

# Prosecuting Attorneys' Council of Georgia CaseLaw UPDATE

WEEK ENDING APRIL 9, 2010

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## THIS WEEK:

- **Special Demurrer; Motion for New Trial**
- **Speedy Trial**
- **Jury Charges; Circumstantial Evidence**
- **Escape; Sufficiency of Evidence**
- **Jury Charges; Terroristic Threats**
- **Double Jeopardy**
- **DUI; Jury Charges**
- **Guilty Pleas**
- **Jury Charges**
- **Impeachment Evidence; Quiroz v. State**
- **DUI; Implied Consent**

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### **Special Demurrer; Motion for New Trial**

*Thompson v. State, S10A0566*

Appellant was convicted of felony murder, armed robbery, and possession of a firearm during the commission of a crime. He argued that the armed robbery count of the indictment was defective because it failed to allege the essential element that the property taken was the "property of another" under OCGA § 16-8-41 (a). The Court held that this was in essence a special demurrer. Pursuant to OCGA § 17-7-110, a special demurrer must be filed within ten days after the arraignment. But here, appellant did not file a special demurrer in the trial court. Instead, he raised this issue for the first time orally, at the end of the motion for new trial hearing. The failure to file a timely special demurrer seeking additional information constitutes a waiver of the right

to be tried on a perfect indictment, and thus the issue was waived.

After the trial court denied the motion for new trial, appellant filed a second amended motion for new trial, which raised this claim that the indictment was fatally defective. The Court held that because the amendment was filed after the motion for new trial had already been denied, it was untimely. Moreover, to the extent that the second amended motion can be deemed the equivalent of a motion in arrest of judgment (a post-trial means by which a defendant may challenge an indictment as one would do in a general demurrer), it too was not timely filed. A motion in arrest of judgment must be filed within the term of court in which the judgment was rendered. OCGA § 17-9-61 (b). Here, the amended motion for new trial was out of term.

### **Speedy Trial**

*Gray v. State, A09A1995*

Appellant appealed from the denial of his motion to dismiss the indictment. He argued that his right to a constitutional speedy trial had been violated. The facts of this case are long and complex. Appellant was initially arrested for rape and other crimes in September, 2000. He was indicted in May, 2001 and reindicted in January, 2008. The Court, utilizing the factors under *Barker v. Wingo*, first held that the delay of eight years and two months between appellant's arrest and his motion to dismiss was uncommonly long and presumptively prejudicial. As to the reasons for the delay, the Court found that the State did not try to intentionally hamper the defense. Much of the delay was caused by the failure of the State to locate the victim. Some of the delay was caused by appellant failing to appear.

This factor was weighted against the State. The Court held that appellant's failure to assert his rights for more than seven years after his arrest was weighted heavily against him. Finally, the Court addressed the prejudice prong of the *Barker v. Wingo* analysis. The Court found 1) appellant did not suffer oppressive pretrial incarceration; 2) appellant did not suffer unusual anxiety or concern from the delay; and 3) appellant failed to show that his defense would be hampered by the delay. Therefore, in weighing all the factors, the Court found that the trial court did not abuse its discretion in denying the motion to dismiss the indictment.

### **Jury Charges; Circumstantial Evidence**

*Martinez v. State, 09A1608*

Appellant was convicted of trafficking in cocaine. He argued that the evidence was insufficient to support his conviction and that the trial court erred in failing to give a sua sponte charge on circumstantial evidence. The Court held that a trial court must charge on the law of circumstantial evidence, OCGA § 24-4-6, even absent a request, if the case against the defendant is wholly circumstantial. When the trial court fails to do so and the defendant's guilt of the offense is not otherwise established by overwhelming evidence, reversal is required. Here, the evidence against appellant was entirely circumstantial and therefore, the trial court's failure to give a jury charge covering the principal of circumstantial evidence was erroneous. Moreover, this error was not harmless. While the circumstantial evidence was sufficient to authorize appellant's conviction, the evidence of his guilt was not overwhelming. Therefore, his conviction was reversed.

