

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 6, 2012

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:

- **Effective Assistance of Counsel; Right to Testify at Trial**
- **Voir Dire**
- **Juveniles; Burglary**
- **Search & Seizure**
- **Inconsistent Verdict; Jury Charges**
- **Speedy Trial; Barker v. Wingo**
- **Venue; Jury Charges**
- **Similar Transactions; Prior Difficulties**
- **Hearsay**

Effective Assistance of Counsel; Right to Testify at Trial

Rudolph v. State, A11A1587 (12/19/12)

Appellant was convicted of sexual assault of a 12-year-old girl who was the daughter of one of appellant's friends. Appellant contended trial counsel was ineffective for failing to call two witnesses who would have contradicted the victim's trial testimony, for failing to properly consult appellant about his right to testify, and incorrectly informing the trial court that he did not want to testify. Appellant argued trial counsel failed to call his two sons to testify that appellant contended would have impeached the victim's testimony. Trial counsel testified at the hearing for motion for a new trial that the reservation to call appellant's two sons to testify was a strategic decision in light of the two son's contradicting testimonies. The Court held a defense counsel's decision to not call certain witnesses or any matter of

strategy or tactics in that regard will not constitute ineffective assistance of counsel unless those errors are unreasonable ones that no competent attorney would have made under similar circumstances.

Appellant also argued that trial counsel was ineffective for failing to properly advise him of his right to testify, and for incorrectly advising the court that appellant did not want to testify. Despite the conflicting testimony of appellant and trial counsel as to the discussions regarding appellant's right of testifying at trial, the determination of witness credibility and the resolution of conflicts in testimony are left to the discretion of the trial court. The trial court chose to credit trial counsel's testimony that discussion with appellant regarding his right to testify did in fact take place and were properly executed. Furthermore the court found appellant presented no evidence as to the likelihood that the outcome of his trial would have been different had he testified. The failure to show any likelihood of a different outcome of trial invalidates a claim for ineffective assistance of counsel. The court denied appellants motion for a new and this Court affirmed.

Voir Dire

Sadat-Moussavi v. State A11A1685 (12/27/11)

Appellant was convicted of numerous charges including aggravated assault, false imprisonment, and terroristic threats. Appellant contended the trial court erred in denying the defense's motion to strike a juror for cause. During voir dire, a juror gave an affirmative response to the statutory question regarding whether any of the prospective jurors had any prejudice or bias either for or against the accused. Appellant contended the trial court

should have granted the defense's motion to strike for cause.

To disqualify a juror for cause, the record must establish that the juror's opinion was so fixed and definite that it would not be changed by the evidence or the charge of the court upon the evidence. Furthermore, the Court stated that this determination is not weighed in light of an isolated response or statement but a final distillation of a prospective juror's *voir dire*. The Court held the trial court is not required to make this decision based on the prospective jurors initial response and can rather make a determination based upon the subsequent qualifying answers and the responses to the *voir dire* question as whole. The Court affirmed judgment.

Juveniles; Burglary

In the Interest of R. H. Jr. A11A1915 (12/20/11)

Appellant was adjudicated delinquent for a burglary. Appellant contended the evidence in support of his conviction was insufficient to sustain his adjudication of delinquency. The evidence showed appellant was seen by a neighbor of the victim knocking on the back door of the victim's house and was seen tampering with the door, opening it and then closing the door. The evidence revealed that the juveniles had wanted to see if the victim's boyfriend was home so that they could play the victim's boyfriend's video games, as they had done in the past. The victim was not home at the time and testified that appellant did not have permission to be in the home while the victim and or the victim's boyfriend were not there. As well as reporting items disturbed in her home, the victim reported items stolen from the home including \$450 in cash, DVDs, and two video games.

Appellant argued there is insufficient evidence as to the unauthorized entry element of burglary. Appellant supported this argument by relying on the absence of the victim's boyfriend's testimony. The Court held the absence of this testimony was irrelevant and that the victim's testimony alone was sufficient to establish appellant's entry was without authority.

Appellant further argued the evidence failed to establish the necessary intent to commit burglary. The Court noted that mere illegal entry alone does not establish the elements necessary for a charge of burglary, some evidence must reveal that there exists an intent

to commit a felony or in the instant case, theft. The Court held that the intent to steal can be inferred if the evidence shows there were valuable goods kept inside the dwelling into which the unlawful entry was made. The victim testified that valuable items were missing from her residence. The Court held this evidence was sufficient for the trier of fact to infer intent and establish that appellant's action did in fact amount to the crime of burglary.

