

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 25, 2012

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THIS WEEK:

- **Res Gestae; Judicial Comments**
- **Opening Statement; Closing Argument**
- **Speedy Trial; Barker v. Wingo**
- **Demurrers; Indictment**
- **Chain of Custody**
- **Contempt; Subpoenas**

Res Gestae; Judicial Comments

Rawls v. State, A12A0093 (5/17/2012)

Appellant was convicted of aggravated assault with intent to rape, aggravated sexual battery, and child molestation. He contended that the trial court erred by denying his motion in limine concerning evidence that he had been drinking alcohol. Specifically, appellant contended that the testimony by school personnel that he smelled of alcohol on the day that the victim made the outcry at school should be excluded because the trial court erroneously concluded that (a) the testimony was res gestae, and (b) there was an adequate factual basis for the testimony. The trial court concluded that the evidence of appellant's alcohol use on the day of the outcry was admissible because "it goes to the res gestae[,] and it's relevant to that extent." Appellant argued that because no crime was committed on the day of D. R.'s outcry at school, the circumstances of that day cannot be considered part of the res gestae of the crime. However, the Court found that, "Surrounding circumstances constituting part of the res gestae may always be shown to the jury along with the principal fact, and their admissibility is within the discretion of the trial court; it does not matter that the

[circumstance] does not establish directly the main offense." Thus, the Court found that the outcry itself was direct evidence of the abuse, and appellant's odor of alcohol on the day of D. R.'s outcry was relevant as one of the circumstances leading up to the outcry.

Appellant also argued that the trial court abandoned its role as an impartial arbiter when the trial court judge asked a witness where the events occurred, effectively establishing venue.

The Court found that the trial court merely asking the witness questions about the locations of events and not referring to whether venue had been proved did not amount to reversible error.

Opening Statement; Closing Argument

Gomez v. State, (5/17/2012) A12A0387

Appellant was convicted of theft by taking. He argued that the trial court erred in failing to give curative instructions or to rebuke counsel because of certain comments the assistant district attorney made in opening statement. The Court found any errors to be harmless and concluded that, contrary to appellant's assertion, the prosecutor did not make a prohibited golden rule argument during closing argument and therefore affirmed appellant's conviction.

The record showed that appellant was convicted of taking Clyde Stutts's boat trailer. He admitted taking the trailer; his defense was that he thought the trailer was abandoned. Appellant argued that the trial court should have rebuked the prosecutor or issued curative instructions because of certain comments the prosecutor made in his opening statement. Specifically, the he said, "[The investigator] got a lead that a stolen trailer was there, and he went to [appellant's] residence. Pursuant to

a Fourth Amendment waiver, he went onto his property and looked at a trailer that was parked on [appellant's] property, determined that it was stolen, determined that it belonged to Mr. Clyde Stutts, and ultimately took possession of it and returned it to Clyde Stutts." Once the assistant district attorney had completed his opening statement, appellant objected to the reference to "a lead," which he contended violated an order in limine to exclude any statements made by a confidential informant or any other witness not subpoenaed to testify. He also argued that the reference to a Fourth Amendment waiver impermissibly placed his character in issue. The Court found that the record contained no order granting the motion in limine. Although in his brief appellant cited a particular page in the appellate record as being an order granting the motion in limine, that citation refers to an order on appellant's "Objection To Proceeding on the State's Accusation," not his motion in limine. Nonetheless, the trial court instructed the assistant district attorney to "[s]tay away from the 'lead' language" and that it was unnecessary to reference the Fourth Amendment waiver. Appellant argued that the trial court should have additionally given curative instructions or rebuked counsel in accordance with OCGA § 17-8-75. However, the Court noted that appellant did not object to the comments in the opening statement at the time they were made. Instead, he waited until the end of opening argument to object. Having failed to assert a contemporaneous objection, appellant waived his right to complain about the remarks on appeal.

Appellant next argued that the prosecutor made a prohibited golden rule argument in his closing. Appellant said that the following portion of the State's closing argument violated this prohibition: "And if we're not going to hold [appellant] accountable in this case, then maybe somebody can stop by my office and tell me how many more months before he can go steal it again. And I'm not being facetious, but that's exactly what Mr. McNeill is asking you to do." The Court held that this was not a prohibited golden rule argument.