### **Escape; Sufficiency of Evidence**

*Meadows v. State, A09A2172*

Appellant was convicted of felony obstruction, misdemeanor obstruction, and escape. He claimed the evidence was insufficient to support his convictions. The evidence showed that a concerned citizen called 911 to report that a man had been firing a gun and was on a particular highway. The information was relayed to the County Sheriff and his Chief Deputy who were advised to be on the lookout for a black male dressed in dark clothing and

carrying a plastic bag. The Sheriff drove to the highway, where he and the Chief recognized appellant, with whom they were familiar, walking down the road and carrying a plastic bag. The Chief asked appellant what was going on. Appellant, who was upset, responded that he had broken up with his girlfriend, and that "I'm fed up with all this God damn f\_\_\_ing bull\_\_\_ between me and my girlfriend." The Chief exited the car and "charged him at that time for disorderly conduct . . . and asked him if I could search." Because of the received information about a gun, he placed appellant against the car, searched his bag, and then began to pat appellant down for weapons. Appellant elbowed the Chief before he could complete the pat-down, causing the Chief to lose his balance. Appellant then ran away into the woods. Appellant was eventually apprehended and once at the jail, resisted entering the cell and had to be forced inside.

The Court held that the Chief lacked probable cause to arrest appellant for disorderly conduct. Nevertheless, an officer may conduct a pat-down search of a person whom he reasonably believes to be armed or otherwise dangerous to the officer or others. The Chief was therefore performing his official duty when he searched appellant for weapons, and when appellant elbowed him in course of the pat-down, he committed felony obstruction. Moreover, even if the pat-down was considered to be an integral part of an unlawful arrest such that, under Georgia law, appellant was entitled to resist, an arrestee is never justified in assaulting an arresting officer unless the officer has assaulted him first. Here, no evidence showed that the arresting officer assaulted appellant first.

However, the Court held that the conviction for escape must be reversed. Under OCGA § 16-10-52 (a) (2), a person commits the crime of escape when he, "[b]eing in lawful custody or lawful confinement prior to conviction, intentionally escapes from such custody or confinement."

The test for determining whether a person is "in custody" at a traffic stop is if a reasonable person in the suspect's position would have thought the detention would not be temporary. As appellant was not lawfully arrested for disorderly conduct, he was not placed in lawful custody when the Chief informed him that he was under arrest for that crime. Furthermore, while appellant committed obstruction in

resisting the pat down, appellant was not in "lawful custody or lawful confinement" when he fled the scene. Rather, the lawful actions of the officers had not proceeded beyond a brief investigatory detention in which appellant was not handcuffed, confined, or transported, and a reasonable person would not have been apprised thereby that the detention was not temporary.

### **Jury Charges; Terroristic Threats**

*Martin v. State, A10A0760*

Appellant was convicted of terroristic threats. He contended that the trial court violated his due process rights by instructing the jury that "[a] person commits terroristic threats when that person threatens to commit any crime of violence with the purpose of terrorizing another," when the indictment specifically charged him with "threaten[ing] to commit a crime of violence: to wit: murder upon the [victim]. A criminal defendant's right to due process may be endangered when an indictment charges the defendant with committing a crime in a specific manner and the trial court's jury instruction defines the crime as an act which may be committed in a manner other than the manner alleged in the indictment. The giving of a jury instruction which deviates from the indictment violates due process where there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed to limit its consideration to the manner specified in the indictment.

Here, the Court held, the State did not introduce evidence that appellant made threats against the victim on the date in question other than threats to kill her, and as such, no reasonable possibility existed that the jury convicted him for threatening to commit some other unspecified crime of violence. Moreover, even if the record included evidence of other types of threats, appellant's due process claim failed because a reversal is not mandated where, as here, the charge as a whole limited the jury's consideration to the specific manner of committing the crime alleged in the indictment.

### **Double Jeopardy**

*Patmon v. State, A10A0626*

Appellant was tried for committing several offenses against two victims: Eric Honea,

who died, and Artie Hughes, who survived. With regard to Honea, the jury acquitted him of murder, felony murder, kidnapping with bodily injury (Count 6) and one count of aggravated assault (Count 8), all of which, except Count 6, had accused appellant of “beating [Honea] about the head with an object unknown.” The jury found appellant guilty of armed robbery (Count 7) and aggravated assault for pointing a gun at Honea (Count 10). Appellant was subsequently granted a new trial on the ground that the State failed to prove venue. Prior to retrial, he filed a plea of former jeopardy, contending that the State was collaterally estopped from trying him again for the crimes committed against Honea because the jury in the first trial had determined that he was not the person who committed those crimes.

