Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 3, 2015

THIS WEEK:

Armed Robbery; Sufficiency of the Evidence

Attaway v. State, A15A0513 (5/15/15)

Appellant was convicted of one count of armed robbery, one count of aggravated assault and two counts of possession of a knife during the commission of a crime. The evidence showed that a loss prevention manager approached appellant in an electronics store. He observed a laptop box in appellant's shopping cart and noticed that he was trying to conceal a laptop with his shirt. He told appellant that he needed to recover the evidence, and appellant responded that he did not know what he was talking about. Another store employee approached and appellant tried to run away. Appellant and the second employee then began to scuffle, knocking over several customers and store displays. The loss prevention manager testified that appellant pulled out a knife to effectuate his escape during the scuffle. The manager told the crowd of customers to get away because appellant had a knife, and appellant ran out the store's front door. Appellant dropped the laptop while running. Appellant was apprehended just outside the door by Marines collecting for Toys for Tots. Appellant stabbed one of the Marines with the knife. After he was arrested, other store merchandise was found in appellant's possession.

Appellant contended that the evidence was insufficient to support his armed robbery conviction. The Court agreed. The indictment charged that appellant committed armed robbery in violation of O.C.G.A. § 16-8-41(a) by taking a laptop computer and other merchandise "from the immediat[e] presence of [the store employee], by use of a knife, an offensive weapon." The State therefore was required to prove beyond a reasonable doubt that appellant's use of the knife occurred prior to or contemporaneously with the taking. The "taking" of property is not a continuing transaction which ends only when the defendant leaves the presence of the victim. Instead, the taking is complete once control of the property is transferred involuntarily from the victim to the defendant, even if only briefly.

Here, appellant was already in possession of the laptop computer and other store merchandise when confronted by the two store employees. Although there was evidence showing that appellant used the knife in his attempt to escape the store with the stolen merchandise, there was no evidence that he used the knife in an offensive manner to possess the merchandise in the first place. Rather, appellant's use or threats to use the knife occurred

after the theft was completed. Accordingly, the Court held "we are constrained to agree that the evidence was insufficient to support [appellant]'s conviction of armed robbery". Moreover, because one of the two counts of possession of a knife during the commission of a crime was based on the armed robbery, that conviction was reversed as well.

Ineffective Assistance of Counsel; In re Formal Advisory Opinion 10-1

Pryor v. State, A15A0764 (5/19/15)

Appellant was convicted of attempted armed robbery and possession of a firearm during the commission of a crime. The evidence showed that appellant, Frails, and another person, attempted to arm rob three victims. Frails pled guilty and testified against appellant. Citing *In re Formal Advisory Opinion 10-1*, 293 Ga. 397(2013), appellant argued that his trial attorney had an actual conflict of interest that denied him his constitutional right to counsel because his attorney worked in the same circuit public defender's office as the attorney who represented Frails. He further contended that prejudice is presumed from such a conflict. The Court disagreed.

The Court noted that in *In re Formal Advisory Opinion 10-1*, the Supreme Court held that the standard for the imputation of conflicts of interest under Georgia Rule of Professional Conduct 1.10 (a) applies to the office of a circuit public defender the same way it does to a private law firm. Specifically, the Supreme Court held that if a single public defender in the circuit public defender's office of a particular judicial circuit has an impermissible conflict of interest concerning the representation of co-defendants, then that conflict of interest is imputed to all of the public defenders working in the circuit public defender's office of that particular judicial circuit. The Supreme Court also expressly did not determine whether the representation of co-defendants by different lawyers employed by the same circuit public defender office was absolutely prohibited, but limited its approval of the Bar's Proposed Rule only as to the question of conflict imputation. The Supreme Court further observed that, while it had cited precedent addressing the constitutional guarantee of the assistance of counsel, it did not hold that the imputation of conflicts was compelled by the Constitution, only that Rule 1.10 was "a useful aid in the fulfillment of the constitutional guarantee of the right to effective assistance of counsel."

