

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 16, 2015

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THIS WEEK:

- **Speedy Trial; Barker v. Wingo**
- **Dead Docket; Defendant Not In-Custody**
- **Child Molestation; Change in Victim's Demeanor**

Speedy Trial; Barker v. Wingo

Cawley v. State, A14A0996 (11/21/14)

Appellant was arrested for DUI in February 2009. The accusation was filed against him in March 2009. On March 1, 2013, he filed a motion to dismiss his case on constitutional speedy trial grounds. The trial court denied the motion and the Court of Appeals remanded for findings of fact and conclusions of law based on *Barker v. Wingo*. Thereafter, the trial court issued a more detailed order, again denying appellant's motion. The Court again vacated the trial court's order and remanded for further proceedings.

The Court took issue with the trial court's findings regarding the reason for the 58 month delay. The trial court attributed a "large majority" of the pretrial delay to appellant. However, the Court found, the record supported a finding that appellant alone was responsible for no more than approximately 35 days of the pretrial delay. In so holding, the Court stated that part of the delay resulting from the retirement of the trial court judge must be assigned to the State. Also, the delay resulting from the appeal in this case should also have been weighed against the State. In other words, the trial court erred in weighing the reasons for the delay against appellant and not weighing it against the State lightly or

benignly because the delay was not the result of deliberate state action. And, citing *State v. Johnson*, 291 Ga. 863 (2012), the Court stated that given the facts, it could not conclude that even if the trial court had weighed this factor properly, it would have had no discretion to do anything but deny the motion to dismiss the case. Therefore, the Court again vacated the trial court's order and remanded for a rebalancing of the *Barker v. Wingo* factors.

Dead Docket; Defendant Not In-Custody

Howard v. Warden, 2015 U.S. App. LEXIS 381 (11th Cir. Ga. Jan. 9, 2015)

Howard was indicted and convicted in Muscogee County of burglary in 1997 and sentenced to twenty years in prison. While he was incarcerated for violating his parole on the 1997 conviction, he filed a habeas corpus petition in which he challenged the constitutionality of a 1995 burglary indictment that had been placed on the dead docket in Muscogee County and had remained there for "approximately nineteen years." The record showed that the facts of the 1995 burglary were used as similar transaction evidence in his 1997 burglary trial, but the 1995 burglary was not used to enhance the sentence he received on the 1997 burglary. Howard contended that "the 1995 dead-docketed indictment violates his constitutional speedy trial and due process rights." The U.S. District Court dismissed the petition on the ground that Howard "was not 'in custody' in violation of the Constitution or laws or treaties of the United States" thus depriving the federal courts of jurisdiction to hear his habeas corpus petition under 28 U.S.C. § 2241(c)(3).

A panel of the 11th Circuit Court of Appeals affirmed. In order to seek habeas corpus relief, a person must be “in custody.” Here, the Court found, the dead docketed indictment “imposes no present restraints on Mr. Howard’s liberty . . . [as] it does not currently subject Mr. Howard to any reporting requirements, or limit his ability to work, travel, or reside where he pleases.” Moreover, the Court found, using the facts of the 1995 dead docketed case as similar transaction evidence did not “enhance a later sentence,” which might have been a basis for the federal court to exercise jurisdiction under *Means v. Alabama*, 209 F.3d 1241, 1242 (11th Cir. 2000). Accordingly, the Court concluded, the Georgia dead-docketed indictment did not, by itself, render Howard “in custody” for the purposes of 28 U.S.C. § 2241 and therefore, the district court properly found it did not have jurisdiction to consider his habeas petition.

Child Molestation; Change in Victim’s Demeanor

Jackson v. State, A14A1374 (11/21/14)

Appellant was convicted of aggravated child molestation, three counts of child molestation, and one count of sexual battery. He argued that the trial court erred in overruling his objection to the admission of testimony regarding the change in demeanor of the victim during the time the evidence showed the molestation occurred. He argued that this resulted in the jury improperly considering “its own mental health diagnosis” and that the State was required to offer an expert to testify concerning the meaning of the victim’s conduct. The Court disagreed.

The Court stated that while it has held that an expert may testify that a child’s behavioral characteristics are consistent with those of a child who has been sexually abused, it could find no authority, and appellant had pointed to none, that prohibits testimony from other witnesses about a victim’s demeanor during the time of the alleged acts of molestation. Whether this testimony was permissible was within the discretion of the trial court, and, upon review of the evidence, the Court concluded that it could not say that the trial court abused its discretion in this instance.