The doctrine of collateral estoppel is embodied in the guarantee against double jeopardy. Collateral estoppel means that when an issue of ultimate fact has once been determined by a valid and final judgment, that issue cannot again be litigated between the same parties in any future lawsuit. But, the doctrine of collateral estoppel does not bar a prosecution unless the issues of fact central to that prosecution were *necessarily* determined in the former trial. Unless the record of the prior proceeding affirmatively demonstrates that an issue involved in the second trial was definitely determined in the former trial, the possibility that it may have been does not prevent the relitigation of that issue. Moreover, a defendant’s conduct may be an offense against two statutes; and if each statute requires proof of an additional fact which the other does not, an acquittal or conviction under either statute does not exempt the defendant from prosecution under the other.

The Court held that applying both these principles here, the trial court properly denied the plea in bar. The evidence showed that appellant kidnapped and robbed both victims at gunpoint. Hughes eventually escaped from appellant. Some time thereafter, Honea was found murdered. The Court held that the transcript thus revealed that by finding appellant guilty of the armed robbery and aggravated assault of both victims, as well as the kidnapping of victim Hughes, the jury credited Hughes’s direct, eyewitness testimony as to the offenses committed in his presence, in addition to other identification testimony. The jury found

insufficient evidence to convict appellant of the offenses which occurred subsequently, after Hughes’s escape, and which involved physical injury to Honea, including Count 6, kidnapping with bodily injury. Because the facts central to proving armed robbery and aggravated assault as charged in Counts 7 and 10 of the indictment were separate and distinct from those essential to prove Count 6, the State was not barred from re-prosecuting appellant on Counts 7 and 10.

## **DUI; Jury Charges**

*Myers v. State, A10A0106*

Appellant was convicted of DUI. She argued that the trial court erred in failing to instruct the jury on her sole defense that she lacked the intent to drive. The evidence showed that appellant had ingested alcohol, Ambien and Xanax. She claimed she had no recollection of driving her car the night she was stopped. Citing *Crossley v. State*, 261 Ga. App. 250 (2003), the Court held that the trial court did not err. Driving under the influence and reckless driving are crimes *malum prohibitum*, the criminal intent element of which is simply the intent to do the act which results in the violation of the law, not the intent to commit the crime itself. The State was not required to prove that the defendant intended to drive under the influence. Rather, it was required to show only that while intoxicated, the defendant drove, intending to do so. When viewed as a whole, the trial court properly charged the jury on intent.

## **Guilty Pleas**

*Varner v. State, A10A0222*

Appellant was convicted of armed robbery, aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony. He argued that the trial court erred in refusing to allow him to enter a guilty plea. The record showed that appellant was facing charges in two cases: the instant case and another case involving charges of possession of a weapon by an inmate and criminal attempt to escape. Appellant made three attempts to enter a guilty plea as to both cases. After jury selection in the instant case had begun, defense counsel indicated to the judge that appellant wanted to enter a non-negotiated, or “blind,” plea in both cases. During the

ensuing colloquy, the trial court rejected his plea because appellant stated he was only pleading because of threats to him and his family. Defense counsel then approached the bench and asked to confer with his client so that “he will understand how to answer the questions a little better.” Following a pause in the proceedings, trial counsel returned and informed the judge, “Mr. Varner has changed his mind again. I’m very uncomfortable with continuing to sign him up, so I prefer just to go ahead and go to trial.” Accordingly, the trial court again directed jury selection to proceed. The following morning, appellant again stated he wished to plead guilty. After the State, defense counsel and the court explained the rights appellant would be giving up by entering a guilty plea, appellant again expressed confusion and wanted again to confer with his attorney. The trial court told appellant that he had been provided “plenty of chances” to talk to his attorney; that the jury and the witnesses in the case were ready and waiting in another room; and that the court did not want to “keep dragging this out.” Varner did not relate the source of his confusion, but again requested a meeting with counsel. At that point, the trial court directed the trial to proceed.

