Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 14, 2014

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THIS WEEK:

Burglary; "Without Authority"

State v. Newton, S13G0668 (3/10/14)

Newton was convicted of burglary, theft by taking, and first degree forgery for taking jewelry while touring a home that he claimed he was interested in purchasing and using a fictitious name of "David Flynn" on a brokerage agreement. Newton argued that the evidence was insufficient to support the burglary conviction because there was no evidence that he entered the house without authority. The trial court denied Newton's motion for new trial, noting that he never had authority to enter the house because only a person named David Flynn was so authorized. The Court of Appeals reversed Newton's burglary conviction, concluding the evidence was insufficient to show that he was "without authority" to be in the victim's house. *Newton v. State*, 319 Ga.App. 494 (2012). The Supreme Court granted the State's petition for writ of certiorari.

The Court noted that in 2007, when the events in this case took place, O.C.G.A. § 16-7-1(a) (2007) provided in pertinent part as follows: "A person commits the offense of burglary when, without authority and with the intent to commit a felony or theft therein, he enters or remains within the dwelling house of another …" In a case of first impression, the Court stated that the issue is whether consent to enter, which is procured by fraud, deceit or trickery, constitutes entry "without authority" as contemplated by O.C.G.A. § 16-7-1.

The Court found that there is no meaningful difference between gaining entry by force and gaining consent to enter by artifice. The purpose of the burglary statute is to protect against the specific dangers posed by entry into secured premises of intruders bent on crime. The intruder who breaches the barrier with a lie or deception is no less dangerous than his more stealthy cohorts, and nothing in the statute suggests an intent to exempt him from liability.

The evolution of Georgia's statutory law concerning burglary has been to broaden rather than restrict the parameters within which it may be applied. Here, the evidence showed Newton staged an elaborate ruse to pose as a potential home buyer. Not only did he use an alias, but he used false identification and gave false information concerning his true identity, all to bolster his pretense of being a bona fide potential home buyer. That his pretense directly targeted the real estate agent rather than the homeowner was irrelevant. The real estate agent had a license from the

homeowner to consent on the owner's behalf and grant entry for the limited purpose of showing the home to potential home buyers. Since the realtor's providing consent to enter the home was procured by fraud, Newton's entry into the home was "without authority" under O.C.G.A. § 16-7-1. Therefore, the Court of Appeals' decision was reversed and Newton's conviction for burglary reinstated.

Jurisdiction; Sentencing Orders

Harless v. State, A13A1761 (3/3/14)

Appellant was convicted of aggravated assault and aggravated battery. The trial court entered only a single written sentence of "20 (Twenty) years." She then appealed.

The Court stated that a case is not final and ripe for appeal until a written sentence has been entered on each count of which a defendant was found guilty. Thus, the Court found, because the trial court did not enter a written sentence on each count, the case was still pending in the trial court. Therefore, the case was removed from the Court's docket and remanded with directions to the trial court to enter a written sentence disposing of both counts on which appellant was found guilty. After such entry, the Court stated, the case may be transmitted to the Court for re-docketing because the notice of appeal, prematurely filed, then will have ripened.

Jury Instructions; Severance

Flournoy v. State, S13A1908, S13A1909 (3/10/14)

Appellants, Flournoy and Williams, were convicted of felony murder (with the underlying felony of aggravated assault by shooting the victim) and related crimes stemming from an armed robbery during a drug buy. The evidence showed that the two lured the victim into a car with the intent to buy a large quantity of marijuana from the victim.

Appellants argued that the trial court's instructions constructively amended the indictment by allowing the jury to convict on the aggravated assault count as well as the felony murder count if it found they merely pointed a pistol at the victim as opposed to shooting him, as averred in the indictment. The record showed that the felony murder charge (Count 2 of the indictment), accused appellants with causing the victim's death by aggravated assault by "shooting [the victim]" and with respect to the aggravated assault charge relating to the victim (Count 7), the indictment accused them of "mak[ing] an assault upon the person of [the victim], with a pistol, a deadly weapon, by shooting him . . . ." The trial court instructed the jury that "a person commits aggravated assault when that person assaults another person with a deadly weapon, which is alleged in count 7." The trial court further gave the general instruction on aggravated assault, stating that aggravated assault with a deadly weapon "is defined as an act committed with a deadly weapon, which act places another person in reasonable apprehension of immediately receiving a violent injury."