Search & Seizure

Campbell v. State A11A1939 (12/27/11)

Appellant was convicted of driving under the influence of drugs to the extent that it was less safe to drive ("DUI-less safe"), possession of marijuana, speeding, and failure to change the address on his driver's license. The record indicated that the arresting officer conducted a traffic stop upon detecting appellant traveling 63 mph in a 45mph speed zone. When the officer approached the vehicle, he testified he smelled a faint odor of burnt marijuana. While conducting a background check on the vehicle and the occupants, both the officer and a second officer noticed suspicious moving in the vehicle. This caused the officer to request that the appellant step out of the vehicle. The officer then proceeded with a series of field sobriety tests which led the officer, based on his training, to believe appellant was impaired and less than safe to drive. The officer arrested the appellant and a blood test was later conducted that revealed THC metabolite in the appellant's blood.

Appellant contended that the necessary probable cause justifying his arrest did not exist and that, as a result, the trial court should have excluded the results of his State-administered blood test and other evidence obtained after his arrest. The test to determine the sufficiency of probable cause is whether the material inquiry upon the facts within the officer's knowledge at the time of the arrest constituted a reasonable belief sufficient to authorize a prudent person to believe that the suspect had committed that offense. The facts indicate the appellant was speeding, admitted to smoking marijuana, had the smell of marijuana on his person, had bloodshot eyes, and exhibited multiple clues of impairment during several of the field sobriety tests. The Court found these facts as a whole were overwhelmingly supportive of the officers' actions

in question and substantiated the necessary probable cause.

Inconsistent Verdict; Jury Charges

Morrell v. State A11A2067 (12/27/11)

Appellant was charged with aggravated assault and possession of a firearm during the commission of a crime. At trial, the jury acquitted appellant on the aggravated assault charge but found him guilty of the possession of a firearm charge. The record revealed that appellant was the driver of a car that stopped in front of the victims on a street and appellant's accomplice got out of the vehicle, brandished a weapon, demanded money from the victims, and then shot at of the victims before returning to the vehicle and driving away. Appellant contended the trial court erred in accepting the inconsistent verdicts of guilty of firearm possession and not guilty of aggravated assault.

The Supreme Court abolished the rule against inconsistent verdicts in criminal cases because appellate courts cannot know and should not speculate as to why a jury acquitted on one offense and convicted on another offense. However, there is an exception to this rule when the appellate record makes clear as to the reason why the jury found for separate verdicts, and thus, "when instead of being left to speculate about the unknown motivations of the jury, the appellate record makes transparent the jury's reasoning why it found the defendant not guilty of one of the charges...." Here, the Court found, the record did not invoke such exception.

Appellant further contended the trial court erred in its instruction to the jury on the "knowledge" element of the crime. Appellant argued not only had he not been the shooter, but also did not have the requisite intent to participate in robbery at gunpoint and therefore did not meet the elements of the crime. Since appellant did not object to the instruction at the time, to overturn the verdict, the standard of review is that of plain error, i.e. the contested jury charge must amount to an error that otherwise would have likely changed the outcome of the trial. In reviewing the charge as a whole, the Court held the failure to instruct the jury of knowledge did not affect the outcome of the proceedings and therefore did not amount to that of plain error.

Speedy Trial; Barker v. Wingo

Goffaux v. State A11A2384 (12/21/11)

Appellant was arrested on August 2, 2007, on the charge of child molestation, released on bond the following day, and indicted on one count of child molestation on February 4, 2011. He plead not guilty on March 25, 2011, retained defense counsel for the first time on March 30, 2011, and filed his motion to dismiss the indictment for lack of a speedy trial on April 15, 2011. The trial court denied the motion on July 20, 2011.

The Court held that the almost 48-month delay between appellant's arrest and the denial of his motion was presumptively prejudicial. Initially, in determining the appellant's claim that he was denied his constitutional right to a speedy trial, the trial court was required to decide whether the delay at issue was long enough to create presumptive prejudice against the appellant. If the finding is affirmative, the trial court then must conduct the four-prong test set out in *Barker v. Wingo*: (1) whether the delay before trial was uncommonly long; (2) whether the state or the defendant is more to blame for the delay; (3) whether, in due course, the defendant asserted the right to a speedy trial; and (4) whether the defendant suffered prejudice as a result of the delay.

The Court found that the trial court properly weighed the length of the delay against the State and that the reason for the delay was attributable to negligent prosecutorial action and thus weighed benignly against the State.

However, the Court held the trial court erred significantly on the third *Barker* factor. Although the trial court found that appellant's delay in asserting his right to a speedy trial strongly weighed against him, the court did not consider or discuss that a trial court has the discretion to mitigate the weight given this factor when a defendant fails to assert his right during the period between arrest and indictment if he was out on bond and without counsel. Here, appellant was out on bond and without counsel for nearly 42 months before being indicted and it was only two-and-a-half months after the indictment that appellant asserted his claim and motion to dismiss the indictment.

Furthermore, the Court analyzed the fourth *Barker* factor and held the trial court failed to consider for a second time the presumptive prejudice arising from the pretrial delay of almost 48 months by factoring it

into the prejudice analysis as part of the mix of relevant facts. Therefore, the Court vacated the trial court's order and remanded the case for further proceedings.