The Court stated that regardless of the ethical considerations of having lawyers in the same office work for clients with competing interests, a breach of an ethical standard does not necessarily make out a denial of the Sixth Amendment guarantee of assistance of counsel. And here, appellant did not even argue that any conflict significantly affected his trial counsel's representation of him. Thus, the Court noted, his trial counsel testified that the circuit public defender's office was very aware of the problems that could arise from having attorneys from the office represent co-defendants and although they were all under the same roof, pursuant to office policy the attorneys made "every effort to separate representation" by maintaining individual offices, locking their doors to bar access to their files, and being "very, very careful." Also, the Court found, appellant's trial counsel "did not pull any punches" in his cross-examination of Frails. Accordingly, the Court found no merit to appellant's contentions.

Drug Court; Sentence Credit

Fleming v. State, S14G1811 (6/29/15)

Appellant was indicted on two counts of identity fraud and two counts of financial transaction fraud. She entered a negotiated guilty plea, which allowed for deferred sentencing and participation in a drug court program. Her negotiated plea agreement specified that she would be sentenced to eight years of probation if she completed the drug court program, but she would be sentenced to ten years, with the first four to be served in prison and the remaining six to be served on probation, including residential substance abuse treatment, if she failed to complete the program. The agreement also provided that she would make restitution payments under either scenario. After more than two years in the program, appellant was terminated from it and consistent with the plea agreement, the trial court sentenced her accordingly.

Appellant argued that she should receive sentence credit for the time she spent in the drug court program. The Court disagreed for three reasons. First, pursuant to O.C.G.A. § 15-1-15(a)(2), a court may assign a case to drug court prior to sentencing if the prosecutor consents, as part of a sentence, or as part of a probation revocation. Here, the court deferred sentencing while appellant participated in the drug court program. Once she failed to complete the drug program, her plea agreement dictated that she would then be sentenced to ten years, with four to serve and six on probation. The agreement did not specify that her eventual sentence would be adjusted in any manner to give her credit for the time that she would spend in the drug court program prior to sentencing. Instead, it stated simply and clearly what her sentence would be based solely on her eventual success or failure in the program. Thus, the trial court correctly followed the terms of the plea agreement, to which appellant had agreed, in sentencing her to confinement and not awarding her any credit for time served in the drug court program.

Second, O.C.G.A. § 17-10-11(a) does not apply because the trial court deferred sentencing. Thus, appellant was neither under a sentence nor in confinement while she participated in the drug court program. Although she was required to comply with the rules and regulations of the drug court program, she was not confined during this time. Her criminal case was suspended and she was free from jail while she voluntarily participated in various forms of treatment through the drug court program, always with the option to return to jail and face sentencing. Similarly, the Court noted, O.C.G.A. § 15-1-15 also does not provide for credit for time served, even when the case is assigned to a drug court prior to sentencing.

Finally, as a policy matter, if sentence credit were given for time served in a drug court program, there might be less incentive for a defendant to successfully complete the program, for the drug court team in charge of treatment to work with a defendant when he or she broke program rules, and for the State to agree to a drug court program in lieu of a sentence of confinement. Accordingly, the Court held, no sentence credit for participation in a drug court program was warranted in this particular case.

Video Recordings by Police; O.C.G.A. § 16-11-62 (2)

Sims v. State, S15A0182 (6/29/15)

Appellant was convicted of malice murder and related offenses in connection with

a three-year-old that was left in his custody. The record showed that after appellant called 911 concerning the victim, a police lieutenant arrived at the scene to investigate. Using his smartphone, the lieutenant made a video recording of appellant's account at that time. Relying upon O.C.G.A. § 16-11-62(2), which makes it unlawful for "[a]ny person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities of another which occur in any private place and out of public view," appellant argued the trial court erred in refusing to grant his motion to suppress the video recording made by the lieutenant in appellant's apartment. Appellant argued that before he began recording, the lieutenant did not obtain a warrant permitting the use of a surveillance device inside appellant's apartment under O.C.G.A. § 16-11-64(c).

The Court held that even assuming arguendo that admitting the video recording was in error, it was harmless because it was highly probable that the recording did not contribute to the jury's verdict in light of the overwhelming evidence of guilt. Moreover, the video recording was cumulative of the videotaped statement appellant gave at the police department, his own testimony at trial, and crime scene photographs depicting the victim's room. Finally, the Court noted, the audio portion of the recording of appellant's account was admissible even if the video portion was not.