The Court found no error. Even though the trial court charged the jury on the general definition of aggravated assault with a deadly weapon, it clearly and unequivocally charged that, with respect to the Count 7 allegation of aggravated assault of the victim, appellants could be found guilty only upon the crime as alleged in the indictment. It gave a similar instruction with respect to Count 2 which alleged felony murder. Even where a jury instruction is defective in that the trial court instructs the jury that an offense could be committed by other statutory methods than the one method charged in the indictment, which the Court found, did not occur in this case, such a defect is cured where, as here, the court provides the jury with the indictment and instructs jurors that the burden of proof rests upon the State to prove every material allegation of the indictment and every essential element of the crime charged beyond a reasonable doubt. Furthermore, in order to convict, the jury of necessity had to have found appellants shot the victim, and therefore their assertion that the instruction improperly permitted the jury to convict for aggravated assault if it found they had simply pointed a pistol at the victim, without actually shooting him, lacked merit.

Williams also argued that the trial court erred in denying his motion for severance. The evidence showed that once Flournoy was taken into custody, but prior to his arrest, in the presence of law enforcement officers, Flournoy voluntarily made three phone calls to Williams, who was still at large. In the phone calls, Flournoy made statements that implicated him in the crimes and also asked questions of Williams that had been coached or scripted by law enforcement officers. Flournoy's questions and statements in these conversations identified Williams as the shooter and otherwise implicated Williams in the crimes. In his responses to Flournoy in these phone calls, Williams also implicated himself in the crimes. Recordings and uncertified transcripts of these conversations were tendered into evidence at trial, but neither appellant testified.

The Court stated that in ruling on a severance motion, the trial court should consider: 1) the likelihood of confusion of the evidence and law; 2) the possibility that evidence against one defendant may be considered against the other defendant; and 3) the presence or absence of antagonistic defenses. Here, the trial court did not abuse its discretion in finding that the number of defendants in the case and the evidence presented was not likely to confuse the jury. There were only two defendants, the same witnesses testified against both defendants, and the defendants jointly attacked the credibility of the State's witnesses. Furthermore, the law applicable to each defendant was substantially the same and the evidence showed the defendants acted together. Although appellants raised antagonistic defenses, the Court found this was insufficient to require severance where, as here, Williams failed to show specific prejudice from the presentation of the antagonistic defenses. Also, the trial court properly instructed the jury that an out-of-court statement made by one of the defendants after the alleged criminal acts have ended is admissible only against the person who made the statement and that they should consider such a statement only as against the defendant who made it. Thus, neither the first nor third factor required separate trials.

Relating to the second factor, Williams argued that admission of the phone conversations implicating him in the crimes, when Flournoy elected not to testify and was thus unavailable for cross-examination, robbed him of his constitutional right to confront the witness. The Court disagreed. Here, Williams's own statements and actions directly implicated himself in the crimes since he led police to the gun used in the commission of these crimes and admitted to having possession of the marijuana stolen from the

victim. Consequently, any resulting prejudice from the failure to sever the trials of the two defendants was harmless error. Likewise, even if the introduction of this evidence was a *Bruton* violation, it was harmless error because in some cases the properly admitted evidence of guilt is so overwhelming, and the prejudicial effect of the codefendant's admission is so insignificant by comparison, that it is clear beyond a reasonable doubt that the improper use of the admission was harmless error.

Judicial Bias, Cross Examination

Dunn v. State, A13A2417 (3/3/14)

Appellant was convicted of family violence battery after a bench trial in which the appellant appeared pro se. He contended that the trial judge was not impartial based on two comments the judge made before the trial, one a reference to a prior case in which the judge had found appellant guilty of an offense, and the other a statement that during the bench trial the judge would "hear the evidence and give it my best shot." However, the Court found, appellant never objected to the comments or moved for recusal, and by failing to do so he waived any objection to the judge's presiding in this case. Moreover, the Court found, even if appellant had timely raised the issue of bias, it provided no grounds for reversal. A review of the transcript showed that after appellant had indicated a desire to proceed pro se with a bench trial, the trial court's comments were merely part of its attempt to ensure that he understood his rights and the risks of proceeding without an attorney.