Speedy Trial; *Barker v. Wingo*

Goddard v. State, A12A0504 (5/15/2012)

This was the second appearance of this case before the Court. In the first appearance,

(*Goddard I* "), the Court vacated the trial court's order as it concerned appellant's plea in bar on constitutional speedy trial grounds and remanded the case for the entry of a proper order pursuant to *Barker v. Wingo*, 407 U. S. 514 (1972). Following remand, the trial court entered another order denying appellant's plea in bar on constitutional speedy trial grounds. Appellant appealed the order entered upon remand. For the reasons set forth below, the Court again vacated the trial court's order and remanded the case for a second time for the trial court's reconsideration.

In *Goddard I*, the Court described the relevant factual background as follows: appellant was arrested on December 17, 1992 for snatching a cash box from an employee of a tanning business, and was subsequently indicted for robbery in Newton County on February 19, 1993. On April 12, 1993, the State received a letter from appellant to the "Newton County Court" stating that he was incarcerated in Fulton County under an alias and that he thought it would be best to "let Newton County know where I'm at before my court date comes up." On December 28, 1993, appellant was charged by accusation with reckless driving and fleeing and attempting to elude in connection with the robbery. Less than a month later, on January 20, 1994, appellant filed a demand for speedy trial pursuant to OCGA § 17-7-170 seeking an acquittal on all three charges filed in Newton County. Appellant was released from jail in Fulton County on an unrelated offense on February 1, 1994. On February 11, 1994, the clerk of court mailed appellant's notice of trial on the Newton County charges to the wrong address, and when his case was called for trial on February 28, 1994, appellant failed to appear. The trial court issued a bench warrant for his arrest, but the case was subsequently dead-docketed. Appellant claimed, and the State did not dispute, that from March 14, 1994, until he was finally arrested and transported to Newton County on March 25, 2010, appellant was in and out of jail in at least two other counties. Appellant filed a plea in bar on both constitutional and statutory speedy trial grounds on May 19, 2010. The trial court summarily denied appellant's plea in bar on both grounds on July 14, 2010. In *Goddard I*, supra, 310 Ga. App. at 4 (1), the Court affirmed the trial court's denial of appellant's plea in bar on statutory speedy trial grounds with regard to the robbery charge, but

reversed with regard to the charges of fleeing and attempting to elude and reckless driving. However, the Court of Appeals vacated the trial court's order as it concerned appellant's plea in bar on constitutional speedy trial grounds and remanded the case for proper consideration of the *Barker* factors. Following remand, the trial court denied appellant's plea in bar on constitutional speedy trial grounds.

The Court stated that a finding of "presumptive prejudice" is a threshold inquiry that triggers a speedy trial analysis under *Barker*. The trial court found that the pretrial "delay was not so lengthy as to be considered presumptively prejudicial." The Court held that the trial court's finding was clearly erroneous. Significantly, the trial court erred in calculating the delay in this case as the time elapsed from the date the crime allegedly occurred (December 16, 1992) to the date the case was called for trial (February 28, 1994). "Where a trial has not occurred, the delay should be calculated from the date of arrest or other formal accusation to the date on which a defendant's speedy trial motion was granted or denied . . . , rather than any initial date set for the trial." Thus, the relevant interval of delay here was the time that elapsed between appellant's December 16, 1992, arrest and the trial court's September 7, 2011, denial of appellant's plea in bar on constitutional speedy trial grounds. Based on these relevant dates, the pretrial delay in this case has spanned nearly 19 years. Further, in light of the trial court's own statements that appellant's robbery case appeared to be "an extremely simple" one, with "extremely simple evidence," the pretrial delay of nearly 19 years far exceeded the point at which the delay became presumptively prejudicial.

In applying the *Barker* analysis, the trial court found that the pretrial delay after February 28, 1994, as attributed to the State, was not uncommonly long. The Court found the trial court's finding "flawed." The Court stated that the trial court neglected to consider the entire relevant pretrial delay in this case—that is, the nearly 19 years that elapsed between appellant's December 16, 1992, arrest and the trial court's September 7, 2011, denial of appellant's plea in bar on constitutional speedy trial grounds. On remand, the trial court must reconsider the length of delay as a separate factor under *Barker*, and on balance, determine whether the delay of nearly 19 years was uncommonly long for a robbery charge.

