

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING APRIL 15, 2011

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## THIS WEEK:

- Speedy Trial
- Sentencing; Recidivist
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- Mistrial; Merger
- Jury Charges; Lesser Included Offenses
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- Impeachment Evidence
- Conspiracy, Jury Charges
- Similar Transactions; Reckless Driving
- Identification
- Severance

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### Speedy Trial

*Davis v. State, A10A1877 (3/15/2011)*

Appellant appealed from the denial of his motion to dismiss on the grounds of violation of his constitutional right to a speedy trial. The Court of Appeals vacated the trial court's judgment and remanded the case for further proceedings. The record showed that appellant was indicted for child molestation and sexual battery in May of 2007 after being arrested in November of 2006. In 2009, appellant moved to dismiss, asserting that his right to a speedy trial had been denied. The trial court dismissed the motion after three prosecutors testified that there was no intentional delaying of the appellant's case, and that in fact the appellant was convicted of another crime as this case was awaiting trial.

The Court found that the trial court was correct in concluding that the length of delay between the appellant's arrest and his hearing for the motion to dismiss (over three years) was prejudicial and required the use of the *Barker v. Wingo* factors to determine if his right to a speedy trial was denied. The four factors described in *Barker* are: length of the delay, reason for the delay, assertion of the right to a speedy trial, and prejudice. The Court found that the evidence did not support the trial court's finding that the reason for delay was the appellant's "bench-warrant status" and involvement in another criminal case. The Court also found that the trial court was incorrect in determining that appellant did not timely assert his right to a speedy trial, and that many of the findings concerning prejudice to appellant were not supported by evidence.

Overall, the Court found that many of the conclusions made by the trial court in its application of the *Barker* factors were not supported by the evidence. The Court also expressed that under *Barker*, it is not the role of the appellate court to weigh the *Barker* factors when all factors point in "one clear direction." Therefore, the Court remanded the case back to trial court to make appropriate factual findings based on the evidence.

### Sentencing; Recidivist

*Lester v. State, A10A1665 (3/15/2011)*

The trial court convicted appellant of kidnapping, hijacking a motor vehicle, armed robbery, possession of a firearm during the commission of a felony, carrying a concealed weapon, and possession of a weapon on school property. Since appellant had previous felony convictions, the court sentenced him as a recidivist to life plus 10 years imprisonment for

the armed robbery charge. Appellant argued that the court did not exercise its discretion in sentencing him as a recidivist. The Court found no error in how the trial court sentenced the appellant and it affirmed the judgment.

Under OCGA § 17-10-7 the Court found that the appellant, having been formerly convicted and sentenced to jail time, was to be sentenced to undergo the longest period of time prescribed for the punishment of the subsequent offense. OCGA § 17-10-7 also states that if an individual is convicted of four or more felony offenses then they are subject to “serve the maximum time provided in the sentence of the judge based upon such conviction and shall not be eligible for parole until the maximum sentence has been served.” Appellant contended that the maximum sentence for armed robbery is 20 years in prison and therefore the court failed to use its discretion when it sentenced him to life imprisonment. The Court disagreed and held that since appellant was already a convicted felon, under OCGA § 17-10-7 the court had to sentence him to the longest period of time prescribed for punishment of armed robbery, which is life imprisonment. The trial court actually lacked the discretion to sentence him to a lesser sentence.

Appellant also contended that the trial court did not exercise discretion because it did not impose probation for any of the other charges. The Court disagreed with this contention and found that under the ruling in *Paige v. State*, “Unless affirmative evidence shows otherwise, the trial court is presumed to have exercised its discretion in imposing sentence.” Therefore, both of the appellant’s contentions failed and the Court found that there was no error in the trial court’s sentencing of the appellant as a recidivist.

## **Jury Charges, RICO**

*Redford v. State, A11A0615 (4/1/2011)*

Appellant was found guilty of racketeering in violation of OCGA § 16-14-4 (a). The evidence showed that appellant forged signatures on insurance checks made payable to his employer in order to cash the checks and keep the money for himself. The State offered evidence of 42 such checks which totaled over \$100,000. Appellant was charged with “acquiring control of money through a pattern of racketeering activity” with forgery named as a predicate act.

Appellant contended that the jury might have found that he committed acts of forgery but that each forgery was a separate incident and not part of a larger scheme or pattern of interrelated acts that would constitute racketeering. He requested that the jury be given instructions to find him guilty of forgery in the first degree if they believed him to be guilty of the forgery acts but not guilty of violating the Georgia RICO Act. Appellant contended that he was harmed by the trial court’s failure to give the requested instruction to the jury because he was sentenced to the maximum sentence for racketeering (20 years imprisonment), which is greater than the maximum sentence for forgery in the first degree (10 years imprisonment).