Appellant also argued that the trial court improperly curtailed his right to cross-examine the State's witnesses by not giving him an opportunity to do so until after all four of the witnesses had testified on direct examination. The transcript showed that the four State witnesses did testify consecutively without any cross-examination by appellant, but also without any objection from appellant as to the procedure. After the State rested, the trial court gave appellant the opportunity to question any of the four witnesses, but appellant declined, stating that he just wanted to make a statement. The trial court then told appellant that he did not have to ask questions of the witnesses, but reiterated that "this will be your chance to do that if you want[] to." Appellant again responded that he only wanted to make a statement. Thereafter, appellant testified, denying that he had put his hands on the victim and claiming that she had slipped and fallen.

The Court stated that "[w]hile the procedure was certainly unusual and not one that we encourage," this was a bench trial at which the court has broader discretion and certain evidentiary allowances can be made that differ from a jury trial. Further, a trial court has the authority to exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to: 1) make the interrogation and presentation effective for the ascertainment of the truth; 2) avoid needless consumption of time; and 3) protect witnesses from harassment or undue embarrassment. Nevertheless, the Court found, it did not need to determine whether the procedure was improper because appellant acquiesced in it by failing to object and by expressly stating that he did not want to cross-examine any of the witnesses. Thus, even assuming error, the error was waived on appeal because appellant acquiesced in the procedure used by the court.

Speedy Trial; Barker v. Wingo

Ward v. State, A13A1735 (3/4/14)

Appellant was convicted after a stipulated bench trial of DUI, driving with a suspended license, driving without a license, and improper stopping. Appellant argued that the trial court erred in denying his motion to dismiss his indictment on constitutional speedy trial grounds. Briefly stated, the record showed that he was arrested on February 8, 2006, and indicted on July 25, 2006. He filed his motion to dismiss on February 22, 2012, which the trial court denied on May 8, 2012.

The Court stated that first, a court must determine whether the delay has crossed the threshold dividing ordinary from presumptively prejudicial delay, since, by definition, the accused cannot complain that the government has denied him a "speedy" trial if it has, in fact, prosecuted his case with customary promptness. If the delay passes this threshold test of "presumptive prejudice," then the *Barker v. Wingo* inquiry is triggered. To determine whether the Sixth Amendment right to a speedy trial has been violated, *Barker* requires consideration of four factors: 1) the length of the delay; 2) the reason for the delay; 3) the defendant's assertion of the right to a speedy trial; and 4) whether the defendant was prejudiced by the delay.

The Court found that because appellant was arrested on February 8, 2006, and the ruling on the motion to dismiss was filed on May 8, 2012, this six-year-plus delay was uncommonly long and weighed against the State. As to the reason for the delay, the trial court concluded that "this portion of the balancing test is neutral as to both parties." But, the Court found, the State offered no explanation for the reason for delay from March 2007 to February 2012. Yet, the State was aware as early as March 2007 that appellant was incarcerated in another county. Thus, where no reason appears for a delay, the Court must treat the delay as caused by the negligence of the State in bringing the case to trial. Nevertheless, this factor is weighed to a lesser degree or benignly against the State. Because the majority of the delay, approximately five years, was due to the negligence of the State, this factor should have been weighed against the State, even if to a lesser degree, and was not neutral as to both parties as found by the trial court.

As to the assertion of the right to a speedy trial, the Court found that appellant first asserted his right to a speedy trial when he filed his motion to dismiss in February 2012, more than six years after his arrest. The trial court found that there was no evidence that appellant, who was at all times represented by counsel, asserted any objection to the slow pace of the case. Therefore, as found by the trial court, this factor weighed heavily against appellant.

Finally, as to prejudice, appellant argued that his key witness, who would have testified that he was not driving the vehicle at the time of the incident, was now unavailable. But, the Court found, there was no evidence that appellant had ever located or could locate this witness at any time during the six years his case was pending. Thus, appellant failed to show that this witness's unavailability was due to the State's delay in bringing his case to trial. Under these circumstances, the failure to show prejudice should have been weighed against appellant.

In balancing the factors, the Court held that the trial court erred in concluding that

the reason for the delay was neutral rather than weighing this factor against the State, and erred in concluding that the prejudice factor weighed against the State but "modified by appellant" rather than weighing it fully against appellant. But had the court properly weighed these factors before balancing them, it would have had no discretion to reach a different judgment. Appellant did not assert his right to a speedy trial for six years following his arrest, and failed to show that the delay in the State bringing the case to trial impaired his defense. Under these circumstances, the trial court did not abuse its discretion in denying appellant's motion to dismiss.

