

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MARCH 2, 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:

- **Speedy Trial**
- **Verdict Form; Burden of Proof,**
- **Merger**
- **Speedy Trial; Hearsay**
- **Probation Revocations; Notice**
- **Informants**
- **Self-Defense; OCGA § 16-3-24.2**

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### Speedy Trial

*Phan v. State, S11A1909 (2/27/2012)*

In a telephone interview, the victim, who had traveled back to her family's home in Vietnam, identified appellant as the man who shot her and killed her husband and two year-old son. The State produced its discovery materials in October 2006, and the defense filed more than 50 pretrial motions in November 2006; that same month, the trial court entered an order removing the case from the trial calendar until all pretrial motions had been heard and resolved.

In April 2009, on the day before a long-scheduled motions hearing, the defense filed a constitutional speedy trial demand and a motion to dismiss for the State's failure to provide sufficient resources for the defense. At the outset of the hearing, defense counsel requested a continuance on the basis that the GPDSC had stopped paying their fees in the case. The defense presented testimony to the effect that the then-Director of the GPDSC, having received a recent State audit report indicating potential constitutional problems with the funding structure for GPDSC's ar-

rangements with outside counsel, suspended further payments for appellant's case. There was no funding available for appellant's defense, nor was there any money appropriated for it in the budget for the following fiscal year. The District Attorney candidly conceded that appellant was not being afforded sufficient resources for his defense; nonetheless, the prosecution contended that dismissing the case and striking the death notice were not appropriate remedies and suggested that appellate guidance would ultimately be necessary to resolve the issues.

There was no dispute that the more than four-year delay crossed the threshold of presumptive prejudice. The Court examined whether the defendant or the State bore more accountability for the delay and the Court concluded that while the defense bore some responsibility for the delay, that it alone is not to blame. Once the indictment was issued, more than a year elapsed before the prosecution turned over its discovery to the defense and then well over another year passed before the funding issues erupted and were brought to the trial court's attention. As the record revealed no specific reason for this delay, the Court attributed it to the State's negligence in moving the case forward.

However, the Court noted that appellant first asserted his right to a speedy trial in April 2009, more than four years after his arrest and three-and-a-half years after his indictment. At no point during the years-long period before the funding issues became salient did the defense assert any objection to the slow pace of the case, and the defense actively sought further delay once the funding issues did emerge.

The Court concluded that the trial court properly weighed the length of the delay

against the State and properly weighed appellant's delay in asserting his speedy trial right heavily against the defense and it did not abuse its discretion in denying appellant's motion to dismiss on speedy trial grounds.

## **Verdict Form; Burden of Proof**

*Cheddersingh v. State, S11A1929 (2/27/2012)*

The Court awarded appellant a new trial because a preprinted verdict form erroneously instructed the jury that in order to find appellant not guilty of the crimes charged, the jury had to do so beyond a reasonable doubt.

Appellant was convicted for malice murder, as well as for aggravated assault, armed robbery, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon. Regarding Count One, the verdict form set forth: "As to the offense of Murder (O.C.G.A. § 16-15-1), we the Jury unanimously and beyond a reasonable doubt find the Defendant \_\_\_\_\_." Under the blank space were, in smaller type, the words: "Guilty or Not Guilty." This format was replicated for each of the remaining charges. As to each charge, the jury filled in the word "Guilty." But, the wording of the verdict form required that for the jury to complete the form by filling in "Not Guilty," it would have to complete a sentence stating that it found "unanimously and beyond a reasonable doubt" that appellant was not guilty.

While at trial, appellant did not raise any objection to the verdict form but nonetheless, argued that the verdict form constituted plain error, and that under OCGA § 17-8-58 (b), the asserted error was reviewed. The Court held that the presumption of innocence, the burden of proof, and the standard of proof, are the fundamental doctrines of American criminal jurisprudence and is fundamental to a fair trial and a conviction resulting from a procedure in which the trial court misinformed the jury regarding the effect of that presumption affects not only the fairness of that proceeding itself, but public confidence in the judicial process as a whole.