In response to appellant’s contentions, the Court cited the Georgia RICO Act, which states that: “[i]t is unlawful for any person, through a pattern of racketeering activity or proceeds derived therefrom, to acquire or maintain, directly or indirectly, any interest in or control of any enterprise, real property, or personal property of any nature, including money,” and that a “pattern of racketeering” is defined as “[e]ngaging in at least two acts of racketeering activity in furtherance of one or more incidents, schemes, or transactions... [that] are not isolated incidents.” Under these definitions, the Court agreed with appellant that the State could not carry its burden of proving that he was guilty of racketeering as charged without also proving that he committed at least two acts of forgery that were part of a pattern of interrelated acts and not isolated incidents. However, the Court found, this fact did not make appellant entitled to a jury instruction on the lesser-included offense of forgery. The Court held that since appellant was not charged with forgery under OCGA § 16-9-1, but only with acquiring control of money through a pattern of racketeering activity under OCGA § 16-14-4 (a), the trial court did not err in failing to give appellant’s requested jury charges.

## **Continuance**

*Heard v. State, A10A2201 (3/28/2011)*

Appellant was convicted of possession of cocaine. He contended that the trial court failed to give him the seven days’ notice before trial that is required by Uniform Superior Court Rule (USCR) 32.1. The Court

held that appellant’s motion for continuance should have been granted and reversed his conviction. The record showed that appellant was arrested in January of 2009 for possession of cocaine with intent to distribute. At a preliminary hearing in August of 2009, the court set a status hearing for September 16, 2009, and said that the court “may reach [Heard] for trial that following week.” At the status hearing, appellant’s lawyer told the court that the defense was ready for trial, and the judge responded that the trial would be fitted into his schedule some time within the three weeks following that date. The case was called for trial on October 26, 2009, at which point the prosecution admitted that the seven days notice had not been given to defendant before the trial date. Appellant’s attorney requested a continuance, explaining that the defense needed more time to investigate the case and that the case was not on the court’s trial calendar. The court then denied the continuance, saying that the defense had stated its readiness at the status hearing the previous month, and jury selection began.

The Court held that the trial court completely failed to comply with USCR 32.1, which provides in part that: “The judge or designee shall prepare a trial calendar, . . . and shall give notice in person or by mail to each counsel of record . . . and the defendant . . . not less than 7 days before the trial date or dates. The calendar shall list the dates that cases are set for trial, the cases to be tried at that session of court, . . . the names of the defendants and the names of the defense counsel.” The phone call given to inform the defense of the trial was less than seven days from the date of trial, and the court admitted that the case was never placed onto the trial calendar. Therefore, Court held, the trial court abused its discretion in denying appellant’s motion for continuance.

## **Search & Seizure**

*Curry v. State, A10A2212 (3/30/2011)*

The trial court found appellant guilty of possession of cocaine with intent to distribute, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. Appellant filed a motion to suppress and contended that her residence was unconstitutionally searched without a warrant because it was not proven that she agreed to a

special bond condition. The facts showed that prior to the search of appellant's home, she had been arrested for possession of marijuana with intent to distribute, sale of marijuana, and maintaining a disorderly house. Appellant was released from custody when she posted a bond of \$30,000. While she was free on bond, the sheriff received a tip that appellant was selling cocaine out of her home. Based on this tip, law enforcement officers conducted a warrantless search of her residence. The officers informed appellant that the search was being conducted in accordance with the conditions of her bond, and in the search the officers discovered a large quantity of crack cocaine and a handgun.

The Court found that in order to justify a warrantless search on the grounds of consent, the State has the burden of proving that the consent was freely and voluntarily given under the totality of the circumstances. The evidence showed that appellant's counsel and the trial judge signed the special condition of her bond, which stated that "[defendant] herein specifically agrees to . . . consent to a search, without the necessity or benefit of a search warrant . . . ." Appellant contended that those signatures were not sufficient to prove that she waived her Fourth Amendment rights. The Court disagreed and held that contemporaneous writings, such as the bond form signed by appellant, along with the signed special bond condition are sufficient to waive those rights under OCGA § 24-6-3 (a). Therefore, the Court held, appellant freely and voluntarily gave her consent for a warrantless search, and it affirmed the denial of appellant's motion to suppress.