Search & Seizure

Payton v. State, A13A1980 (3/4/14)

Appellant was convicted of three counts of VGCSA and other crimes. He contended that the trial court erred in denying his motion to suppress. The record showed that Odom owned the home at which appellant lived. Odom, two other unrelated individuals, and appellant all had separate bedrooms in the house. Appellant's girlfriend shared a bedroom with him. On the date of appellant's arrest, Odom observed appellant and his girlfriend fighting as they came out of their bedroom. The fighting continued and when the girlfriend slashed appellant with a knife, Odom called the police. Upon arrival, the officers noticed that appellant appeared to be under the influence of drugs. The officers arrested him and his girlfriend on domestic violence charges. After putting appellant into a patrol car, an officer expressed to Odom that appellant might be involved with drugs and asked for permission to search appellant's room. Odom expressed frustration with appellant and his girlfriend because they lived in his house and ate his food without paying for anything. The police officer understood Odom's statement to mean that neither appellant nor his girlfriend paid any rent. Odom then gave permission to search appellant's room and the drugs were thereafter found in his bedroom.

Appellant argued that the police officers lacked exigent circumstances or valid consent to conduct the warrantless search. Specifically, he argued that the trial court erred in concluding that he was a guest in Odom's house because he paid rent and as such, he was not a guest, but rather a tenant, in the homeowner's house. As a result, he contended, the homeowner was not authorized to consent to the search of his bedroom. The Court disagreed. While a person may have a reasonable expectation of privacy, a warrantless search of a residence may nevertheless be authorized by the consent of any person who possesses common authority over or sufficient relationship to the premises to be searched. The "common authority over the premises" is one independent prong unrelated to the second prong of "sufficient relationship to the premises." As a result, it is the general rule that the voluntary consent of the head of a household to the search of premises owned or controlled by such head of the household is sufficient to authorize a search of the premises without a search warrant, and such search does not violate the constitutional prohibition against unreasonable searches and seizures.

However, a landlord cannot give consent to a search of his tenant's quarters. At the hearing on the motion to suppress, Odom, contrary to what he told the officers at the scene, testified that appellant paid him rent. But, the Court stated, the question of whether appellant was a guest or a tenant is a factual determination that is reserved for the trial court, and must be sustained if there is any evidence to support it. Here, the Court found, the evidence supported that trial court's finding because even if the evidence was conflicting, credibility determinations are also for the trial court and the trial court's finding on the issue were not clearly erroneous. Since the trial court found that appellant was a guest in Odom's house, Odom, as the resident homeowner, was authorized to consent to the search of appellant's bedroom, regardless of whether appellant was an adult, locked his door, or kept Odom out of his bedroom. Moreover, there was no evidence that Odom was coerced or placed under duress in order to obtain that consent.

Furthermore, the Court found, even if Odom did not have the authority to consent to a search of appellant's bedroom, the search was nevertheless reasonable. Citing *Illinois v. Rodriguez*, 497 U. S. 177 (1990), the Court held that a search is reasonable when it is based on the consent of a person whom officers reasonably, but erroneously, believe has authority to consent to the search. Here, Odom told the responding police officer that he owned the house and that appellant lived at the house rent-free. As a result, the police officer reasonably believed that Odom had the authority to consent to the warrantless search.

Nevertheless, appellant argued, the officers were required, under *Georgia v. Randolph*, 547 U. S. 103 (2006), and *Preston v. State*, 296 Ga.App. 655 (2009), to have given him the opportunity to object to the search. The Court again disagreed. Rather, the Court found, nothing in *Randolph* suggests that the police must offer such an opportunity. To the contrary, the *Randolph* Court expressly held that police officers are not required to find a potentially objecting co-tenant before acting on the permission they had already received. Furthermore, the Court found, the officers did not arrive at the residence to execute a search based upon a co-occupant's consent, and therefore *Preston* was distinguishable. Although appellant had been arrested and put inside the patrol car when the officers obtained consent, there was no evidence that such action was done for the purpose of avoiding a possible objection to a search. Consequently, Odom's consent to search gave the police officers legal authority to search appellant's room. Accordingly, the Court affirmed the trial court's decision to deny appellant's motion to suppress.

Guilty Pleas; Alford

Jones v. State, A13A1896 (2/27/14)

Appellant pled guilty to one count of theft by deception. Appellant thereafter attempted to withdraw his guilty plea, which the trial court denied. He contended that his guilty plea was not knowingly entered. Specifically, he contended that, rather than a standard guilty plea, he had attempted to enter a guilty plea pursuant to *North Carolina v. Alford*, 400 U. S. 25 (1970) under which an individual accused of a crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime. Appellant argued that the trial court was required to "go through the *Alford* . . . questions" and because it did not, his plea was not knowingly entered. The Court disagreed.

