

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MARCH 25, 2016

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## THIS WEEK:

- **Recusals; Judges**
- **Brady; Giglio**
- **Conspiracy; Inconsistent Verdicts**
- **Juveniles; LWOP**
- **Defenses; Motions in Limine**
- **COAMs; Preemption**
- **Plea Negotiations; Judicial Misconduct**
- **Probation Revocation; Dismissal of Indictments**
- **Speedy Trial Demands; O.C.G.A. § 17-7-170**
- **Jury Charges; Plain Error**
- **Out-of-time Appeals; Judicial Misconduct**

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### *Recusals; Judges*

*Battle v. State, S15A1510 (3/21/16)*

Appellant was convicted of malice murder, aggravated assault and numerous other crimes. He contended that the judge erred in not recusing himself from the case sua sponte when he learned about an alleged plot by appellant to have him killed. First, the Court found, it was undisputed, that appellant did not file a timely motion to recuse the judge. Specifically, appellant knew about the alleged plot prior to trial, but he waited until after he had been tried, convicted, and sentenced to raise the recusal issue, which he first asserted four years later in his amended motion for new trial. Under these circumstances, appellant forfeited the right to raise the sua sponte recusal issue on appeal.

Moreover, the Court found, even assuming that a trial judge's failure to recuse sua sponte could in some rare instances constitute reversible error even though the parties knew

of the grounds for recusal and did not seek the judge's recusal in a timely and proper way, there was no reversible error in this case. Absent extraordinary circumstances, threats or plots by a criminal defendant against the judge presiding over his case — even serious ones — do not mandate the judge's recusal. Quoting *United States v. Holland*, 519 F3d 909 (9th Cir. 2008), if threats or plots of violence against judges ordinarily sufficed to require recusal, "defendants could readily manipulate the system, threatening every jurist assigned on the 'wheel' until the defendant gets a judge he preferred. Also, the defendant could force delays, perhaps making the cases against him more difficult to try, perhaps putting witnesses at greater risk. Such blatant manipulation would subvert our processes, undermine our notions of fair play and justice, and damage the public's perception of the judiciary." Thus, there was no error in failing to sua sponte recuse.

### *Brady; Giglio*

*Bryant v. State, S15A1738 (3/21/16)*

Appellant was convicted of murder, aggravated assault and other related crimes committed against two victims. Appellant contended that the trial court erred regarding discovery violations. The Court disagreed.

The record showed that during trial, appellant became aware that one victim and a witness had outstanding warrants pending against them. Appellant complained and moved for a mistrial, arguing that the State had violated *Brady* and *Giglio* by failing to disclose the warrants. The Court stated that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is

material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution. This includes the suppression of impeachment evidence that may be used to challenge the credibility of a witness. To prevail on a *Brady* claim, it must be shown that (1) the State possessed evidence favorable to his defense; (2) he did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial would have been different.

Here, the Court found, appellant could not establish a *Brady/Giglio* violation because he was able to obtain the evidence himself. From the record, it appeared that the prosecution was unaware of the warrants because it had not performed criminal background checks of the two witnesses in question. The defense obtained the information on its own accord. Specifically, at trial, defense counsel informed the trial court that he had found out about the warrants from the defense investigator. Nevertheless, in response to appellant's request for a mistrial and as a way of mitigating the late discovery of the information, the trial court allowed appellant broad leeway to cross-examine both individuals, as well as the investigators on the case, about the outstanding warrants. During his cross-examination, appellant was able to establish that neither individual had been arrested on the warrants and counsel was able to imply that the two might be receiving such favorable treatment in exchange for their testimony against appellant. Since there was no violation of *Brady* or *Giglio*, the trial court did not abuse its discretion when it declined to grant a mistrial.

## **Conspiracy; Inconsistent Verdicts**

*Thornton v. State*, S15G1108 (3/21/16)

Appellant was charged with murder, conspiracy to commit murder, making false statements, and tampering with evidence; her co-defendant, Booth, was charged with murder, conspiracy to commit murder, and making false statements. A jury found appellant not guilty of murder but guilty of the remaining charges, and the same jury acquitted Booth of murder and conspiracy

to commit murder but found him guilty of making false statements. The Court of Appeals affirmed appellant's convictions, relying on cases abolishing the inconsistent verdict rule. *Thornton v. State*, 331 Ga.App. 191 (2015). The Supreme Court granted appellant's petition for certiorari, posing the following question to the parties: "Did the Court of Appeals err when it affirmed appellant's conviction for conspiracy to murder although her sole co-conspirator was acquitted of conspiracy to murder by the jury before which they were jointly tried?"