### **Mistrial; Merger**

*Eskew v. State, SA10A2224 (3/30/2011)*

Appellant was convicted of two counts of aggravated battery. The victim was a six-month-old baby. Appellant argued that the trial court had erred in denying his motion for mistrial, which he made during the testimony of one of the State's expert witnesses. The witness had testified regarding a medical examination he made of the victim, which was not reflected in the records the State produced before trial. The expert testified that, in addition to examining the victim around the time of the injury, he also had examined the baby shortly before trial. Based on this later examination, at which the victim had not demonstrated the

ability to meet numerous developmental milestones for a child his age, the witness opined that the victim had exhibited symptoms of a permanent brain injury. Assuming, without deciding, that the trial court should have excluded the witness's testimony about the later examination based on the State's failure to produce records of the examination, the Court found no error. Doctors who examined the victim shortly after he had been injured testified to finding cell death in portions of his brain, resulting in irreversible brain damage. The expert's testimony that the later examination also indicated a permanent brain injury was cumulative of the other medical evidence. Accordingly, the Court found that the trial court had not abused its discretion in denying appellant's motion for a mistrial.

Appellant also argued that the trial court erred in failing to merge, for sentencing purposes, his convictions on the two counts of aggravated battery. Under OCGA § 16-5-24 (a), "[a] person commits the offense of aggravated battery when he or she maliciously causes bodily harm to another by depriving him or her of a member of his or her body, by rendering a member of his or her body useless, or by seriously disfiguring his or her body or a member thereof." The indictment in this case alleged that appellant committed two separate acts against the victim that caused him bodily harm: (1) the act of "violently shaking him," and (2) the act of "fracturing his skull." Evidence was presented to show that the act of fracturing the child's skull was separate from the act of violently shaking the baby —one of the State's expert witnesses testified that, based on the victim's injuries, there had been both a "very forceful shaking of the child" and "some type of impact as well to account for the fracture to the skull." Therefore, the Court ruled that the trial court had not erred in sentencing appellant on both aggravated battery counts.

### **Jury Charges; Lesser Included Offenses**

*Hall v. State, SA10A2226 (3/28/2011)*

Appellant was convicted of aggravated assault and kidnapping for attacking a woman and her granddaughter in a Walmart restroom. Appellant had burst out of a stall, firing a stun gun into the victim's neck while demanding that she join him in a bathroom

stall. The victim refused to enter the stall and a violent struggle ensued. Over the course of approximately 15 minutes, the victim desperately attempted to exit the restroom with her granddaughter while appellant forcibly held the door closed and prevented either of them from reaching the door and leaving. During this struggle, several customers and employees attempted to force their way into the restroom. Appellant also threatened the victim with a large knife and stabbed her in the leg. Eventually, the two victims were able to escape.

Appellant argued that under *Garza* the evidence was insufficient to sustain his kidnapping convictions because the State had failed to prove asportation. The Court disagreed, finding that appellant's movement of the victims was sufficient to sustain the asportation element because the "movement serv[ed] to substantially isolate the victims from protection or rescue" and the movement occurred independently of the aggravated assaults. Therefore, the Court found, the evidence was sufficient to sustain the kidnapping convictions.

Nevertheless, appellant also argued that the trial court erred in denying his request to charge the jury on false imprisonment as a lesser-included offense of the crime of kidnapping. The only difference between the crime of kidnapping and the crime of false imprisonment is the element of asportation. The Court concluded that because there was at least some evidence that the jury could have convicted appellant of the lesser-included offense of false imprisonment, the trial court had indeed erred in refusing to charge on that crime. The Court, therefore, reversed appellant's kidnapping convictions and remanded for retrial.

### **Rape; Similar Transaction**

*Pendley v. State, A10A2301 (3/25/2011)*

Appellant was convicted of aggravated child molestation, rape, attempted child molestation, and first degree cruelty to children. Appellant argued that the trial court erred in allowing the State to introduce, as similar transaction evidence, the testimony of his daughter and his former wife's niece. After the State proffered the testimony of the two witnesses at a pretrial hearing for the purpose of showing appellant's "lustful disposition for young children," the trial court found the similar transaction evidence admissible. Appellant argued that these prior acts were so remote in

time from the charged offenses (11 years in the case of the daughter, and 30 years in the case of the niece) that the prejudicial impact of the evidence substantially outweighed its probative value. However, in *Pareja v. State*, 286 Ga. 117 (2009), the Court explained that the prejudicial impact of similar transactions that are remote in time may be outweighed by their probative value depending on the particular facts of each case and the purpose for which the similar transactions are being offered. Here, the Court found no abuse of discretion in the trial court's decision to admit the similar transaction evidence.