A ruling on a motion to withdraw a guilty plea lies within the sound discretion of the trial court and will not be disturbed absent a manifest abuse of such discretion. When the

validity of a guilty plea is challenged, the State bears the burden of showing affirmatively from the record that the defendant offered his plea knowingly, intelligently, and voluntarily. The State must show that the defendant was cognizant of all of the rights he was waiving and the possible consequences of his plea. After a defendant's sentence has been pronounced, his guilty plea may be withdrawn only to correct a manifest injustice. The test for manifest injustice will by necessity vary from case to case, but withdrawal is necessary to correct a manifest injustice if, for example, a defendant is denied effective assistance of counsel, or the guilty plea was entered involuntarily or without an understanding of the nature of the charges.

Here, the Court found, although sentencing documents suggest an *Alford* plea, the transcript reflected that appellant chose to enter a guilty plea. In any event, pretermitting whether the trial court erred in failing to question appellant to establish if he wanted to enter an *Alford* plea, the record demonstrated that appellant was cognizant of all of the rights he was waiving and the legal consequences of his plea. There are no additional requirements under *Alford* regarding the apprisal of the consequences of a guilty plea. Thus, the Court found, under these circumstances, there was no manifest injustice demanding the grant of appellant's motion to withdraw his guilty plea.

Jury Charges; Shoplifting

Gilliland v. State, A13A1982 (2/28/14)

Appellant was convicted of felony shoplifting for taking a cellular phone from a retail cellular phone store. Appellant claims that the trial court erred in two of its charges to the jury. Specifically, he argued that a charge setting forth the elements of shoplifting erroneously instructed the jury that the offense could be committed in a manner not alleged in the accusation against him, and that a supplemental charge, given in response to a question from the jury, erroneously instructed the jury that it could consider the wholesale value of the phone taken from the store. Appellant did not object to either charge at trial, and therefore, the Court found, its review of the charges was limited to whether either charge amounted to plain error.

The State's accusation alleged that appellant committed the offense of shoplifting "by taking possession of merchandise with a value greater than $300.00 from a retail establishment, to wit: [the cellular phone from the store], with the intent of appropriating said merchandise to his own use, and without paying for said merchandise[.]" But in defining the offense of shoplifting in its charge to the jury, the trial court quoted the statutory elements of the offense, which set out an alternative manner by which the crime can be committed. He instructed them that "[t]he [s]tate has to prove beyond a reasonable doubt that the defendant . . . with the intent of appropriating merchandise to his own use without paying for the same *concealed or took possession of* the telephone described in this accusation and that the telephone was worth more than $300." (Emphasis supplied.) The Court stated that if a jury charge recites the entire statutory definition of a crime and the indictment or accusation does not, the deviation may violate due process unless a limiting instruction is given. Here, however, the trial court did give instructions that limited the jury's consideration to the manner of shoplifting alleged in the accusation. In its charge to the jury, the trial court read the language of the accusation and instructed the jury that "[t]he burden of proof rests upon the [s]tate to prove every material allegation of the indictment or accusation and every essential element of the crime charged beyond a reasonable doubt." The accusation also went out with the jury during the deliberations. The Court concluded that under these circumstances, viewing the charge in its entirety, it was not misleading and therefore, did not amount to plain error.

Appellant also argued that the trial court erred in its instructions to the jury concerning how to determine the value of the phone. The Court noted that the value of the merchandise taken affects the classification of the offense as a felony or misdemeanor, and under the version of the statute in effect at the time of appellant's conviction, a person convicted of shoplifting would be punished as for a felony if the value of the property at issue exceeded $300. In its initial charge to the jury, the trial court instructed that "[i]n all cases involving theft by shoplifting, the term 'value' means the actual retail price of the property at the time and place of the offense." This correctly tracked the statutory definition of "value" found in O.C.G.A. § 16-8-14(c). During its deliberations, however, the jury asked if the phone would have a lower value if it were a display model that was not for sale. The trial court responded: "The fact of whether the phone was a display or not to be sold or whatever does not determine its value. It's the value of that phone or instrument if it were to be sold because that would be an option to the owner. But it has a value, you know. You can look at the testimony as to possibly what was paid for it rather than just what it was to be sold for. But no, it doesn't have to be sold. It's there and it has a value." Appellant argued that this additional instruction erroneously allowed the jury to consider the phone's wholesale rather than its retail value.