The Court noted that in *Smith v. State*, 250 Ga. 264 (1982), it stated in dicta that "[i]n a joint trial of co-conspirators, a failure of proof as to one conspirator would amount to a failure of proof as to both, the evidence presented being identical. Co-conspirators, alleged to be the only two parties to the conspiracy, may not receive different verdicts when they are tried together. In such a situation, the verdicts are inconsistent because they reach different results regarding the existence of a conspiracy between these two parties based on exactly the same evidence." Four years later, however, in *Milam v. State*, 255 Ga. 560 (1986), the Court unequivocally abolished the inconsistent verdict rule.

Thus, the Court stated, this case was one of first impression only inasmuch as it concerns inconsistent conspiracy verdicts between jointly-tried co-conspirators and as it concerns the validity of the dicta in *Smith*. After considering the matter, the Court saw no reason why *Milam* and its progeny would not be applicable here. Accordingly, the Court disapproved of the dicta in *Smith* inasmuch as it had been abrogated by *Milam* and its progeny. Therefore, the Court concluded, because the evidence was otherwise sufficient to convict appellant of the crimes for which she was charged, the Court of Appeals did not err when it affirmed appellant's conviction for conspiracy to murder.

## **Juveniles; LWOP**

*Veal v. State*, S15A1721 (3/21/16)

Appellant was convicted of murder, rape, armed robbery and other crimes. The evidence showed that his crimes were part of a series of gang-related crimes. At the time of the crimes, appellant was 17 1/2 years old. At the sentencing hearing, the trial court

made no explicit mention of appellant's age or its attendant characteristics, saying only: "based on the evidence.... it's the intent of the court that the defendant be sentenced to the maximum." The court then imposed a sentence of life without parole (LWOP) for the murder to run consecutively to the six consecutive life-with-parole sentences plus the 60 more consecutive years the court imposed for the other convictions. Two years later, with the assistance of new counsel, appellant filed an amended motion for new trial, raising for the first time a claim that his LWOP murder sentence was unconstitutional under *Miller v. Alabama*, 132 S.Ct. 245 (2012). The trial court denied the motion. Citing *Jones v. State*, 296 Ga. 663 (2015), and *Brinkley v. State*, 291 Ga. 195 (2012), the court first held that appellant's constitutional challenge to his sentence was untimely, as it had not been raised before sentencing but rather for the first time two years later in his amended motion for new trial. The court then alternatively denied the claim on the merits, stating: "As the Court indicated at that time, its sentence was based upon the evidence in the case which included [appellant's] involvement in several savage and barbaric crimes and also included evidence of [appellant's] age."

Appellant contended that the trial court erred in sentencing him to life without parole for malice murder. The Court agreed. The Court noted that over the past decade, the U. S. Supreme Court has applied its "evolving standards of decency" theory of the Eighth Amendment to promulgate ever-increasing constitutional restrictions on the states' authority to impose criminal sentences on juvenile offenders. The U.S. Supreme Court's recent decision in *Montgomery v. Louisiana*, 136 S.Ct. 718 (2016), was a continuation of this evolving standard. Although *Miller* did not outlaw LWOP sentences for the category of all juvenile murderers, *Montgomery* held that *Miller* announced a *substantive rule* of constitutional law that the sentence of life without parole is disproportionate for the vast majority of juvenile offenders, with sentencing courts utilizing the process that *Miller* set forth to determine whether a particular defendant falls into this *almost-all* juvenile murderer category for which LWOP sentences are banned.

And, the Court stated, a sentence imposed in violation of this substantive rule

— that is, an LWOP sentence imposed on a juvenile who is not properly determined to be in the very small class of juveniles for whom such a sentence may be deemed constitutionally proportionate — is not just erroneous but contrary to law and, as a result, void. Therefore, the Court found, “it follows, as a matter of Georgia procedural law, that Appellant’s *Miller* claim — now understood to be a substantive claim that, if meritorious, would render his sentence void — could be properly raised in his amended motion for new trial and in this direct appeal, despite his failure to raise the claim before he was sentenced...[and t]o the extent *Jones*, *Brinkley*, or any other Georgia appellate case holds otherwise, it is hereby disapproved.”