Venue; Jury Charges

Dixson v. State A11A1329; A11A1330 (11/23/11)

Appellant and daughter were tried together. The appellant was convicted of five counts of misdemeanor theft by receiving and one count of felony fleeing and eluding. The evidence showed appellant's daughter and another woman were seen by an off-duty police officer stealing clothing from The Children's Place. The appellant and daughter left the scene in appellant's car and were subsequently followed by another officer. The vehicle attempted to elude the police when the officer attempted to conduct a traffic stop on the vehicle. The officer in pursuit witnessed the throwing of clothing from car. Clothes from five different stores were found in the vehicle. Neither appellant nor her daughter presented receipts as evidence that the clothes were properly purchased. The third woman accomplice testified at trial for the State.

Appellant argued the evidence was insufficient to show appellant received stolen property from the various stores or that the property was stolen in Dawson County. Appellant contended that the only evidence that the items were stolen was the accomplice's uncorroborated testimony which alone, was insufficient to support her conviction. The Court held that it is for the fact finder to determine if evidence, even though circumstantial, is sufficient to warrant a finding of guilt. The Court stated that guilt may be inferred from possession of recently stolen property in conjunction with other evidence of knowledge. The evidence showed a deputy observed appellant's daughter and accomplice appearing to shoplift; appellant thereafter drove her vehicle in an attempt to elude pursuing police officers; and there were no receipts showing the items purported to be stolen were purchased. Thus, the evidence was sufficient to support her convictions.

Appellant also argued that the trial court erred in denying her motion in arrest of judgment on the attempting to elude count because the charge was improperly and incompletely alleged. Appellant argued that the indictment failed to allege every material element of the offense by omitting the "pursuing" element and by not specifying the type of signal given. She

contended that she could admit all of the allegations of the indictment and be innocent of the crime of fleeing and eluding because there would be no admission that she attempted to flee from a "pursuing" police officer after having been given a signal to stop by "hand, voice, emergency light, or siren." The Court disagreed. The Court held that where an accusation charges the accused with having committed certain acts "in violation of" a specified penal statute, the accusation incorporates the terms of the referenced Code section. Because an accused cannot admit an allegation that her acts were "in violation of" a specified Code section and yet not be guilty of the offense set out in that Code section, such an accusation is not fatally defective. Thus, appellant's claim was without merit.

Similar Transactions; Prior Difficulties

Gant v. State A11A1566 (12/15/11)

Appellant was found guilty of child molestation, enticing a child for indecent purposes, and incest. Appellant also argued the trial court erred in admitting evidence of "similar transaction" and prior bad conduct evidence without conducting a hearing. The evidence at issue is the victim's testimony regarding the numerous sexual acts of molestation committed against her by appellant prior to the 2006 incident at issue. The Court held these acts were not similar transactions but were considered prior difficulties between the parties. Evidence of prior difficulties between the defendant and the victim is admissible without notice or a hearing. The Court affirmed the trial court's ruling and affirmed judgment.

Hearsay

In the Interest of D. E. A11A1763 (12/19/11)

Appellant was adjudicated delinquent following the finding he committed burglary. Appellant argued the evidence was insufficient to sustain the judgment. The Court considered the question whether after viewing evidence in light most favorable to prosecution; any rational trier of fact could have found essential elements of the crime beyond a reasonable doubt. The Court further noted that in a delinquency proceeding, hearsay evidence has no probative value even when it is admitted without objection.

Appellant allegedly burglarized a home, stealing a rifle, and an Xbox™ system. The Court noted that the only non-hearsay evidence adduced at trial was as follows: An investigating officer to the reported burglary spoke to witness who led her to a gun that was reportedly stolen. Another investigating officer testified that a .22 caliber rifle was stolen. A witness, appellant's aunt, stated that he offered to sell her an Xbox™ game system and a couple of games for \$78 and then two day later, reduced the price to \$48.

The Court found that all the other evidence that remained that connected appellant to the theft of the Xbox™ system and the stolen gun was hearsay or double hearsay. For example, the officer testified that a witness claiming to be appellant's cousin stated that appellant told him that he had stolen the gun. The Court held that it was error to permit an investigating officer to testify, under the guise of explaining the officer's conduct, to what other people communicated to the officer during the investigation.

Moreover, appellant's purported admission was inadmissible as double hearsay. An officer testified that Harvey Sessoms, who claimed to be appellant's cousin, told the officer that appellant had a stolen gun in his bedroom; that an unidentified friend told him, i.e., Sessoms, that it was stolen from the residence burglarized; and that appellant told him that he stole the gun. However, neither Sessoms, the unidentified friend, nor appellant testified at trial. Although appellant's statement might be an admission against interest, that exception would overcome only one layer of the hearsay. Accordingly, absent the hearsay, the evidence that appellant committed burglary was plainly insufficient.