But, the Court stated, assuming without deciding that the instruction was inaccurate, appellant failed to show that it affected the outcome of the proceedings, and consequently failed to show plain error. The Court found that the trial court instructed the jury that, in order to prove a felony, the State had to demonstrate beyond a reasonable doubt that the phone had a minimum retail value of at least $300. The State presented evidence from one of the store's sales representatives that the type of phone at issue had a retail value greater than that minimum amount. And although the State also presented evidence of the amount the store paid for the phone (its wholesale value), that amount also exceeded $300.

Judicial Comments; Credibility of Witnesses

Wilson v. State, A13A2031 (2/28/14)

Appellant was convicted of possession of cocaine with intent to distribute and possession of marijuana. The evidence showed that an officer saw appellant sleeping in a car. When he looked inside, he also saw marijuana in plain view. A subsequent search of the vehicle revealed a mirror and numerous rocks of crack cocaine. During cross-examination of the officer, defense counsel elicited testimony from him regarding conflicts in his written report and his trial testimony regarding the amount of crack cocaine he found in the vehicle. Defense counsel also elicited testimony from the officer that although he learned at the scene that the vehicle belonged to another person, he failed to verify the information or to inventory the vehicle. The

officer also testified that he did not attempt to fingerprint the mirror, nor did he take any video or photographs of the evidence in the vehicle. Further, he testified on cross-examination that he estimated the weight of the crack cocaine to be approximately 6.5 grams; the GBI subsequently determined the weight of the crack to be 1.64 grams.

During closing argument, defense counsel argued, "It's not okay for police officers to lie. It's not okay for them to overlook things[,] and it's not okay for them to get the details wrong. Their job is to investigate. When they don't, it's not okay. It's not okay for them to cover things up." The trial court interjected, "Ma'am, I've cautioned you. Ladies and gentlemen, you are to disregard the comments from this attorney about any witness lying or covering up." The trial court then instructed defense counsel that she would "be told to sit down if [she did] that again."

Appellant argued that the trial court erred by making improper comments regarding the credibility of a witness in violation of O.C.G.A. § 17-8-57. The Court agreed and reversed his convictions. The purpose of O.C.G.A. § 17-8-57, at least in part, is to prevent the jury from being influenced by any disclosure of the judge's opinion regarding a witness's credibility. The credibility of a witness is a material fact in every case, and any questions of credibility are for the jury to decide. Therefore, anything which tends to uphold, to support, to disparage, or to lower the character and the resulting credibility of the witness is vitally connected with the facts of the case. Here, the trial court's admonition to defense counsel and instructions to the jury to disregard defense counsel's challenge to the officer's credibility clearly intimated the court's opinion that the officer's testimony was believable. It was thus impossible to say that, after hearing the trial court's statements, the jurors were not influenced to some extent. Therefore, the trial court erred in making statements that could have been interpreted as offering an opinion on the officer's credibility.

Moreover, the Court added, the trial court's purported curative instruction did not eradicate its inappropriate comments. The law is well-established that instructions given to the jury by the trial court cannot cure a violation of O.C.G.A. § 17-8-57. Rather, the trial court's compliance with the statutory language of O.C.G.A. § 17-8-57 is mandatory, and a violation of its mandate requires a new trial. According, the Court held, in light of the mandatory nature of the statute and the case law interpreting the statute, appellant's convictions were reversed and the case remanded to the trial court for a new trial.

Search & Seizure; Prolonged Stop

Bennett v. State, A13A2163 (3/3/14)

Appellant was charged with possession of methamphetamine. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed.

The evidence showed that appellant was a passenger of a truck driven by his girlfriend. The officer stopped the truck because it did not have a rear bumper. The officer stated that both appellant and his girlfriend appeared extremely nervous when he approached the truck. The officer said that when he looked inside the truck, there was a sunglasses case "between the driver's seat and the middle seat." According to the video of the stop, the officer leaned in the window and said "you've got to get a bumper on it, you know that." Appellant's girlfriend responded, "We're still trying to get it fixed." The officer then stated: "Okay. All right. That's fine."