### **Impeachment Evidence**

*Hopkins v. State*, A10A1749 (3/29/2011)

Appellant was convicted of theft by shoplifting. The State had presented evidence that on November 29, 2007, a loss prevention investigator at a Home Depot store saw appellant and another man place approximately 30 rolls of copper wire into a shopping cart. Appellant pushed the shopping cart toward the entrance/returns area of the store, rather than the cash register area. As appellant passed the "point of sale" area or "sensormatic bars," an alarm sounded and a cashier stopped him. Appellant and the man he was with stopped briefly, then left the store without the merchandise.

Appellant testified at trial that he was merely following the instructions of his employer and had no intention of committing a theft. In an effort to impeach appellant's testimony, the State introduced a certified copy of his 1995 conviction for burglary, for which appellant had received a ten-year sentence. Appellant testified that, as to the prior burglary, he was homeless at that time and "the only thing [that] happened there . . . [was] I broke into a place and went to sleep."

Appellant argued that the trial court erred in admitting evidence of his prior burglary because it was more than ten years old. The Court disagreed, stating that the decision to admit or exclude evidence lies within the discretion of the trial judge, and the Court will not interfere with such discretion unless it has been abused. Pursuant to OCGA § 24-9-84.1 (b), the trial court has the discretion to admit evidence of a conviction in the interest of justice if its probative value substantially outweighs its prejudicial effect. The Court held that both the charged offense and the

burglary offense for which appellant was previously convicted involved the intent to commit a theft. Therefore, the probative value of the prior burglary conviction substantially outweighed its prejudicial effect on the jury's determination of appellant's credibility as to his intent in the charge at issue. Under these circumstances, appellant failed to show that the trial court abused its discretion in admitting the prior conviction.

### **Conspiracy, Jury Charges**

*Watson v. State*, A11A0090 (3/28/2011)

Appellant was convicted of four counts of armed robbery; aggravated battery; five counts of aggravated assault; burglary; possession of a firearm during the commission of a felony; and conspiracy to possess cocaine. Appellant argued that the trial court's decision to recharge the jury on the concepts of conspiracy theory and accomplice liability following a question from the jury was confusing and misleading and, therefore, constituted reversible error. Appellant did not contend that the recharge misstated the law, but that by refusing to answer the jury's questions with a simple "no" instead of a recharge, the court deprived him of his defense that he was merely present and not an active participant in the crimes.

During deliberations, the jury sent a note containing the following questions to the judge: "If guilty of conspiracy to possess cocaine (or any other charge), are they guilty of all charges? If one is guilty of a crime, then are they all guilty of the same crime?" After discussing the questions with the attorneys, the court told the jury that "conspiracy is a legal theory that can apply to any crime. It's not just to conspiracy to possess cocaine, if you so find." The court then recharged the jury on the law concerning conspiracy theory and accomplice liability. The court explained that "conviction of one defendant does not necessarily require conviction of another," that, even if the jury found a conspiracy, it still had to find that "the State has proven that each defendant was or was not in the conspiracy," and that, while the law may "authorize" a conviction under a conspiracy theory of liability, it never "mandate[s]" it. The judge also instructed the jury to consider the entire charge that had been given to it earlier, a charge that thoroughly covered the concepts of knowledge, intent, and mere presence.

The Court concluded, therefore, that the recharge was proper and that it did not overemphasize the State's theory of the case, comment on the evidence, or leave an erroneous impression in the minds of the jurors. Moreover, simply answering "no" to the questions posed would have been a grossly over-simplified and misleading response to the jury's questions. By recharging the jury on the concepts of conspiracy theory and accomplice liability as it did, the court correctly and fairly answered the question posed.

### **Similar Transactions; Reckless Driving**

*Shy v. State*, A10A1696 (3/29/2011)

Appellant was convicted of two counts of first degree vehicular homicide (reckless driving), reckless driving, failure to maintain lane, driving in the emergency lane, and driving with a suspended license. He contended that the trial court erred in admitting similar transaction evidence, specifically that he was unfairly prejudiced by the admission of evidence of his four prior DUI convictions because, while the DUI convictions were similar to each other, they were not sufficiently similar to the charged offenses. The Court disagreed, explaining that, with regard to prior DUI convictions, "it is the simple act of driving while under the influence that establishes the commission of the crime. Evidence of a prior DUI offense, regardless of the circumstances surrounding its commission, is logically connected with a pending DUI charge as it is relevant to establish that the defendant has the bent of mind to get behind the wheel of a vehicle when it is less safe for him to do so." Moreover, where an accused is charged with reckless driving, test results showing the use of drugs are admissible because the reckless driving violation could have been precipitated by the drug usage.

