

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 16, 2016

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THIS WEEK:

- **Impeachment; Prosecutorial Misconduct**
- **Speedy Trials; *Barker v. Wingo***
- **Out-of-time Appeals; Merger**
- **DUI; Voluntary Consent**
- **Bond Conditions; Double Jeopardy**
- **Right to Public Trial; Motions to Close Courtroom**
- **Juror Misconduct**

Impeachment; Prosecutorial Misconduct

Parker v. State, A16A1252 (11/1/16)

Appellant was convicted of two counts of armed robbery, two counts of aggravated assault, and one count each of aggravated battery and possession of a firearm during the commission of a felony. Appellant contended that the trial court erred when it ruled that appellant opened the door to evidence that he had a previous charge for aggravated assault after he testified that he “had never been in no situation like this.” Appellant argued that the evidence was improper character evidence and that the State improperly impeached him pursuant to O.C.G.A. § 24-6-609 because he was only convicted of misdemeanors. The Court disagreed.

The Court found that appellant’s statement that he had never “been in no situation like this,” could have been interpreted to refer to a charge of aggravated assault, or even more broadly, facing criminal charges. And it was within the trial court’s discretion to determine whether the jury might have interpreted his testimony in this manner. Thus, as the trial court ruled, the State was therefore allowed,

pursuant to O.C.G.A. § 24-6-621, to disprove the fact appellant testified to by impeaching him with his prior charge for aggravated assault, even though that charge resulted in a conviction on a lesser misdemeanor offense.

Appellant also argued that trial counsel was ineffective in failing to object to the State’s closing argument. During closing, the prosecutor argued: “He’s not new to this rodeo. He’s been arrested before, for the same crime, aggravated assault. And not only has he been arrested before, he’s been convicted of the violent crime of family violence battery and cruelty to children in the third degree, not one count but two counts. And in fact he had just been convicted, just a month earlier, on March 22nd of 2011, 30 days prior to when he committed this offense. Do you believe that somebody who’s been convicted of those crimes is not capable of committing this offense? Is not capable of holding somebody, not one but two people up at gunpoint? Do you think that somebody who’s committed that prior offense is not capable of talking to his friends and planning a robbery in an apartment building on two unknowing victims, two strangers late at night, when they hope they can get away with it because nobody else is around? No. Folks, this is not his first rodeo. He is not the innocent boy that he wants you to believe he is.”

The Court stated that evidence of appellant’s previous charge and conviction was admitted to attack his credibility by disproving facts to which he testified. This evidence was not admitted as evidence of other acts pursuant to O.C.G.A. § 24-4-404(b). Even if it had been admitted for such a purpose, it could not be used to show his propensity to commit a crime. The State therefore could not

argue that this evidence showed that appellant had a propensity to commit aggravated assault here, and trial counsel was ineffective in failing to object to this portion of the prosecutor's closing statements.

Nevertheless, the Court noted, while a defendant fails to satisfy the second prong of *Strickland* where the evidence is overwhelming, strong evidence of guilt can also support the conclusion that no reasonable probability of a different outcome exists. And therefore, the Court held, appellant's ineffective assistance claim failed because he failed to show a reasonable probability that the outcome of the trial would have been different had counsel objected to the State's closing argument.

Speedy Trials; Barker v. Wingo

State v. Bonawitz, A16A1153 (11/2/16)

Bonawitz was charged with burglary. The trial court granted his motion for discharge and acquittal for a violation of his constitutional right to a speedy trial. The State appealed.

The record showed that Bonawitz was booked into prison on an aggravated assault charge on September 20, 2012. While in custody on that charge, it was determined that there was DNA evidence allegedly implicating him in an unrelated burglary that had occurred in 2006. On January 29, 2013, Bonawitz was indicted for that burglary, and a grand jury arrest warrant was filed for Bonawitz on February 1, 2013. Upon learning of the burglary charge on June 10, 2014, Bonawitz filed a pro se motion for a production order, and filed numerous motions, demands, and letters with the superior court, indicating his desire to be brought to trial on that charge. In September 2015, Jaaziel Fortilla, who had previously pled guilty to the 2006 home invasion underlying the burglary charge that had been brought against Bonawitz, died before Bonawitz was brought to trial. On September 18, 2015, Bonawitz filed the motion for discharge and acquittal of the burglary charge based on a violation of his constitutional right to a speedy trial; he did not assert a violation of his statutory right to a speedy trial.