The officer then asked if there were any drugs in the car and both appellant and his girlfriend answered "no." The officer asked if anyone was on probation or parole and appellant replied that he was on probation "for drugs." The girlfriend then refused the officer's request to search the vehicle. The officer then told her that he was going to walk his dog around the truck and ordered appellant and his girlfriend to get out of the truck. After appellant got out of the truck, the officer told him to put his hands on top of his head and, when he did so, the officer noticed a knife sticking out of appellant's pocket. The officer removed the knife and asked appellant if he could search his pockets. According to the officer, appellant replied that he was on probation and therefore "had to" consent. The search revealed the drugs on appellant's person. When questioned as to why he immediately began a search for drugs after just briefly mentioning the bumper, the officer stated that it was because appellant and his girlfriend were nervous, their hands were shaking, they were sweating, they would not make eye contact, and there was a sunglasses case between the seats.

The Court stated that assuming without deciding that the officer could stop the truck and inquire about the missing bumper, nervous behavior and a sunglasses case between the seats are not a sufficient basis for prolonging the stop.

Once the tasks related to the investigation of the traffic violation and processing of the traffic citation have been accomplished, an officer cannot continue to detain an individual without articulable suspicion. Once the purpose of the traffic stop has been fulfilled, the continued detention of the car and the occupants amounts to a second detention. If an officer continues to detain an individual after the conclusion of the traffic stop and interrogates him or seeks consent to search without reasonable suspicion of criminal activity, the officer has exceeded the scope of a permissible investigation of the initial traffic stop. Here, the Court concluded, the officer told appellant's girlfriend that she needed a bumper on the truck, but did not issue a warning and did not go back to his car to perform a license check; rather, the officer began inquiring about drugs, told the appellant and his girlfriend to get out of the truck and requested consent to search the truck. Accordingly, the officer impermissibly prolonged the traffic stop beyond the time necessary to warn appellant's girlfriend to get a bumper. Therefore, the trial court erred in denying appellant's motion to suppress.

Kidnapping; Garza

Sellers v. State, A13A1857 (2/27/14)

Appellant was convicted of kidnapping with bodily injury, rape, aggravated sexual battery, aggravated assault and burglary. The victim was the 69 year old grandmother of appellant's wife. The evidence showed that the victim lived alone and that on the night of the crimes, she was sitting in her bedroom when she heard a sound outside the adjacent bedroom. When she went into the other bedroom to investigate, she discovered appellant. He forced her back into her bedroom, where he pushed her down on the bed, bound her up and then assaulted her.

Appellant argued that his conviction for kidnapping must be reversed because the

evidence of asportation was insufficient under *Garza v. State*, 284 Ga. 696 (2008). The Court agreed. *Garza* sets out the following four factors that should be considered in determining whether the asportation element of kidnapping has been shown: 1) the duration of the movement; 2) whether the movement occurred during the commission of a separate offense; 3) whether such movement was an inherent part of that separate offense; and 4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. In analyzing these factors, it is not necessary that each one be satisfied in the State's favor in order to find asportation. Rather, the heart of *Garza*'s analysis is whether the movement in question is in the nature of the evil the kidnapping statute was originally intended to address, i.e., movement serving to substantially isolate the victim from protection or rescue, or merely attendant to some other crime.

Here, the Court found, the evidence pertinent to this issue showed that appellant immediately ordered the victim to go back to her bedroom and pushed her a few steps in that direction. Both bedrooms were located off a short hallway at the back of the house and were closely situated. Thus, there was no question here that the distance the victim moved was short and the duration of the movement was brief. Further, once the victim was in her bedroom, appellant immediately pushed her down on the bed, bound her, and began to sexually assault her. Because the evidence showed that the other bedroom was for the most part unfurnished, it appeared that appellant may have moved the victim back to this bedroom so that he could place her on the bed for the purpose of binding and raping her. Accordingly, while the movement of the victim was not a necessary part of the sexual assault crimes, it allowed appellant to exercise control over the victim during his conduct of the rape and was, therefore, an inherent part of the rape. Also, because the victim was in the house alone and both bedrooms were located in the back of the house, the movement from one bedroom to another did not further isolate the victim or decrease the potential for rescue, thereby posing no significant danger to the victim independent of the danger posed by the sexual assault and rape. Accordingly, appellant's conviction for kidnapping was reversed under the standard set forth in *Garza*.

Extraordinary Motions for New Trial; Out-Of-Time Appeals

Kilgore v. State, A13A1954 (3/3/14)

Appellant was convicted of VGCSA. The trial court imposed sentence and entered final judgment of conviction on December 1, 2011. Appellant did not move for a new trial or file a notice of appeal within 30 days of the final judgment. Rather, on January 23, 2012, his trial attorney filed a document entitled "Extraordinary Motion for New Trial." On April 24, 2013, the trial court entered an order denying the motion on the basis that there was sufficient evidence to support the jury's verdict, and also granting appellant 30 days to file an appeal. Appellant timely filed a direct appeal from that order.