In a criminal case, a verdict form is erroneous when the form would mislead jurors of reasonable understanding, or the trial court erroneously instructed the jury on the presumption of innocence, the State's burden of proof, the possible verdicts that could be

returned, or how the verdict should be entered on the printed form. The trial court's oral instructions informed the jury that the defendant was innocent until proven guilty beyond a reasonable doubt, and that the burden of proof is upon the State and never shifts to the defendant. Nonetheless, the Court recognized that " 'the presence of . . . written instructions in the jury room . . . serve[s] to enlighten, rather than confuse, the jury.' [Cit.]" *Howard v. State*, 288 Ga. 741, (2011). When the written instructions that the jury has with it in the jury room are infirm, the expected result is not enlightenment, but confusion. The Court concluded that the verdict form would mislead jurors of reasonable understanding as to the presumption of innocence and the proper burden of proof for the jury's consideration, and that this constituted error despite the inclusion of proper language elsewhere in the jury instructions when taken as a whole.

## **Merger**

*Alvelo v. State, S11A1979 (2/27/2012)*

Appellant was convicted of the malice murder, aggravated assault and false imprisonment, possession of a knife during the commission of a crime, and concealing a death. Appellant argued that his conviction and sentence for the aggravated assault of one victim should be vacated because the conviction merged as a matter of fact into the conviction for the malice murder of that victim. The indictment charged appellant with assaulting the victim with a knife and a hatchet, objects likely to result in serious bodily injury when used offensively against another. The malice murder count of the indictment charged appellant with causing the victim's death with malice aforethought by use of a knife and a hatchet. The forensic pathologist found the cause of death to be "multiple sharp force injuries." The State argued the a separate conviction for aggravated assault could survive because the forensic pathologist noted that the victim sustained both lethal and non-lethal injuries and the numerous wounds suffered by the victim were not inflicted in quick succession because the blood-spatter evidence established the victim suffered his injuries in several rooms of the house.

However, the Court found that the crime of aggravated assault is included in the crime of malice murder when the former "is established by proof of the same or less than all the facts

or a less culpable mental state than is required to establish the commission of [the latter]." OCGA § 16-1-6(1). The aggravated assault that resulted in the victim's death merged as a matter of fact into the murder conviction. However, a separate judgment of conviction and sentence is authorized if a defendant commits an aggravated assault independent of the act which caused the victim's death. The forensic pathologist who conducted the autopsy catalogued the victim's wounds as "chop injuries" that fractured the victim's skull and incapacitated him and were likely inflicted with the hatchet, "punctures" and "superficial," "deep," and "very deep" incisions and stab wounds that were inflicted by knives. The pathologist did not testify as to the order in which the wounds were inflicted and did not describe any specific wound as being a fatal injury, concluding that the victim's cause of death was due to "multiple sharp force injuries." In light of the pathologist's testimony and in the absence of evidence that the victim suffered a non-fatal injury prior to a deliberate interval in the attack upon him, and a fatal injury thereafter, the Court found that appellant's conviction for aggravated assault of the victim merged into the conviction for malice murder of the victim.

## **Speedy Trial; Hearsay**

*State v. Takyi, A11A2103 (2/29/2012)*

Elizabeth Takyi was arrested for driving under the influence of alcohol. Eighteen months later, following an evidentiary hearing, the trial court dismissed the State's case on the ground that the State had violated Takyi's constitutional right to a speedy trial. The record showed that on October 3, 2008, an officer issued Takyi citations for failure to maintain her lane and driving under the influence of alcohol. The citations ordered Takyi to appear in municipal court on November 19, 2008. The matter was apparently continued, and on January 5, 2009, Takyi appeared at an arraignment in municipal court and demanded a trial by jury.

Just over a year later, defense counsel, sent a letter to the solicitor general inquiring about the status of the case and stating that his client requested "that the charges against her be brought to trial at the earliest possible opportunity, asserting her right to a speedy trial under the constitution." Defense counsel raised a concern about how the case was af-

fecting his client's immigration status, and he concluded with the following request: "please try to locate this case and accuse it as quickly as possible, so we can get it to trial before it results in her losing everything she has worked so hard for."