Battered Person Syndrome; Jury Charges

Pena v. State, S15A0430 (6/29/15)

Appellant was convicted of malice murder and related crimes. The evidence showed that appellant beat and kicked the victim to death. He first contended that the trial court erred in disallowing expert testimony regarding his symptoms of PTSD and his relatives' testimony about physical abuse and corporal punishment that he experienced in childhood. He contended that the exclusion of this evidence prevented him from presenting a justification defense based on battered person syndrome.

However, the Court found, the evidence in question was not admissible to support appellant's justification defense. Because justification is based on the fears of a reasonable person, the subjective fears of a particular defendant are irrelevant in the evaluation of this defense. Therefore, evidence of abuse or violent acts committed against a defendant by someone other than the victim is not admissible to support a justification defense. Moreover, the Court noted, appellant was unable to proffer any admissible evidence indicating that he and the victim had a close personal relationship or that the victim had a history of abusing him. Accordingly, the Court concluded, the trial court did not abuse its discretion in not admitting this evidence.

Appellant also argued that his trial counsel rendered ineffective assistance by not objecting to the following charge: "In applying the laws of self-defense, a person is justified to kill another person in defense of self or others. The standard is whether the circumstances were such that they would excite the fears of a reasonable person. For the killing to be justified under the law, the accused must truly have acted under the influence of these fears and not in the spirit of revenge." Specifically, appellant contended that this jury instruction placed an additional burden on him not authorized by the statutory definition of justification in O.C.G.A. § 16-3-21 because the language, "in the spirit of revenge," no longer appears in the statute.

The Court stated that a jury instruction must be adjusted to the evidence and embody a correct, applicable, and complete statement of law. It is well settled that the law will not justify a killing for deliberate revenge however grievous the past wrong may have been. Additionally, when comparing the current language of O.C.G.A. § 16-3-21 with the previous statute that included the "spirit of revenge" language, the Court noted that in essence the old law and the new law have the same standard as to justification of homicide. Therefore, the instruction given was a correct statement of the law. Accordingly, appellant's ineffective assistance claim failed.

Judicial Commentary; Prior Statements

Dailey v. State, S15A0587 (6/29/15)

Appellant was convicted of felony murder. He contended that the trial court impermissibly commented on the evidence when he disparaged trial counsel in the presence of the jury. During trial counsel's cross-examination of the supervising investigator, the prosecutor objected that "pretty much everything [trial counsel] is asking…. is all hearsay." The trial court responded, "Well, I mean at some point [the investigator] indicated that he was ultimately responsible for the investigation. However, I think he has made it clear what he did and did not do. So if [trial counsel] wants to meander through this I think [he] has the right to. How effective it is[,] is another question. So I'll overrule the objection." Appellant argued that this judicial comment violated O.C.G.A. § 17-8-57 by intimating that trial counsel was wasting his and the jury's time because the evidence was clearly sufficient to support the charges.

The Court disagreed. The Court found that the overall import of the judge's comment was an explanation of the ruling on the State's objection, and such explanations clearly do not run afoul of § 17-8-57. "The judge's brief musing about defense counsel's strategy was unnecessary, and such comments should be avoided, but the judge's comment here in no way constituted the type of direct comment on the substance or weight of the evidence that we have held to violate § 17-8-57."

Appellant also argued that the trial court erred in excluding the testimony from one of the investigating officers that one person had failed to identify appellant from a photographic line-up. Specifically, appellant argued that the testimony was admissible under O.C.G.A. § 24-8-801(d)(1)(C) (prior statement of witness is not hearsay if declarant testifies and is subject to cross-examination, and if the statement is one of identification of a person). He also contended that the testimony had indicia of reliability and that it was exculpatory evidence that the jury was entitled to hear. However, the Court found, the trial court properly sustained the State's hearsay objection to the officer's testimony because it was clear that the individual in question was not going to be called to testify.

O.C.G.A. § 16-13-43; Void for Vagueness

Whatley v. State, S15A0032 (6/29/15)

Appellant was indicted for withholding information from a practitioner pursuant to O.C.G.A. § 16-13-43(a)(6). She filed a general demurrer contending that the statute was void for vagueness and the trial court denied it. The Court stated that the void for vagueness doctrine of the Due Process Clause requires that a challenged statute or ordinance give a

person of ordinary intelligence fair warning that specific conduct is forbidden or mandated and provide sufficient specificity so as not to encourage arbitrary and discriminatory enforcement. Vagueness challenges that do not implicate First Amendment freedoms must be examined in the light of the facts of the case to be decided.