The trial court found that the length of delay was in excess of two-and-a-half years from the date of indictment. The trial court held, and the State conceded, that this delay was presumptively prejudicial. Therefore, the Court proceeded to the four-factor balancing test of *Barker v. Wingo*.

As to the length of the delay, the Court found that a delay of almost 27 months in a noncapital murder case is unusually long. And thus, the trial court properly weighed this factor against the State. As to the reason for the delay, the Court found that the record showed that the pretrial delay was partially attributable to Bonawitz, in light of his efforts to secure a better plea agreement and his attorney's unavailability during some of the plea negotiations. Nevertheless, a large part of the delay was attributable to the government. The State offered no explanation for the delay between the indictment or the arraignment, and the trial court noted that there was no explanation as to why Bonawitz was not placed on calendar call on August 5, 2015, for the trial week of September 21, 2015. Bonawitz's numerous filings of letters and speedy trial demands also weighed against a finding that Bonawitz engineered the delay. Finally, the State provided no undisputed evidence that Bonawitz engineered the delay by announcing a plea at calendar call. The trial court inferred that he was put on the call by mistake, and the Court found that it must defer to the trial court's factual finding in analyzing a defendant's argument that he was denied his right to a speedy trial. Thus, the Court found, there was no error in the trial court's determinations as to the cause of the delay.

As to the third factor, the assertion of the right to a speedy trial, the trial court weighed this factor against the State, noting that Bonawitz "first put the State on notice that he wanted his case to move forward in June 2014, when he asked to be brought in to handle his case." The State, disregarding the pro se motion for production order in June 2014, argued that the trial court committed error in failing to consider the two year delay between the indictment and Bonawitz's first speedy trial demand, which was made on February 21, 2015. But, the Court found, in order to invoke the right, the accused need not file a formal motion. The relevant question for purposes of the third factor is whether the accused has asserted the right to a speedy trial in due course. Thus, the trial court's finding that Bonawitz put the State on notice in June 2014 was not error and authorized the court to weigh this factor against the State.

Finally, as to prejudice, the trial court found that "[t]he original investigation into this case led to the arrest and conviction

of [Fortilla]. That individual died in early September 2015, causing [Bonawitz] prejudice in his case because of the loss of his testimony." But, the State argued, the trial court erred in making the assumption that the witness would have been a favorable witness to Bonawitz and that the court ignored the DNA evidence that would have lessened the importance of the witness' testimony.

The Court disagreed, Bonawitz showed prejudice because the deceased witness took sole responsibility for the crime and the death of a critical defense witness or destruction of tangible evidence highly favorable to the defendant would figure prominently in any evaluation of the fourth factor, and it would weigh heavily in favor of finding a violation of the defendant's constitutional right to a speedy trial. If witnesses die or disappear during a delay, the prejudice is obvious. Thus, the trial court was authorized to find that Bonawitz suffered prejudice to his defense.

Having weighed all the factors against the State, the Court concluded that the trial court did not abuse its discretion in its balancing of the factors and finding that Bonawitz was denied his constitutional right to a speedy trial.

Out-of-time Appeals; Merger

Reid v. State, A16A1380 (11/3/16)

Appellant pled guilty to possession with intent to distribute cocaine, two counts of aggravated assault on a peace officer, two felony counts of obstruction of a peace officer, and two misdemeanor counts of obstruction of a peace officer. He filed a pro se motion for an out-of-time appeal, alleging that some of his convictions should have merged. The trial court summarily denied the motion in a one-sentence order without an evidentiary hearing.

The Court stated that a conviction that merges with another conviction is void and a sentence imposed on such a void conviction is illegal and will be vacated even if no merger claim was raised in the trial court and even if the defendant does not enumerate the error on appeal. Indeed, to disregard the merger issue and allow the defendant to serve a sentence for a criminal conviction that has been identified as illegal and void would not comport with fundamental fairness and due process of law. Therefore, the Court stated, contrary to the State's argument that appellant's guilty plea waives any error here, merger claims are not

waived by the entry of a guilty plea, and appellate courts have an obligation to correct such errors.