Appellant also argued that the circumstantial evidence was insufficient to support his conviction for reckless driving. The Court disagreed. Reckless driving occurs when a person drives a vehicle "in reckless disregard for the safety of persons or property." OCGA § 40-6-390 (a). If the evidence is sufficient, whether a defendant's manner of driving under the circumstances demonstrated a reckless disregard for the safety of others is a question that is reserved for the jury. Although appellant

argued that there was no direct evidence of his manner of driving, and that the circumstantial evidence supported a separate hypothesis that he had lost consciousness because of heat exhaustion and dehydration before the accident, the jury considered the testimony regarding this alternative theory and obviously rejected it. Therefore, the Court found that there was sufficient evidence for the jury to find beyond a reasonable doubt that appellant was driving his truck in a manner exhibiting a reckless disregard for the safety of others.

## Identification

*Simmons v. State, A11A0204 (3/30/2011)*

Appellant was convicted of armed robbery. The evidence showed that appellant had robbed a restaurant. Two days after the robbery, the police separately showed the witnesses a photographic lineup. Both selected appellant's photograph and both identified him as the robber at trial. The police obtained the restaurant's video surveillance recording of the robbery, and the State played the recording for the jury.

Appellant argued that the trial court erred in denying his motion to suppress the witnesses' pretrial identification and allegedly tainted in-court identification as the photographic line-up was unduly suggestive in that appellant had the darkest complexion in the photo array.

"An identification procedure is impermissibly suggestive when it leads the witness to an all but inevitable identification of the defendant as the perpetrator or is the equivalent of the authorities telling the witness, 'This is our suspect.'" Here, the detective put together an array containing six photographs that depicted individuals with similar characteristics. All were African-American males of a similar age, with the same build, head shape, skin tone, facial hair, jewelry, clothing, and expression. The photographs were also the same size and depicted head shots taken against the same neutral background. Although appellant's skin-tone was slightly darker than the others depicted, that was a minor difference that did not cause the photographic array to be impermissibly suggestive. Therefore, the Court concluded, the trial court was authorized to find that there was no impermissible suggestiveness.

Moreover, the Court found that even if the lineup had been impermissibly suggestive, the trial court would have been authorized to

find that there was no substantial likelihood that either witness misidentified appellant. The witnesses testified that appellant had stood just a short distance from each of them, that each had gotten a good look at appellant's face, and that they each independently had picked appellant's photograph out of the lineup without any hesitation or doubt. Further, the identification occurred only two days after the crime was committed.

## Severance

*Machiavello v. State, A10A1641 (3/25/2011)*

Appellant was convicted of aggravated child molestation and two counts of child molestation, sexual battery, and cruelty to a child. Appellant argued that the trial court erred in denying his motion to sever because the court failed to assess whether severance would promote a fair determination of guilt or innocence as to each offense.

Appellant was indicted on seven counts, two involving a victim in 1999, and five involving another victim between October 2001 and February 2002. Appellant moved to sever trial on the charges pertaining to the first victim and those pertaining to the second victim, arguing that due to the complexity of evidence and number of offenses it was probable that the jury would be unable to distinguish the evidence and apply the law intelligently to each offense; and that trying them together would serve no purpose other than to impugn his character.

When two or more crimes of the same general nature are committed against different persons, at different times and places, and are charged in separate counts of an indictment, severance is mandatory upon the defendant's motion if the crimes are joined *solely* because they are of the same or similar character. If the offenses are not joined solely because they are of the same or similar character, and evidence of one charged offense would be admissible as a similar transaction during trial on another charged offense, the trial court has the discretion to decide whether to grant a motion to sever. In making this decision, the court must consider the complexity of the case and determine whether the jury will be able to fairly and intelligently "parse the evidence and apply the law with regard to each charge."

The Court agreed with the trial court and the State that even if the cases were tried

separately, evidence of one incident would be admissible during trial on the other because the cases showed a common pattern of conduct. In fact, the Court noted that not only were the two victims' stories strikingly similar, but the manner in which appellant gained access to his second victim appeared to have been a blatant attempt to recreate, through artifice and deceit, the very circumstances that allowed him access to his first victim. Thus, the trial court did not abuse its discretion in denying the motion to sever.