Moreover, the Court stressed, “*Montgomery* emphasizes that a life without parole sentence is permitted only in ‘exceptional circumstances,’ for ‘the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible’; for those ‘rarest of juvenile offenders ... whose crimes reflect permanent incorrigibility’; for ‘those rare children whose crimes reflect irreparable corruption’ — and not, it is repeated twice, for ‘the vast majority of juvenile offenders.’ 136 S.Ct. at 733-736 (emphasis added). The Supreme Court has now made it clear that life without parole sentences may be constitutionally imposed only on the worst-of-the-worst juvenile murderers, much like the Supreme Court has long directed that the death penalty may be imposed only on the worst-of-the-worst adult murderers. To the extent this Court’s decisions in *Jones* and *Bun* suggested otherwise, they are hereby disapproved.”

Here, the Court noted, the trial court appeared generally to have considered appellant’s age and perhaps some of its associated characteristics, along with the overall brutality of the crimes for which he was convicted, in sentencing him to serve life without parole for the murder — a crime for which appellant may have been convicted only as an aider-and-abettor. The trial court did not, however, make any sort of distinct determination on the record that appellant was irreparably corrupt or permanently incorrigible, as necessary to put him in the narrow class of juvenile murderers for whom an LWOP sentence is proportional under the Eighth Amendment as interpreted in *Miller* as refined by *Montgomery*. Accordingly, the Court vacated the life without parole sentence imposed on appellant for malice

murder and remanded the case for resentencing on that count in accordance with its opinion, *Miller*, and *Montgomery*.

## **Defenses; Motions in Limine**

*Gilreath v. State*, S15A1512 (3/21/16)

Appellant was convicted of malice murder and associated crimes in connection with the beating death of two-year-old Joshua Pinckney, the son of his live-in-girlfriend, Miriam Pinckney (“Pinckney”). The evidence, briefly stated, showed that Pinckney had two young children, Joshua and Maria, both of whom were adopted from Guatemala; Pinckney and her children were living with appellant at the time of Joshua’s death. Appellant was left to care for the children while Pinckney was at work. However, Pinckney came home at lunch at appellant’s request, noticed nothing wrong and went back to work. Pinckney also came home after work and noticed a slight bruise on Joshua’s cheek, but still left him in the care of appellant. The next morning, Joshua was found to be unresponsive and the medical examiner determined that Joshua had been severely beaten, sustaining injuries equal to that expected from a car accident, and died as a result of severe trauma to the head. The medical examiner opined that Joshua died somewhere between four and twelve hours before he was found, though eight-to-ten hours was most likely; the medical examiner also opined that Joshua sustained his injuries somewhere between four and fifteen hours before he died, though eight-to-twelve hours was most likely.

The State moved the trial court to prohibit appellant from eliciting testimony from Pinckney’s ex-husband, who testified as a witness for the State, that Pinckney had a history of threatening both children. The State’s motion in limine was granted. Appellant made an offer of proof, and the trial court reaffirmed its ruling. Appellant contended that the trial court abused its discretion and the Court agreed.

The Court stated that this case was similar to *Scott v. State*, 281 Ga. 373 (1) (2006), in which the Court held that the trial court prevented the defendant from presenting a complete defense. Here, the Court found, Pinckney’s ex-husband, an attorney, would have testified that: he observed Pinckney slap then-infant Maria in the face for refusing to

eat breakfast and that he considered reporting the incident to the Department of Human Resources; Pinckney would cuss at the infant children or threaten the children with beatings (though the children were too young to understand); Pinckney had indicated that she wanted to send the children back to Guatemala; and Pinckney had a history of engaging in this type of behavior when she was feeling stressed or angry. This evidence, the Court found, like the evidence in *Scott*, raised a reasonable inference of appellant’s innocence and, like in *Scott*, Pinckney’s presence in the residence on the day of the murder connected her with the corpus delicti.

The Court further determined that the exclusion of this evidence was not harmless. Thus, the Court found, the State elicited testimony from a variety of witnesses portraying Pinckney as a caring and capable mother. The trial court’s ruling not only hamstrung the defense from rebutting testimony that Pinckney was a good mother, but the ruling also prevented appellant, like the defendant in *Scott*, from presenting evidence that the only other person in the house at the time had a history of cruel treatment towards her own children. Therefore, the Court held, the trial court’s ruling constituted reversible error. Accordingly, appellant’s convictions for malice murder, and count six, cruelty to children in the first degree (premised on cruel and excessive physical pain caused by bruising) were reversed.