The Court noted that appellant was indicted for, and convicted of, aggravated assault on a peace officer (O.C.G.A. § 16-5-21(d)) for “unlawfully mak[ing] an assault upon the person of [Officer] Brock, knowing said [Officer] Brock was a peace officer engaged in the performance of his official duties, said assault being with an object, to wit: hands, which when used offensively against a person, is likely to or actually does result in serious bodily injury ...” Appellant was also indicted for and convicted of felony obstruction of a peace officer (O.C.G.A. § 16-10-24(b)) for “unlawfully, knowingly, and willfully obstruct[ing] [Officer] Brock, a law enforcement officer in the lawful discharge of his official duties by offering and doing violence to said officer by trying to strike said officer with his fist” The record clearly showed that the crime of obstruction was established by proof of the same or less than all the facts required to establish the crime of aggravated assault on a peace officer. Consequently, appellant’s convictions for aggravated assault on a peace officer and felony obstruction of a peace officer as to Officer Brock should have merged.

Furthermore, the Court found, misdemeanor obstruction is a lesser included offense of felony obstruction, and therefore, appellant’s convictions for felony and misdemeanor obstruction also could have merged. But, given the scant record before the Court concerning the confrontation between appellant and Officer Duncan, the Court found that it could not conclude that appellant’s felony and misdemeanor obstruction charges should have merged. And, in light of its conclusion that appellant opened the door to an out-of-time appeal on the merger of the other charges, the Court determined that this was an issue for the trial court to address on remand.

Nevertheless, the Court stated, its conclusion that appellant’s merger claims were meritorious did not end the inquiry. To be entitled to an out-of-time appeal, appellant still had to show that counsel was constitutionally defective for failing to advise him of the right to appeal or failing to file the appeal on his behalf. Where, as here, the underlying merger claim has merit, the trial court must determine whether trial counsel’s deficient performance was the cause of the

failure to file a timely direct appeal. Thus, the trial court must hold an evidentiary hearing on this issue. And, having concluded that appellant’s merger claim would entitle him to relief, the Court found that the trial court’s failure to conduct a hearing was error. It therefore vacated the trial court’s order and remand the case with instructions for the trial court to hold an evidentiary hearing on trial counsel’s performance.

DUI; Voluntary Consent

State v. Young, A16A1435 (11/2/16)

Young was charged with DUI (less safe) and DUI (per se). The trial court granted Young’s motion to exclude her breath test, finding “that Young was under arrest and in handcuffs when the submission to the search was requested. [Young] was not informed that the test was not mandatory[,] and the language of the implied consent warning suggests otherwise as it begins ‘Georgia law requires that you submit. ...’ [Young] was not advised of her *Miranda* rights[,] and she was not asked if she was freely and voluntarily agreeing to be tested.” The State appealed.

The Court found that the evidence, including the videotape of the stop, did not show that the officers used fear, intimidation, threat of physical punishment, or lengthy detention to obtain Young’s consent to the breath test, and the officers and Young conducted themselves calmly. The trial court did not find that Young’s intoxication, youth, lack of education, or low intelligence somehow negated the voluntariness of her consent. Instead, the court concluded that Young’s consent was involuntary because the police failed to advise her of her *Miranda* rights or to inform her that the test was not mandatory and because the language of the implied consent warning suggests otherwise. But, the Court noted, the implied consent notice read to Young accurately recites Georgia law as contained within O.C.G.A. § 40-5-67.1(b)(2) and informs the suspect of her choice of either agreeing or refusing to submit to chemical testing, and the possible consequences for each choice. And there is no unlawful coercion where, as here, the officer merely informs the arrestee of the permissible range of sanctions that the State may ultimately be authorized to impose. Further, the Supreme Court of the United States and other courts

have rejected invitations to create a duty to inform suspects of their constitutional right against unreasonable searches and seizures, and the Court stated, it will not depart from their well-worn path.