The Court held that contrary to appellant’s contention, the trial court did not force appellant to trial when he attempted to enter a guilty plea. Rather, the record showed that the trial court made every effort to determine if appellant understood the implications of a guilty plea. Moreover, a defendant has no constitutional right to have his guilty plea accepted by the court. Thus, once appellant expressed confusion over whether to plead guilty or go to trial, the trial court did not abuse its discretion in refusing to permit him to enter a guilty plea.

## **Jury Charges**

*Disabato v. State, A10A0457*

Appellant was convicted of aggravated sexual battery, aggravated child molestation, and child molestation of a 12 year old. Appellant argued that the trial court erred in giving the State’s requested charge that “[k]nowledge of the age of the victim is not a legal element of a child molestation charge.” The State requested the charge because appellant’s counsel elicited testimony throughout the trial that the victim had identified herself as 18 years old.

The Court held that a requested jury charge must be legal, apt and precisely adjusted to some principle involved in the case and be authorized by the evidence. Also, a requested charge should be given if it is a correct statement of law that is pertinent and material to an issue in the case and not substantially covered by the charge actually given. Here, the charge given by the court was correct, apt, applicable, authorized by the evidence, and not otherwise covered by the court's instructions.

Appellant also contended that the trial court erred in refusing to give his requested charge on mistake of fact. Appellant conceded that mistake of fact is not a defense to the crimes of aggravated child molestation and child molestation. But, he argued, he was entitled to a charge on mistake of fact with respect to the sexual battery charges because he testified that he believed that the victim was 19 when he performed oral sex on her. The Court found that this particular act, however, constituted the offense of aggravated child molestation as charged in the indictment. Appellant denied committing the acts for which he was charged with aggravated sexual battery. Therefore was not entitled to the requested charge because one cannot contend that he did not commit the act while at the same time argue he committed the act by mistake.

### **Impeachment Evidence; Quiroz v. State**

*Carter v. State, A10A0426*

Appellant was convicted of aggravated assault, two counts of simple battery, and two counts of aggravated battery. He contended that the trial court erred in allowing the State to impeach him with his prior felony conviction for enticing a child for indecent purposes. Appellant argued that the trial court failed under *Quiroz v. State*, 291 Ga. App. 423 (2008), to make express findings that the evidence's probative value outweighed its prejudicial effect under OCGA § 24-9-84.1 (a) (2). At trial, the defense objected to the evidence and the trial court summarily concluded that the evidence could come in, but only if appellant testified. Following the motion for new trial, the trial court engaged in the required balancing test and made express findings in accordance with *Quiroz*. The Court held that "as long as the trial court makes express findings on this issue, even if made in an order on a motion

for new trial, as was done here, the intent of OCGA § 24-9-84.1 is satisfied."

### **DUI; Implied Consent**

*State v. Metzger, A10A0772*

Metzger was charged with DUI. He filed a motion in limine seeking to suppress the results of his breath test. The trial court granted the motion and the State appealed. The evidence showed that the officer at first misread the implied consent warnings to Metzger. Eventually Metzger agreed to a breath test and asked about an independent test. The officer told Metzger he could get one at the local hospital. Following the breath test at the station, Metzger asked for a blood test. At first the officer told him that he was not entitled to one because he failed to request it at the scene of the stop. But then the officer decided to take him to the local hospital for his requested test.

The Court held that the State has the burden of showing compliance with OCGA § 40-6-392 (a) (3), and the trial court must determine whether, under the totality of the circumstances, the officer made a reasonable effort to accommodate the accused's request for an independent test. The "qualified personnel of his own choosing" language in OCGA § 40-6-392 (a) (3) is not superfluous, and the fact that the accused was given an additional test at a facility other than the one he selected does not demonstrate the State's compliance with the statute. Whether or not the officer made a reasonable effort is a question of fact. Here, the trial court found that the officer did not make a reasonable effort to accommodate Metzger's request for an independent test by qualified personnel of his own choosing because he could easily have asked limited questions regarding Metzger's choice of personnel but instead unilaterally chose the location for the independent test. Since there was evidence to support the trial court's decision, the Court affirmed the trial court's order of suppression.