The solicitor general filed formal charges against Takyi in the state court and on February 22, 2010, Takyi, filed a demand for speedy trial pursuant to the United States and Georgia Constitutions and pursuant to OCGA § 17-7-170. On April 27, 2010, the judge held a hearing on the motion and entered an order granting the motion to dismiss. The court found that the 18-month delay was unreasonable and raised a presumption of prejudice, thereby triggering a balancing test of the remaining factors. The court found that there was nothing in the record to explain the delay other than the State's negligence and nothing to indicate that Takyi bore any responsibility for the delay; that Takyi had asserted her right to a speedy trial as early as possible given that the case was missing for a year or more; and that Takyi was prejudiced because she had suffered unusual and extreme anxiety and concern associated with the pending charges because of her unresolved immigration status.

The Court reviewed the trial court's application of the four-factor balancing test and found that although there was significant evidence in Takyi's favor regarding her attempts to obtain a speedy trial, the trial court's findings appeared to be based on an error of law regarding when Takyi could assert a constitutional speedy trial demand and partially based on improper hearsay evidence. Takyi testified that she was prejudiced in that the delay caused her anxiety and concern regarding her immigration status. The State contended that the trial court allowed impermissible hearsay on this topic, over objection, and based its findings of fact on that hearsay with regard to this factor. The rule that hearsay is objectionable and without probative value is applicable to hearings on speedy trial motions, thus, the trial court erred by allowing hearsay evidence and relying on hearsay in its findings.

## **Probation Revocations; Notice**

*Jones v. State, A11A2052 (2/29/2012)*

Appellant filed an application for discretionary appeal, which the Court granted

in order to review whether the trial court was authorized to revoke the balance of appellant's probation. The Court reversed. The record revealed that appellant pleaded guilty to one count of felony cruelty to children and was sentenced to ten years probation with sex offender conditions. Appellant violated the provision of his probation, requiring him to "[r]eport to the Probation Officer and permit the Probation officer to visit [him] at home or elsewhere." In the revocation petition, the Georgia Department of Corrections, Probation Division recommended a six-month revocation of appellant's probation based on the violation.

At the revocation hearing, the probation officer testified that appellant had been in jail for six months for a previous probation revocation, and upon release was ordered to report to the probation office within 48 hours. Although appellant initially reported at that time, he was given an appointment to meet with his probation officer on a later date, which appointment he failed to keep. The office issued a warrant for appellant's arrest, and appellant turned himself in after learning of the warrant.

At the conclusion of the hearing, the trial court determined that appellant had failed to comply with special conditions of his probation, namely that he register as a sex offender. Based on that finding, the trial court revoked the balance of appellant's probation, which amounted to four years, eleven months, and one day, and directed that he serve that time in the state penal system.

Appellant argued that the trial court's revocation order was erroneous because the State did not petition for modification based on any failure on appellant's part to meet any requirements that he register as a sex offender, which was the reason his probation was revoked by the trial court. Due process requires that a defendant be given written notice of the claimed violation of his probation prior to a probation revocation hearing. In addition, in order to revoke the probationary features of a sentence the defendant must have notice and opportunity to be heard, the notice being sufficient to inform him not only of the time and place of the hearing and the fact that revocation is sought, but the grounds upon which it is based. It may not be revoked where there is no evidence that the defendant violated its terms in the manner charged in the notice, even though there is evidence at the hearing

that the defendant violated the terms of probation in some other manner as to which there was no notice given. Likewise, if a judgment is based upon an offense not charged in the petition for revocation, it must be reversed. The Department's petition for revocation of probation contained no allegation that appellant had failed to register as a sex offender, and the trial court therefore erred by revoking appellant's probation on that basis.

## **Informants**

*Strozier v. State, A11A1956 (2/29/2012)*

Appellant was convicted of rape. He first argued that he was denied due process when the trial court refused to require the identification of an informant who witnessed the events leading up to the events that transpired. Appellant argued that the informant served as an "informer witness," that his or her identification should have been revealed as the "only witness not also involved" in the attack, and that the trial court committed an error of constitutional magnitude when it refused to require such identification. The Court disagreed. OCGA § 24-9-21 and OCGA § 24-9-27 create a privilege against disclosure of the identity of a confidential informant who was not an eyewitness to the offense that forms the basis for the prosecution, and the Court noted that the non-disclosure of a confidential informant's identity "encourages assistance, protects the future usefulness of the informant, and protects the safety of the informant, and is a matter of sound public policy within the statutes."