## **COAMs; Preemption**

*Gebrekidan v. City of Clarkston*, S15A1442 (3/21/16)

Appellant operates a convenience store in the City of Clarkston where she sells packaged beer, malt beverages, and wine for consumption off-premises and also offers COAMs for play pursuant to a state license granted pursuant to the COAM Laws. Clarkston has an ordinance that provides as follows: “No retail dealer in packaged beer, malt beverages or wine shall permit on his premises any slot machines or mechanical music boxes or pinball machines or any form of electronic or mechanical game machine or coin-operated device which might be used for entertainment or amusement purposes.” Appellant was convicted and fined for violating this ordinance. Appellant appealed to superior court asserting that local legislation regarding COAMs was preempted by state law. After the superior court affirmed

her conviction, appellant was granted a discretionary review by the Supreme Court to address whether the State's detailed statutory scheme regulating coin operated amusement machines (COAMs) and COAM businesses in Georgia, see O.C.G.A. §§ 16-12-35 and 50-27-70 to 50-27-104 (COAM Laws), preempts the City's ordinance under the Uniformity Clause of the Georgia Constitution, see Ga. Const. of 1983, Art. III, Sec. VI, Par. IV (a).

The Court stated that state statutes generally control over local ordinances on the same subject. This doctrine, known as state preemption, is rooted primarily in the Georgia Constitution's Uniformity Clause, which now reads: "Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws."

Under the first part of the Uniformity Clause, the General Assembly may preempt local ordinances on the same subject as a general law either expressly or by implication. The Court found that the COAM Laws, the text of which (aside from annotations) fills more than 35 pages of the Georgia Code, establish by general laws precisely the sort of comprehensive statutory scheme regulating a subject — COAMs and COAM businesses — on a statewide basis that gives rise to implied preemption of local ordinances on the same subject. In so holding, the Court stated that it does not matter that the local ordinance does not duplicate any specific provision of the COAM Laws. Where the state statutory scheme is as comprehensive as the COAM Laws, the Court presumes that the General Assembly meant to occupy the entire field of regulation on the subject, and thus that the gaps the legislature left were intended to be unregulated matters rather than spaces for local governments to fill by local regulation. Therefore, contrary to the City's claim, the ordinance is not one that only incidentally affects COAMs and COAM businesses. The direct effect of the ordinance is to ban COAMs from businesses in the City of Clarkston where the State of Georgia allows them. Accordingly, the Court concluded, the COAM Laws preempt the city ordinance.

The Court next addressed the second part of the Uniformity Clause. Under this part of the Clause the ordinance, because it also regulates COAMs and COAM businesses, is preempted unless it is (1) authorized by general laws, and (2) does not conflict with them. The Court found that it need not address the conflicts question because the ordinance is not authorized by general laws. Accordingly, the Court concluded, the local ordinance was not authorized by general law, and thus the ordinance was not saved from preemption by the COAM Laws under the "except" provision of the Uniformity Clause. It therefore reversed appellant's conviction.

### ***Plea Negotiations; Judicial Misconduct***

*Boccia v. State, A15A1660 (2/12/16)*

Appellant and a codefendant were convicted by a jury of armed robbery, battery, and carrying a weapon in a school safety zone. Appellant was sentenced to 15-to-do-14 on the armed robbery. He received concurrent sentences of 10 years on the weapons conviction and 1 year on the battery. He contended that the trial court's comments "improperly encouraged [him] to proceed to trial" rather than "entertaining any plea discussions with the prosecution" because the trial court led him to believe that he would not receive a sentence of greater than 10 years. The record showed that at one point during trial the Court told the prosecution it had a "you've-got-to-be-kidding-me feeling about this case right now, that what I'm seeing right now by virtue of just your opening statements is y'all are pursuing armed robbery against these two defendants based on a PVC pipe that somebody picked up in a frat fight and a pocket knife that maybe has a 2-inch long blade on it. I have seen the State come off armed robbery charges for a lot more egregious conduct than this. *I'm not prejudging anything . . . I haven't heard your case. . . .* I don't pick the charges, but I do sentence. *You're going to have to get an armed robbery conviction to get a whole lot of time from what I'm seeing right now.*" (Emphasis supplied)

Although appellant conceded that the trial court did not explicitly state that appellant would not get more than ten years, he argued that there was no reason to accept the plea offer of ten years "because a conviction following

trial would have no worse consequences." But, the Court noted, the State's "best last offer" was not a straight 10 year sentence, but 15-to-do-10. Also, the record showed that the trial court's comments came after appellant rejected this offer and after appellant told the court he wanted to go to trial despite understanding that he could be sentenced to a maximum of life plus 51 years if convicted on all counts. Accordingly, the Court found no merit in his contention that he rejected an offer because of the trial court's after-the-fact comments.

