which items of evidential value only could not be the subject of a search warrant, but left open the possibility that an individual's private papers might have protection under the Fifth Amendment. Since *Hayden*, the Supreme Court has continued to put distance between itself and the broad language used in one of its prior opinions, *Boyd v. United States*, 116 U.S. 616 (1886), regarding the Fifth Amendment protection afforded to the contents of private documents. Thus, the Court stated, "We need not decide in this case whether the concept that the Fifth Amendment shields the contents of private papers has any remaining viability since the medical records at issue, which were neither owned nor possessed by [appellant], are not [appellant]'s private papers."

Finally, appellant argued that his medical records should receive Fifth Amendment protection since they reflect information he was "compelled" to disclose to medical personnel and the results of blood and urine tests to which he was "compelled" to consent to obtain appropriate medical treatment. The Court stated that since neither the taking nor the chemical analysis of appellant's blood and urine compelled him to provide testimony or evidence of a communicative nature, the results of the analyses performed on his blood and urine were not within the scope of the Self-Incrimination Clause of the Fifth Amendment. Further, because appellant did not assert that he divulged information to medical personnel or consented to tests as a result of coercive police activity, he had no basis for asserting a violation of his Fifth Amendment privilege against self-incrimination.

Search & Seizure

Nix v. State, A11A1577 (10/13/11)

Appellant was convicted of possession of over an ounce of marijuana. He argued that the trial court erred in denying his motion to suppress. The evidence showed that appellant was stopped for driving with an inoperative headlight. Appellant provided the officer with his driver's license, and the officer determined that the license was valid and that appellant had no outstanding arrest warrants. The officer told appellant that he was not going to cite him, but only give him a verbal warning. Nevertheless, while the officer was talking to appellant, he noticed that appellant was very nervous. Because the officer's experience indicated that this might suggest appellant was concealing something, he requested consent to search the vehicle. Appellant consented and the marijuana was located in the vehicle. Between four and seven minutes had elapsed from the time the officer initiated the stop to the time he asked for consent to search. The officer could not recall when during this period he returned appellant's license to him.

Appellant contended that the purpose of the traffic stop had been fulfilled when the officer gave him a verbal warning and instructed him to repair his headlight. Thus, he argued, the traffic stop had already ended when the officer asked for consent to search the car. The Court, however, found that the officer's testimony reflected that he sought consent to search immediately after issuing the verbal warning. Where an officer requests consent to search contemporaneously, or nearly so, with the moment the purpose of a traffic stop is fulfilled, a trial court is authorized to conclude that the request did not unreasonably prolong the detention. Here, the evidence showed that appellant was legally detained when the officer requested consent to search. Thus, the Court found no error in the trial court's denial of appellant's motion to suppress the evidence found during the search.

Jury Charges

Williams v. State, A11A1108 (10/13/11)

Appellant was convicted of armed robbery of a bank and other offenses. He contended that the trial court erred in giving a party to the crime jury instruction. The evidence showed that appellant, described as a man wearing a mask, black gloves, safety goggles, overalls, a jacket, and a blue fisherman's hat, walked into a bank and committed armed robbery. None of the victims were able to identify him as the masked man who robbed the bank. His defense was that he was not the one who committed the robbery. Particularly, he pointed out that he was not apprehended wearing clothes that matched the description given by the victims and that several witnesses saw the suspect get into a yellow Cobalt vehicle. However, other witnesses saw the suspect get into a green Cadillac. Appellant subsequently fled from the police in his green Cadillac while in possession of the proceeds of the robbery and he was subsequently apprehended in the vehicle with those proceeds.

The Court held that to authorize a jury instruction on a subject, there need only be produced at trial slight evidence supporting the theory of the charge. Whether the evidence presented is sufficient to authorize the giving of a charge is a question of law. Even slight evidence will justify a charge although the great preponderance of evidence tends to show the nonexistence of such fact. Here, several witnesses claimed to have seen the robber leave in a yellow Cobalt. Other witnesses said the perpetrator got into a green Cadillac. Given the evidence, it was possible that appellant acted with an accomplice who fled the scene in the yellow Cobalt, while appellant took possession of the robbery proceeds and fled the scene in the green Cadillac. Thus, there was slight evidence to justify the charge as to parties to the crime as two or more persons could have been involved.

Jury Charges; Burden of Proof

Tidwell v. State, A11A1147 (10/13/11)

Appellant was convicted of terroristic threats and aggravated battery. The evidence showed that appellant attacked the victim, his girlfriend, when she asked appellant if she could lower the air conditioning. Appellant first argued that the trial court erroneously instructed the jury as to the crime of terroristic threats. The record showed that the trial court twice charged the jury that "[a] person commits the offense of terroristic threats when that person threatens to commit any crime of violence with the purpose of terrorizing another or in reckless disregard of the risk of causing such terror." The Court stated that the charge was consistent with the statute, but the indictment specified only that appellant threatened to commit a crime of violence "with the intent to terrorize." Therefore, appellant argued, the jury could have found him guilty of threatening to commit a crime of violence with only a reckless disregard of the risk of causing terror, and not with the intent to cause terror, as alleged in the indictment.