The Court stated that to the extent appellant is deemed to have directly appealed from the denial of an extraordinary motion for new trial, such an appeal would not be properly before the Court because under O.C.G.A. § 5-6-35(a)(7), a party must file an application for discretionary appeal from such an order. However, the Court's jurisdictional review is also guided by the principle that courts are not bound by the designation given motions by the parties and that it also must look to substance over nomenclature. Here, even though appellant designated his filing as an extraordinary motion for new trial, in substance it was a motion for leave to file an out-of-time appeal based on allegations that even though he had expressed his desire to appeal his conviction and could not afford an attorney, appellate counsel was not appointed to represent him until after the expiration of the 30-day period for filing an appeal.

An out-of-time appeal is a judicial creation that serves as the remedy for a frustrated right of appeal. The disposition of a motion for out-of-time appeal hinges on a determination of who bore the ultimate responsibility for the failure to file a timely appeal. The out-of-time appeal is granted where the deficiency involves not the trial but the denial of the right of appeal. Thus, an out-of-time appeal may be granted where a defendant in a criminal case is not advised of his right of appeal or his counsel fails to appeal as directed. Under the circumstances here, the Court concluded, it was apparent that the trial court found that appellant's right to appeal was frustrated and thus, the trial court granted him 30 days to file an out-of-time appeal. Since appellant timely filed his notice of appeal, the case was properly before the Court.

Merger; Remand

Dean v. State, A13A2099 (2/27/14)

Appellant was convicted of armed robbery, aggravated assault, and possession of a firearm during the commission of a felony. The evidence showed that appellant robbed the victim at gunpoint as the victim sat in the victim's truck. Appellant contended the trial court erred by not merging the aggravated assault offense into the armed robbery offense for sentencing purposes. The Court agreed.

The Court noted that the indictment alleged that appellant committed aggravated assault in that he did "assault [the victim] by pointing a .38 Taurus revolver at him, a firearm, which is a deadly weapon." The indictment also alleged that appellant committed armed robbery in that he did "with intent to commit theft, take U. S. Currency and a red Verizon cell phone, property of [the victim], from the person and immediate presence of [the victim] by use of a .38 Taurus revolver, a firearm, which is an offensive weapon." The Court stated that there is no element of aggravated assault with a deadly weapon that is not contained in armed robbery. And because aggravated assault with a deadly weapon does not require proof of any element that armed robbery does not, convictions for both offenses will merge, but only if the crimes are part of the same act or transaction.

The State argued that the crimes of armed robbery and aggravated assault did not involve the same conduct and therefore, did not merge. Specifically, the State contended that the evidence was sufficient for a jury to find that the armed robbery was completed after appellant pointed the revolver at the victim and took the victim's cell phone and keys, and that the facts supporting the aggravated assault occurred when, after taking the victim's money and cell phone, appellant continued to point the revolver at the victim and "made the additional statement about taking the keys to the truck." But, the Court found, the evidence showed that the armed robbery began when appellant pointed the revolver at the victim for the purpose of robbing the victim, during which time the aggravated assault also occurred; and the armed robbery concluded

immediately thereafter when appellant took the victim 's money and cell phone. There was no evidence of a break in appellant's pointing the revolver at the victim between the time appellant obtained the money and cell phone and the time appellant asked whether he should also take the keys to the vehicle. The evidence showed one act or transaction. Accordingly, the aggravated assault was included in the armed robbery, appellant's conviction and sentence for aggravated assault were vacated, and the case was remanded to the trial court for resentencing.

Appellant also moved to remand the case to the trial court so that he could assert claims of ineffective assistance of trial counsel. The Court found that after appellant's conviction, trial counsel timely filed a notice of appeal. More than a year later, trial counsel withdrew as counsel of record. New appellate counsel filed an entry of appearance less than three months after trial counsel had withdrawn as counsel of record, which was approximately one and one half months before the case was docketed in the Court of Appeals. Thus, there was no opportunity to assert a claim of ineffective assistance of trial counsel at the trial level, and therefore, the Court granted the motion for remand to the trial court for appropriate findings concerning the issue of ineffective assistance of trial counsel.