Moreover, whether or not a confidential informant's identity is discoverable "rests within the sound discretion of the trial court, which discretion can be exercised only after the trial court has heard evidence as to the relevance, materiality, and necessity of disclosure from the defense." And when the issue concerns disclosing the identity of an informer-witness (a person used to establish facts upon which to base a prosecution) and/or an informer-participant (a person used to obtain evidence), the trial court must apply the *Roviaro v. United States* balancing test if, pursuant to *Brady v. Maryland*, the informer's identity is required to be disclosed. The trial court conducted an untranscribed, in camera interview with the informant and then stated on the record that nothing indicated that the

informant was an eyewitness to the attack, and that the informant had only seen the victim when she was on the street with the men and was of the opinion that the victim was intoxicated and seeking drugs at that time. Thus, the trial court determined that it was not necessary to identify the informant and denied appellant's motion accordingly. Under the foregoing circumstances, the trial court correctly denied the motion to reveal the informant's identity when the informant was a mere tipster. Thus, the trial court did not err in denying the motion and was not required to conduct further inquiry.

### **Self-Defense; OCGA § 16-3-24.2**

*State v. Hipp, A11A2322 (3/1/2012)*

The record showed that Hipp was involved in a physical altercation in which he drew a knife. The police were called, and Hipp was subsequently arrested and charged with the offenses of simple battery and aggravated assault. Hipp moved to dismiss the indictment, arguing that he was immune from prosecution under OCGA § 16-3-24.2, because he was acting in self-defense. At the pre-trial hearing on Hipp's immunity motion, Hipp and his son testified in support of Hipp's self-defense claim. The trial court denied Hipp's immunity motion, finding that it suggested that Hipp's altercation was more of a mutual combat, rather than an action taken in self-defense. Following the denial of Hipp's motion for immunity, the case proceeded to a jury trial. The State presented the testimony from the victim and several eyewitnesses showing that Hipp and the victim had a verbal argument, that Hipp initiated the physical confrontation, and that Hipp pulled out an open knife on the victim. The witnesses stated that no one attempted to attack Hipp at any time. The State also presented evidence of five similar transactions where Hipp assaulted or battered others. Hipp asserted self-defense at trial. After hearing all of the testimony, the jury found him guilty of the charged offenses.

Hipp subsequently filed a motion for new trial on general and special grounds specifically arguing that the evidence was insufficient to support his conviction, and that his pre-trial motion for immunity should have been granted because the evidence adduced at the pre-trial hearing was uncontroverted by the

State. At the hearing on Hipp's motion for new trial, Hipp argued that the evidence he presented at the pre-trial hearing was not controverted or impeached. Although Hipp acknowledged that the State's trial evidence may have impeached his pre-trial testimony, he nevertheless asserted that the trial court should disregard the trial evidence and rely solely on the pre-trial testimony to find that he was immune from prosecution. The trial court found that a review of the evidence presented at the pre-trial immunity hearing demonstrated that Hipp established by a preponderance of the evidence that he was entitled to immunity as contemplated in OCGA § 16-3-24.2.

In its sole enumeration of error, the State contended that the trial court's post-conviction grant of immunity was not authorized by the evidence and impermissibly invaded the province of the jury. The Court noted that the trial court initially denied Hipp's immunity motion at a pretrial hearing and the court erred by ruling again on his claim of immunity in a motion for new trial. The trial court may only decide this question before, not after, trial. The Court held that once the case proceeded to trial and the jury rejected Hipp's claim of self-defense, the trial court was not permitted to revisit its prior ruling or correct any purported error, because OCGA § 16-3-24.2 no longer applied. The trial court's determination that the State proved beyond a reasonable doubt that Hipp committed the crimes charged is irreconcilable with its finding that Hipp proved by a preponderance of the evidence that he acted in self-defense. Accordingly, the trial court erred in making a post-conviction determination that Hipp was immune from prosecution, and therefore the Court reversed the trial court's grant of a new trial on that ground.