Here, the Court noted, since appellant did not argue that O.C.G.A. § 16-13-43(a)(6) violates her First Amendment freedoms, she would necessarily have to challenge the constitutionality of the statute as applied to the specific facts of her case. But, the Court found, a review of the record showed that appellant challenged O.C.G.A. §16-13-43(a)(6) on its face, not as applied. And, the Court observed, the trial court noted in its order that "[n]either party has presented any facts . . . beyond the indictment." The indictment, in turn, merely tracked the language of the statute, supplying the names of the doctors involved, the drugs prescribed, and a general period of time during which the statute was allegedly violated. There was thus no indication anywhere in the record that appellant raised an argument with regard to the facts of her specific case, much less the application of O.C.G.A. § 16-13-43(a)(6) to her specific facts. Accordingly, since only a facial challenge to the statute was raised, and a facial challenge was not warranted, the trial court should have denied appellant's general demurrer for this reason rather than considering the merits of her constitutional claim. Therefore, the Court affirmed the denial of appellant's general demurrer und the right-for-any-reason rule.

Extraordinary Motions for New Trial; DNA

Bharadia v. State, S14G1149 (6/29/15)

Appellant was convicted of burglary, aggravated sodomy, and aggravated sexual battery with respect to his breaking into the victim's apartment and physically attacking her. The record, briefly stated, showed that ten days after the assault, gloves which the victim identified at trial as the type her assailant wore during the assault were found at the home where appellant's co-defendant, Flint, occasionally resided. While appellant's first motion for new trial was pending, testing on the gloves showed that none of the DNA recovered on the gloves matched appellant. Instead, the testing revealed DNA of an unknown male and female. Additional funding for testing was denied. In denying appellant's motion for new trial, the court found under *Timberlake v. State*, 246 Ga. 488 (1980), that the evidence was not newly discovered. Appellant's conviction was affirmed on appeal. *Bharadia v. State*, 282 Ga.App. 556 (2006) (*Bharadia I*).

In 2013, the Georgia Innocence Project assisted appellant in filing an extraordinary motion for new trial, as well as a motion for additional DNA testing to compare the DNA on the gloves with that of the co-defendant or, alternatively, for a comprehensive CODIS database search to compare the results of the previous DNA testing to DNA profiles in the database. The trial court denied the request for further DNA testing, but granted the request for a CODIS database search. The CODIS search identified Flint's DNA on the gloves as did a subsequent confirmation test. Nevertheless, the trial court again denied appellant's extraordinary motion for new trial, finding that under *Timberlake*, appellant failed to show that the evidence was newly discovered and failed to show that the delay in acquiring the evidence was not the result of a lack of due diligence. The Court of Appeals affirmed, finding that appellant failed to meet the due diligence standard. *Bharadia v. State*, 326 Ga.App. 827 (2014) (*Bharadia II*).

The Supreme Court stated that application of the six factors set forth in *Timberlake* has long formed the standard by which the courts of this state determine whether to grant a new trial on the basis of newly discovered evidence. One of the requirements is a showing of due diligence in acquiring the newly discovered evidence. In the case of an extraordinary motion for new trial, whether founded on a claim of newly discovered evidence or other grounds, O.C.G.A. § 5-5-41 also applies, and sets forth certain requirements and standards for judging whether such a motion should be granted. Pursuant to subsection (a) of the statute, when, as here, a motion for new trial is made after the expiration of the 30 day period allowed for such motions, good reason must be shown by the movant, and found by the trial judge, why the motion was not made within the 30 day period. Thus, the Court stated, both statutory and case law require a showing of due diligence to authorize the trial court's exercise of discretion to grant an extraordinary motion for new trial on the ground of newly discovered evidence.