The Court disagreed. Generally, the giving of a jury instruction which deviates from the indictment violates due process where

there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed to limit its consideration to the manner specified in the indictment. Here, the evidence showed that appellant threatened to kill the victim, after which "he continued to pound [her] in the face." When asked for an explanation of his behavior, appellant informed the victim that she "was going to realize who was the man of that house" and that she "[didn't] know when to shut [her] mouth." Appellant's conduct, as described by the victim, was consistent with an intent to terrorize, but not with a reckless disregard of a "risk" of causing terror. Thus, the evidence presented at trial supported two alternative theories: either that appellant committed no offense at all, or that he committed the crime of terroristic threats as alleged in the indictment by, with the intent to terrorize, threatening to commit a crime of violence against the victim. The charge, although not consistent with the indictment, did not reasonably present the jury with an alternate basis for finding appellant guilty of terroristic threats and, therefore, did not require the Court reverse the conviction.

Appellant also contended that, notwithstanding its preliminary instructions, the trial court erred in failing to instruct the jury following closing arguments on the presumption of innocence, reasonable doubt, and the burden of proof. Here, the trial court instructed the jury on the presumption of innocence, reasonable doubt, and the burden of proof before opening arguments. The trial court gave additional instructions following closing arguments, and in doing so, it again instructed the jury that the burden "never shifts to the defendant to prove their innocence," but it did not instruct the jury again as to the presumption of innocence and the requirement that the State prove each element of the crime beyond a reasonable doubt. Rather, the trial judge instructed the jury to "[k]eep in mind the instructions [he] gave [them] at the beginning of the case."

The Court agreed that the trial court erred, but concluded that it was highly probable that the error did not contribute to the verdict. The trial court charged the jury on the principles of reasonable doubt and the presumption of innocence in the preliminary charge, referred the jury back to those instructions in its final charge, and it did so in the context of a one-day trial. Given the strength of the evidence of appellant's guilt, and given that the jury deliberated the same day that they were given the instructions as to the presumption of innocence and reasonable doubt, the Court found that the trial court's error in failing to comply with OCGA § 5-5-24 (b) was harmless.

Due Process; Speedy Trial

Hill v. State, A11A1880 (10/12/11)

Appellant was charged with distribution of methamphetamine. The offense occurred in October of 2006. He was indicted in August of 2010. He contended that the delay between the time of the alleged offense and the time of his indictment violated his due process rights. The Court held that to prove such a violation a defendant must prove (1) that the delay caused actual prejudice to his defense, and (2) that the delay was the result of deliberate prosecutorial action to give the State a tactical advantage. If both elements are not shown, a defendant cannot prevail on a due process claim. Here, appellant contended that he was prejudiced by the pre-indictment delay because his father, who was a potential defense witness, passed away during that period. However, the Court found, the possibility of prejudice, including prejudice due to an inaccessible witness, is inherent in any delay, and the applicable statute of limitation is the primary guarantee against bringing overly stale criminal charges. Moreover, appellant failed to demonstrate actual prejudice under the circumstances because he failed to detail the anticipated testimony of his father, failed to provide any information about the anticipated testimony of the State's witnesses, or explain how the testimony of his father would have conflicted with that of any of the State's witnesses. Moreover, since appellant failed to satisfy the prejudice prong of the test, the Court did not have to reach the issue of whether the delay was the result of deliberate prosecutorial action to give the State a tactical advantage.

Appellant also alleged a violation of his right to a constitutional speedy trial. The Court stated that only the pretrial delay which occurs subsequent to arrest or indictment is examined for a violation of the right to a speedy trial guaranteed by the Sixth Amendment. Here, appellant's right to a speedy trial attached on August 3, 2010, the date of his indictment for the offense in this case. His trial was specially set to commence five months from that date, and the trial court ruled on his motion to dismiss less than eight months from that date. Appellant failed to show any evidence to support a finding of presumptive prejudicial delay, as required for a speedy trial violation under the analysis set forth in *Barker v. Wingo*, 407 U. S. 514, 530-531 (IV) (1972). Therefore, trial court did not err in denying his motion to dismiss on speedy trial grounds.

Rule of Lenity

Rouen v. State, A11A1337 (10/12/11)

Appellant was convicted of homicide by vehicle in the first degree (based on the predicate offense of felony hit-and-run) and of felony hit-and-run. The trial court merged the felony hit-and-run count into the vehicular homicide count and sentenced appellant to ten years in prison on the vehicular homicide count. Appellant argued that the trial court erred in failing to apply the rule of lenity, which he contended would have allowed him to be sentenced for the lesser offense of felony hit-and-run under OCGA § 40-6-270 (b), rather than for homicide by vehicle in the first degree (hit-and-run) under OCGA § 40-6-393 (b).

The Court held that appellant's argument failed for two reasons. First, the rule of lenity does not apply to convictions for two felony offenses. Since the offenses at issue here are both classified as felonies, the rule of lenity was inapplicable in this case. Second, the essential requirement of the rule of lenity is that both crimes could be proved with the same evidence. The fact that a single act may violate more than one penal statute does not implicate the rule of lenity. Here, the Court found, the two statutes upon which appellant was convicted do not define the same offense. Under the felony hit-and-run statute, the State is required only to prove that the defendant was "involved in an accident" and failed to render aid as described in the statute; but under the statute setting forth vehicular homicide in the first degree (hit-and-run), the State must prove that the motorist caused the accident. The element of causation is essential to prove first degree vehicular homicide (hit-and-run), but is not necessary to prove felony hit-and-run. Therefore, the trial court correctly merged the lesser offense, felony hit-and-run, into the offense of first degree vehicular homicide (hit-and-run) and properly sentenced appellant on the latter offense.