Appellant also argued that the trial court interfered in the plea negotiation process. Specifically, the trial court commented before closing arguments as follows: "[Y]ou know my feelings on the case. It really hasn't changed. You know, my comments initially were after hearing the State's opening that even if you proved everything you're going to prove I was a bit surprised at what was going forward." The trial court continued, however, saying, "I think what is in evidence under the law as to what elements there are for armed robbery, there's enough there for a jury to consider it, so I think as a court that's where I am, but as far as a plea, that's a whole different ballgame."

The Court stated that while it is inappropriate for a trial court to insert itself into the plea negotiation process, Uniform Superior Court Rule 33.5 (B) expressly allows a trial court to indicate whether it is likely to agree in a proposed plea. And here, the Court found, the trial court did not enter into plea negotiations and neither promised nor implied that it would give appellant a 10-year sentence, or that it would give him a higher sentence if he did not plead. Moreover, the court clearly stated that it was not prejudging the case. Therefore, the Court found, the trial court did not insert itself into the plea negotiations.

### ***Probation Revocation; Dismissal of Indictments***

*State v. Miller, A15A1667, A15A1668, A15A1748 (2/12/16)*

Miller, Evans and Broughton appeared for hearings as to whether their probations should be revoked in light of their involvement in new crimes. When the State failed to produce victims or witnesses of each of the new crimes, the trial court dismissed all three of the new indictments "for want of prosecution." The State appealed all three dismissals on the ground that the trial court

interfered with the State's right to prosecute when it dismissed the new indictments during the probation revocation hearings. The Court agreed and reversed all three cases.

The Court stated that a trial court is authorized to dismiss accusations and indictments. Specifically, a trial court's power to control the proceedings before it entails the discretion to dismiss criminal charges without prejudice for want of prosecution. But, a trial court abuses its discretion when it interferes with the State's right to prosecute by dismissing an accusation without a legal basis to do so. A trial court generally lacks the authority to dismiss accusations *with* prejudice, except when a prosecutor would violate a defendant's rights by continuing a prosecution. And here, the Court found, there was no evidence to support a finding that the defendants suffered a violation of any of their rights, including due process.

A trial court has the discretion, however, to dismiss criminal cases *without* prejudice as long as the record provides a legal basis for the dismissal, such as a want of prosecution. But, the Court noted, there is no authority for the proposition that a trial court, where there is no due process violation, is authorized to dismiss criminal charges without prejudice due to the unavailability of evidence. Therefore, the Court concluded, there was no legal basis for the trial court to dismiss the indictments without prejudice.

Moreover, the Court noted, the trial court dismissed the three indictments at issue during the probation revocation proceedings triggered by them. But a criminal prosecution and a probation revocation proceeding based on the same occurrence actually have nothing to do with each other. At a probation revocation proceeding, the defendant is not in the position of one accused by indictment, even though the probationary condition alleged to have been violated is the commission of a crime against the State. Such a proceeding is not a trial on a criminal charge, but is a hearing to judicially determine whether the conduct of the defendant during the probation period has conformed to the course outlined in the order of probation. Thus, the Court found, even if the trial court would have been justified in denying the State's petitions for probation revocation on the ground that it had failed to produce any witnesses in support of the petitions, there was no legal basis for the dismissal of the indictments.

## **Speedy Trial Demands; O.C.G.A. § 17-7-170**

*Redford v. State, A15A1868 (2/11/16)*

Appellant appealed from the denial of his motion for a speedy trial. The record showed that appellant had counsel from February 2014 until May 2014. Appellant, acting pro se, filed his motion for a speedy trial in April 2014.

The Court stated that a demand for a speedy trial has no legal effect whatsoever if filed by a defendant, acting pro se, at a time when he or she is represented by counsel. Accordingly, the trial court did not err in denying the motion on this ground. Moreover, the Court noted, O.C.G.A. § 17-7-170(a) provides that "the demand for a speedy trial shall be filed with the clerk of court and served upon the prosecutor and upon the judge to whom the case is assigned." The trial court may deny a demand for speedy trial if the defendant fails to serve the demand on both the prosecutor and the trial court. And here, the trial court found that appellant did not serve the court because appellant's certificate of service on the motion showed only service on the State. Thus, this too provided sufficient grounds for denying appellant's motion.