The Court noted that although appellant asked for DNA testing of his co-defendant at the time of his first motion for new trial, that request was denied, and he did not challenge that denial on appeal. Therefore, the trial court's initial decision to deny the request for testing Flint's DNA for purposes of comparing it to the DNA found on the gloves can no longer be contested because it remains unreversed and unmodified. Furthermore, a post-trial motion for DNA testing pursuant to O.C.G.A. § 5-5-41(c)(3)(A) requires the person convicted of a felony and desiring such testing to show that "[e]vidence that potentially contains deoxyribonucleic acid (DNA) was obtained in relation to the crime and subsequent indictment, which resulted in his or her conviction." The renewed request appellant made for DNA testing of Flint or for performing a CODIS database search did not involve any new testing of the gloves or any other physical evidence that potentially contained DNA obtained in the course of investigating or prosecuting the crime in this case. Accordingly, the Court found, it was not properly a request for DNA testing made pursuant to O.C.G.A. § 5-5-41 (c), nor was it granted pursuant to that statute. Accordingly, the Court held, O.C.G.A. § 5-5-41(c) was not applicable to this case.

Nevertheless, the Court stated, the *Timberlake* factors were still relevant and must be addressed. And here, the Court agreed with the trial court that appellant failed to show that he exercised due diligence. The gloves could have been tested for DNA prior to trial, and once the test results showed the DNA was not a match to appellant, he could have requested, prior to trial, the DNA testing of Flint, who admitted to being at the crime scene, to determine if the DNA was a match to him. Instead, appellant waited over a year after trial to determine that DNA relevant to the identity of the assailant was on the gloves and that the DNA did not belong to him, and then waited again until almost nine years after trial and almost seven years after his initial motion for new trial proceeding was completed to establish that the DNA was a match to his co-defendant. His defense at trial was that he was not present at the scene of the crimes, yet appellant failed to show that circumstances beyond his control prevented him from seek-

ing and obtaining any and all of this testing and resulting evidence prior to trial. Instead, he avoided the risk that pre-trial DNA test results from the gloves would implicate him in the crimes and waited until after his trial and conviction to request these initial tests, at which time he would have been no worse off by a positive test result than he was before taking the risk of requesting a post-trial DNA test. Accordingly, the Court concluded, the trial court did not abuse its discretion in ruling that appellant failed to show the delay in acquiring the pertinent evidence was not owing to his lack of due diligence, a requisite factor to support any motion for new trial on the ground of newly discovered evidence.

Recidivist Sentencing; King v. State

Hillman v. Johnson, S15A0097 (6/29/15)

Appellant was convicted of two counts of armed robbery and one count each of burglary, aggravated assault, and possession of a firearm by a convicted felon. Based on that prior felony conviction and O.C.G.A. § 17-10-7(a), the trial court concluded that it was required to sentence appellant to the maximum time authorized for each offense. After his conviction was affirmed on appeal, appellant filed a habeas petition, alleging that his trial counsel provided ineffective assistance of counsel by failing to challenge at trial and on appeal the "dual use" of appellant's prior felony conviction to convict him of the felon-in-possession charge and to sentence him as a recidivist on all of his convictions under § 17-10-7(a). The habeas petition was denied and the Court granted appellant's application for appeal.

Citing *King v. State*, 169 Ga.App. 444 (1984) and later cases from the Court of Appeals which purported to apply *King*, appellant contended that his counsel render ineffective assistance by failing to challenge the use of his prior felony conviction to enhance the sentences for all of his convictions. The Court disagreed. First, the Court stated, the reasoning and result of *King* were sound. The *King* Court held that O.C.G.A. § 17-10-7(a), which requires courts to sentence defendants with a prior felony conviction to the maximum time authorized for any subsequent conviction, does not apply to violations of O.C.G.A. § 16-11-131. That statute, which was enacted after § 17-10-7, prohibits persons with a prior felony conviction from possessing firearms (i. e., being a "felon-in-possession") and provides a general sentencing *range* of one to five years, would be rendered meaningless if § 17-10-7(a) applied.

However, the Court noted, after *King*, the Court of Appeals held in *Arkwright v. State*, 275 Ga.App. 375, 376-377 (2005), *Allen v. State*, 268 Ga.App. 519, 533-534 (2004) (*Allen I*), and *State v. Freeman*, 198 Ga.App. 553, 555 (1991) (and said in many more cases) that prior felony convictions used to prove a felon-in-possession charge cannot be used to sentence the defendant as a recidivist under § 17-10-7(a) on *any* conviction in the same case, not just on the felon-in-possession conviction. In *State v. Slaughter*, 289 Ga. 344 (2011), the Court noted that it rejected the reasoning of these post–*King* cases, explaining that the narrow holding in *King* was based on a careful examination of § 17-10-7(a)'s practical effect in the specific context of violations of the later-enacted § 16-11-131. And while the Court of Appeals since *Slaughter* has "corrected some of its errant case law in this area, e.g. *Harris v. State*, 322 Ga.App. 87 (2013), the Court of Appeals has not has not disapproved *Allen I* and similar decisions that improperly extended *King* to sentencing under § 17-10-7(a) for offenses that do not have a prior felony conviction as an element." Therefore, the Court stated, "We take that step now. *King*'s rationale, which we endorsed in *Slaughter*, has no application to crimes that do not have as an element the defendant's prior conviction of a felony. Accordingly, we disapprove the Court of Appeals' extension of *King* to sentencing on other types of crimes in *Freeman*, *Allen I*, and *Arkwright*."