Thus, the Court found, based upon its de novo review of the undisputed evidence before the trial court, including the video recording, and its application of the law to these undisputed facts, it concluded that the State met its burden of proving that Young voluntarily consented to the breath test under the totality of the circumstances. Here, the Court found, Young immediately verbally agreed to submit to the requested breath test, and there was no evidence of any coercive circumstances that would undercut the voluntariness of her consent. Thus, because there was no evidence that Young’s consent was anything but free and voluntary, the trial court erred by granting her motion in limine to exclude the results of the State-administered breath test.

Bond Conditions; Double Jeopardy

Edvalson v. State, A16A1392 (11/8/16)

Appellant was initially charged with four counts of sexual exploitation of a minor and was released on bond. Thereafter, the State sought to revoke his bond for failure to follow its conditions. The trial court denied the motion, but ordered additional conditions of the bond while stating that the special conditions of the original bond would remain in force.

Subsequently, appellant was indicted on 22 counts of sexual exploitation of a minor. He then filed a motion to dismiss and plea of former jeopardy, arguing that his bond conditions were punitive, rather than remedial; that the Double Jeopardy Clause bars him from being punished twice for the same crimes; and that because the State could not punish him further for the indicted crimes, the charges against him should be dismissed. The trial court held a hearing on that motion, and thereafter denied the same.

The en banc Court stated that the Fifth Amendment’s Double Jeopardy Clause protects against a second prosecution for the same offense after acquittal, a second prosecution for the same offense after conviction, and multiple punishments for the same offense. But, even though both appellant and the State focused on

the Double Jeopardy Clause's prohibition against multiple punishments, they failed to acknowledge the fundamental principle that an accused must suffer jeopardy before he can suffer double jeopardy. Thus, neither party addressed the threshold question presented by this appeal, which was whether jeopardy attached as a result of appellant's pretrial bond revocation proceeding.

Addressing this issue, the Court stated that in the case of a jury trial, jeopardy attaches when a jury is empaneled and sworn. In a non-jury trial, jeopardy attaches when the court begins to hear evidence. Thus, jeopardy does not attach, and the constitutional prohibition against double jeopardy can have no application, until a defendant is put to trial before the trier of facts, whether the trier be a jury or a judge. Accordingly, jeopardy does not attach at any pretrial proceeding, including a bond revocation hearing. Accordingly, the Court found, appellant had not yet suffered jeopardy, and therefore, he had no basis for asserting a claim of double jeopardy.

Moreover, it is the Fifth Amendment's Due Process Clause, not its Double Jeopardy Clause, that protects a defendant from pretrial punishment. Thus, the appropriate remedy for pretrial punishment (including bond conditions that are punitive, rather than remedial) is to bring a petition for habeas corpus or other proceeding under the Due Process Clause.

In so holding that appellant has not suffered jeopardy, and thus, cannot assert a double jeopardy claim, the Court noted that three relatively recent decisions from the Court analyzed a defendant's challenge to the denial of his motion to dismiss and plea of former jeopardy that, like appellant's plea in bar, was based on the argument that pretrial bond conditions constituted punishment within the meaning of the Double Jeopardy Clause. See *Alden v. State*, 314 Ga.App. 439, 440 (2012); *Strickland v. State*, 300 Ga.App. 898, 901 (2009); and *Bozzuto v. State*, 276 Ga.App. 614, 616 (1) (624 SE2d 166) (2005). The Court stated that "[t]o the extent that either *Alden*, *Strickland*, or *Bozzuto* can be read as affording a defendant a right to assert a plea of former jeopardy based on any pretrial punishment, including any allegedly punitive conditions imposed on a defendant's pretrial bail bond, those holdings are disapproved."

Accordingly, the trial court did not err in denying appellant's motion to dismiss and plea of former jeopardy.

Right to Public Trial; Motions to Close Courtroom

Jackson v. State, A16A0738 (11/3/16)

Appellant was convicted of incest, statutory rape, child molestation, and two counts of aggravated child molestation. The victim was 16 years old at the time of trial. The State relied upon O.C.G.A. § 17-8-53 and § 17-8-54, and asked the court to close the courtroom to appellant's family and to all non-essential courtroom personnel during the victim's testimony. Over appellant's objection, the court granted the motion. Appellant argued that the closure of the courtroom violated his constitutional rights. The Court agreed and reversed his convictions.