## **Jury Charges; Plain Error**

*Barnes v. State, A15A1631 (2/15/16)*

Appellant was convicted of statutory rape, enticing a child for indecent purposes, child molestation, and contributing to the delinquency of a minor. Appellant argued that the trial court committed reversible error in failing to give the jury the complete pattern jury charge he requested regarding his decision not to testify in his own defense at trial. The Court agreed.

The record showed that appellant requested and the court gave, Pattern Charge § 1.32.10 which states as follows: "The defendant in a criminal case may take the stand and testify and be examined and cross-examined as any other witness. You should evaluate such testimony as you would that of any other witness. However, the defendant does not have to present any evidence nor testify. *If the defendant chooses not to testify, you may not consider that in any way in making your decision.*" (Emphasis supplied). But, in giving the charge, the Court left out the italicized language. The Court noted that since defense

counsel did not object to the charge as given, the failure to give the complete charge must be reviewed under a plain error standard.

Under this standard of review, the Court stated that it is required to determine whether the instruction was erroneous, whether it was obviously so, and whether it likely affected the outcome of the proceedings. The Court found that all three of these prongs were satisfied. Nevertheless, the Court stated, it must also determine whether to use its discretion to remedy the error by granting a new trial. The test for exercising its discretion is whether the error seriously affects the fairness, integrity or public reputation of judicial proceedings. And here, the Court found, the failure to give the instruction subverted the privilege against compulsory self-incrimination and not only undermined the fairness of the proceeding, but public confidence in that process. Accordingly, the Court concluded, appellant must be awarded a new trial.

## **Out-of-time Appeals; Judicial Misconduct**

*McCranie v. State, A15A2008 (2/2/16)*

Appellant pled guilty to child molestation and statutory rape. He contended that the trial court erred in summarily denying his motion for an out-of-time appeal. The Court agreed and reversed.

Out-of-time appeals are designed to address the constitutional concerns that arise when a criminal defendant is denied his first appeal of right because the counsel to whom he was constitutionally entitled to assist him in that appeal was professionally deficient in not advising him to file a timely appeal and that deficiency caused prejudice. However, for an out-of-time appeal to be available on the grounds of ineffective assistance of counsel, the defendant must necessarily have had the right to file a direct appeal. A direct appeal from a judgment of conviction and sentence entered on a guilty plea is only available if the issue on appeal can be resolved by reference to facts on the record. The ability to decide the appeal based on the existing record thus becomes the deciding factor in determining the availability of an out-of-time appeal when the defendant has pled guilty. Issues regarding the effectiveness of counsel are not reached unless the requirement that the appeal be resolved by reference to facts on the record is met.

Thus, in considering appellant's argument that trial counsel was ineffective for failing to advise him of his right to appeal, the only relevant factor was whether appellant had a possible ground for appeal about which his lawyer failed to inform him. Appellant argued that he had a ground to challenge his plea as being involuntary because the trial court impermissibly interfered in the plea negotiations. The Court noted that judicial participation in the plea negotiation process is prohibited by court rule in this state and is prohibited as a constitutional matter when it is so great as to render a guilty plea involuntary.

Here, the Court found, the trial court not only rejected the negotiated plea, but repeatedly indicated that it wished to sentence appellant to a longer sentence. The trial court also stated that it would be happy for appellant to withdraw his plea so that the trial court could preside over his trial. Appellant ultimately agreed to enter a guilty plea with less favorable terms than those which he had originally negotiated. Thus, the Court found, and the State conceded, the judicial participation in the plea negotiations in this case was so great as to render appellant's resulting guilty plea involuntary. Accordingly, appellant had a possible ground for direct appeal based on the trial court's interference in the plea negotiations.

A trial court is required to make an inquiry as to whether the defendant was responsible for the failure to pursue a timely direct appeal. A trial court abuses its discretion when it fails to make such a factual inquiry. Thus, the trial court erred when it denied appellant's motion without making a factual inquiry into whether his failure to timely pursue a direct appeal was attributable to him or trial counsel. Accordingly, the Court reversed the trial court's denial of appellant's motion for out-of-time appeal and remanded the case for the trial court to conduct the requisite factual inquiry.