Here, the trial court found that “[o]n balance, defendant is to blame for the delay in bringing the case to trial after February 28, 1994.” The trial court’s findings of fact in support of its conclusion, however, were incomplete. First, the trial court failed to consider the approximately 14-month delay between appellant’s arrest on December 16, 1992, and his call to trial on February 28, 1994. The State conceded that it was responsible for this initial delay in bringing appellant to trial. The State cited no specific reason for this delay, instead asserting only that 14 months was “a very reasonable and common period of time.” However, the Court stated, when there is no apparent reason for a delay, the Court must treat the delay as caused by the negligence of the State in bringing the case to trial.

Moreover, the next interval of delay was the approximately 16 and one-half year delay between appellant’s call to trial on February 28, 1994, and the trial court’s original July 14, 2010, denial of appellant’s plea in bar on constitutional speedy trial grounds. The trial court issued a bench warrant for appellant’s arrest when he failed to appear for trial on February 28, 1994. The record reflected, however, that appellant failed to appear on February 28, 1994, because the clerk of court mailed the notice of trial to the wrong address. Moreover, the State conceded that it was negligent in failing to properly enter the February 28, 1994, bench warrant into the Georgia Crime Information Center (“GCIC”) database. Thus, although appellant was frequently arrested and incarcerated from March 13, 1994, through February 2010, for other, unrelated charges in different counties, it was not until March 25, 2010, that he was finally arrested on the outstanding bench warrant for the Newton County charges.

The Court held that the trial court made factual findings that were unsupported by the record and misapplied the *Barker* factors; therefore, the Court stated that the deference owed to the trial court’s ultimate ruling was extinguished. Given these errors, the Court stated it could not conclude that the trial court would have still been required to weigh those factors in the manner in which it did, so as to determine that appellant’s right to a speedy trial had not been violated. Accordingly, the Court vacated the trial court’s judgment and remanded the case for proceedings consistent with its opinion.

Demurrers; Indictment

State v. Grube, A12A0618 (5/16/2012)

Timothy Harris Grube was indicted for attempted child molestation, attempted aggravated child molestation, and computer pornography. After the trial court quashed his first indictment for failing to name the alleged victim of the charged offenses, the State reindicted him for the same offenses, identifying the victim as “Tiffany.” Grube filed a special demurrer seeking to dismiss the second indictment, again arguing that the indictment did not sufficiently identify the alleged victim. The trial court granted the special demurrer, and the State appealed. The Court found no error and accordingly affirmed.

The State argued that the trial court erred in considering and granting the special demurrer because Grube relied upon facts outside the indictment, namely that the victim was not an actual child but instead was an adult working with law enforcement. The State contended that this turned Grube’s motion into an improper speaking demurrer. The Court disagreed and found that the trial court held that Grube’s indictment was insufficient to withstand a special demurrer because it did not adequately identify the alleged victim. In so holding, the Court relied upon *Dennard v. State*, 243 Ga. App. 868 (2000).

The defendant in *Dennard* was indicted for attempted child molestation, attempted statutory rape, attempting to entice a child for indecent purposes, and attempted sexual exploitation of children in connection with his exchange of messages over the internet with an undercover police officer posing as a minor named “Shari.” The trial court denied special demurrers which *Dennard* had sought to each count on the ground that the indictment did not name the victim of the charged offenses. The *Dennard* Court found that the trial court’s denial of the special demurrers was error. In doing so, the Court noted that our “Supreme Court [has] held that ‘(f)or the protection of the accused it is necessary that, in an indictment for an offense against the person of another, the person injured should be referred to by his correct name, if it be known, or by some name by which he is commonly and generally called.’”

The State argued that the crimes for which Grube was charged — attempted child molestation, attempted aggravated child molesta-

tion, and computer pornography based upon solicitation of child molestation — were not crimes against a particular person but rather crimes against society. But the Court noted that it previously established in *Dennard* that attempted child molestation and attempted aggravated child molestation were crimes against a particular person and required the victim to be identified in the indictment, even where the “victim” was a police officer using a pseudonym. Alternatively, the State argued that the name “Tiffany” satisfied *Dennard*’s requirement that the victim be identified. The Court found that the identification of a crime victim in this manner could not sufficiently apprise a defendant of what he must be prepared to meet at trial or show with accuracy to what extent the defendant may plead a former acquittal or conviction. Because this indictment contained inadequate information as to the alleged victim, it was not in perfect form and thus the trial court did not err in granting Grube’s special demurrer and dismissing the indictment.