Initially, the Court stated that it needed to address the State's assertion that the courtroom was closed only to appellant's family members and that appellant failed to preserve any challenge to this partial closure because, although he objected to a complete closure, he did not specifically object to a partial closure. The Court noted that a partial closure occurs when some members of the public are permitted to attend, while a total courtroom closure involves exclusion of all members of the public. This distinction matters because a when the courtroom is only partially closed to spectators, the impact of the closure is not as great, and not as deserving of such a rigorous level of constitutional scrutiny.

After reviewing the record, the Court stated as follows: "Despite the State's clear and unequivocal statements to the trial court asking to remove everyone but essential courtroom personnel, the State baldly asserts on appeal that it sought to exclude only [appellant's] family members. This is nonsense." In fact, the Court found, there was no doubt that the trial court excluded everyone in the courtroom except law enforcement, the parties, their counsel, and courtroom personnel."

Nevertheless, the Court noted, rather than admit that the courtroom was completely closed, the State argued that member of the press were courtroom personnel and that because the press was part of the courtroom personnel, it was inherent in the court's ruling that the press was not removed from

the courtroom. The Court responded to this argument as follows: "If the State's first argument is nonsense — and it is — then this argument is nonsense on stilts."

Turning to the merits of appellant's arguments, the Court stated that constitutional law requires that the party seeking to close a hearing must advance an overriding interest of the likeliness of prejudice, the closure must be no broader than necessary to protect that interest, the trial court must consider reasonable alternatives to closing the proceeding, and it must make findings adequate to support the closure. And here, the Court found, the closure did not comply with constitutional requirements because the trial court made no findings adequate to support the closure, including a consideration of reasonable alternatives. In so holding, the Court rejected the State's argument that appellant did not propose any reasonable alternatives to the trial court. But, the Court stated, a trial court is required to consider alternatives to closure even when they are not offered by the parties. In any case, the trial court erred by not entering written findings on this issue.

Nevertheless, the Court stated, a violation of a defendant's constitutional right to a public hearing does not automatically result in a new trial. But, here, the court closed the courtroom during the most critical testimony of the trial itself. There was no way to remedy that error short of a new trial. "As reluctant as we are to require the victim to testify again, we have no choice but to reverse [appellant's] convictions."

Juror Misconduct

Woodruff v. State, A16A0882 (11/3/16)

Appellant was convicted of possession of marijuana with intent to distribute, possession of morphine, and possession of oxycodone. He argued that he was entitled to a new trial because of juror misconduct. The record showed that after the trial, while defense counsel was packing his bags in the hallway outside the courtroom, he spoke with a juror who told him that some of the slang terms appellant had used in his statement were confusing. She said that one of the jurors had used a cell phone to look up the meaning of the slang terms to determine whether they matched the names of the narcotics listed in the indictment, in spite of the trial court's

repeated instructions to the jurors not to research the case. The State did not dispute that misconduct occurred, but presented the affidavits of all 12 jurors that the misconduct did not affect the verdict.

The Court stated that in a direct appeal of a criminal conviction, there is a presumption of prejudice to the defendant when an irregularity in the conduct of a juror is shown and the burden is on the prosecution to prove beyond a reasonable doubt that no harm has occurred. The State must overcome this presumption beyond a reasonable doubt, and the court must determine whether the juror misconduct was so inherently prejudicial as to require a new trial, or whether it was an immaterial irregularity without opportunity for injustice.

Here, the Court noted, appellant admitted that all contraband found at his house was his. A chemist identified pills taken from the house as morphine and oxycodone, the narcotics appellant was convicted of possessing. In his statement, appellant used the slang terms to generally describe his drug-selling practices; he did not use the slang terms to identify the drugs seized from his house. Further, the State presented affidavits from every juror, who testified that the misconduct did not affect the verdict.

Thus, the Court found, where the substance of the juror misconduct is established without contradiction, the facts themselves may establish the lack of prejudice or harm to the defendant. Under the circumstances of this case, the Court stated that the juror's actions, while improper, were not so prejudicial as to have contributed to the conviction, and were harmless beyond a reasonable doubt.