Chain of Custody

Ashley v. State, A12A0626 (5/18/2012)

Appellant was convicted of two counts of VGCSA. He contended that the drugs were improperly admitted into evidence because the chain of custody was not proved, the chemist who analyzed the drugs should not have been qualified as an expert witness, and the evidence was insufficient. The Court affirmed.

The evidence showed that the drugs were tested by the Georgia crime lab, returned to the arresting police agency, and then sent back to the crime lab for retesting when the initial chemist who tested the drugs was unavailable to testify as to those results because the chemist was no longer employed by the crime lab. A second chemist retested the drugs prior to trial, and she testified as to the results she obtained. Notably, appellant did not contend that tampering occurred or may have occurred between the time the drugs were returned to the police agency after initial testing and the time the drugs were sent back to the crime lab for retesting. He specifically argued the possibility that tampering occurred when the initial chemist handled the drugs. But appellant presented no evidence of tampering, only mere speculation that because the initial handling of the drugs at the crime lab was unknown, tampering could

have occurred. The Court found that the State met its burden of showing with reasonable certainty that the evidence was the same as that seized and that no tampering or alteration occurred. Accordingly, the trial court did not err in admitting the drugs.

Contempt; Subpoenas

In the Interest of J. D. A12A0426 (5/18/2012)

The juvenile court found appellant, the mother of J.D., in contempt for willful violation of two juvenile court orders and sentencing her to a total of 40 days for both acts of contempt. The evidence showed that J. D. was placed on probation by order of the juvenile court. The juvenile court put appellant under a protective order that required her to do the following things in furtherance of her son's delinquency probation: 1) ensure that she keep her home in a clean, appropriate manner; 2) cooperate in good faith with the juvenile court, case workers, or any other agency entrusted by the juvenile court; 3) refrain from acts that might make the child's home an inappropriate place for her children; 4) ensure that the child attends school; 5) participate with the child in any counseling or treatment deemed necessary; and 6) attend all appointments with the juvenile court and ensure that the child has transportation to all appointments. A contempt hearing was scheduled in regard to J. D.'s failure to comply with certain terms of his probation. Appellant admitted that she had received a subpoena to appear at J. D.'s contempt hearing. Although J. D. appeared, appellant did not. As appellant was unable to be located, the juvenile court indicated that it would conduct a show cause hearing where appellant would have an opportunity to explain why she should not be held in contempt of court. Following hearing, the State filed a motion for willful contempt against appellant for her failure to appear. The State subsequently filed an amended motion for contempt against appellant for her willful failure to comply with the terms of the trial court's prior protective order — specifically, that she failed to cooperate in good faith with the juvenile court, case workers, or other agency entrusted by the juvenile court, and that she failed to participate with J. D. in any counseling or treatment deemed necessary.

At a later hearing, appellant stated that she had a medical excuse for one incident in

which she failed to appear. The court subsequently ordered that she return by 4:30 p.m. that afternoon with the referenced medical documentation. Again, the appellant failed to appear. Although appellant later testified that the reason she failed to appear at 4:30 p.m. was her inability to secure timely transportation, the Court found that the juvenile court judge was authorized to reject her testimony as not credible and find that appellant had in fact had the ability to comply with the juvenile court's order to return at 4:30 p.m.

Appellant also challenged her second contempt conviction on the grounds that the subpoena was issued to her less than 24 hours prior to the hearing and was thus not enforceable. The Court noted that while a subpoenaed witness cannot be held in contempt for failure to obey a subpoena that was not served upon a witness at least 24 hours before the hearing as required by OCGA § 24-10-25 (a), the witness can waive the 24-hour notice requirement. In granting appellant a continuance, the juvenile court issued her a verbal order, as well as the written subpoena, requiring her to return to court at 4:30 p.m. or otherwise be held in contempt. At no point before leaving the courtroom, however, did appellant object to the timeliness of the subpoena. Thus, the Court concluded that appellant waived any challenge to the subpoena's timeliness, and the juvenile court did not err in holding appellant in contempt.