In light of this holding, the Court found that appellant's trial counsel did not render ineffective assistance by failing to challenge appellant's sentences for the armed robberies, burglary, and aggravated assault based on the Court of Appeals' post-*King* cases because those cases interpreted the law incorrectly. However, the Court found, the habeas court erred in holding that appellant failed to show either deficient performance or prejudice with respect to his recidivist sentence for possession of a firearm by a convicted felon. Under *King*, which was correctly decided, the trial court was not required by § 17-10-7(a) to sentence appellant to the maximum term of five years for violating § 16-11-131. And, after review of the record, the Court concluded that there was a reasonable probability that the trial court would have sentenced appellant to less than the maximum five years on the felon-in-possession conviction.

Search & Seizure

Galloway v. State, A15A0603 (5/20/15)

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress. Specifically, he argued that the search warrant was based upon information provided by a confidential informant (CI) whose reliability was not properly demonstrated to the issuing magistrate. The Court disagreed.

The evidence showed that the officer seeking the warrant testified that he disclosed additional information not found in the affidavit supporting the warrant. Testimony from a motion to suppress may supplement the four corners of an affidavit in order for a trial court to determine what the magistrate knew at the time of the issuance of the warrant. The Court also stated that it is well established that the trial court may consider oral testimony presented to a magistrate in support of the issuance of a warrant. Thus, the Court found, although it appeared that the officer possibly could have provided the magistrate with more detail concerning the informant's past reliability such as the type of information the informant provided on previous occasions, the use made of that information and whether it was in fact useful, and the time frame of the past information in comparison to the more recent information, considering the totality of the circumstances provided to the magistrate, including information about the confidential informant's relationship with appellant and how he came to be in his residence; that the officer knew the informant and found his information to be reliable in the past; the recent time frame for when the informant had been in the residence and viewed suspected drugs and paraphernalia; the fact that the informant told the officer that there was a gun in the residence; and the officer confirmed that the occupants were convicted felons, the Court concluded that the information relayed to the magistrate provided a substantial basis for the magistrate's finding of probable cause. Accordingly, the trial court did not err by denying appellant's motion to suppress.

Indictments; Ineffective Assistance of Counsel

Brooks v. State, A15A0701, A15A0702 (5/21/15)

Appellants, Brooks and Jones, were convicted of numerous felonies in connection with an armed robbery at the victim's home. Jones argues that his convictions must be reversed because the indictment under which he was charged was void, as one of the grand jurors who returned the indictment was a convicted felon. But, the Court found, by failing to timely raise it, Jones waived this attack on the indictment.

Jones further argued that he could not waive his attack on the indictment because the indictment was void, which rendered the judgment of conviction void, and a void judgment may be attacked at any time. The Court noted that Jones cited no authority to support his assertion that a judgment of conviction entered upon an indictment that is allegedly void due to composition of the grand jury is itself void. And, the Court stated, the fact that a defendant's convictions arose from an indictment void due to an improperly constituted grand jury did not render his sentence void.

Brooks argued that trial counsel was ineffective for failing to move to quash the indictment or to arrest judgment. As for the failure to move to arrest judgment, the Court stated that a motion to arrest judgment due to a defective indictment should be granted only when an indictment is absolutely void in that it fails to charge the accused with any act made a crime by the law. Since Brooks did not argue that the indictment failed to charge him with an act made a crime by law, his trial counsel was not ineffective for failing to move to arrest judgment on this ground.

And, the Court noted, at the motion for new trial hearing, trial counsel testified that he did not move to quash the indictment because the State simply could re-indict Brooks, it would only delay the trial, and he had filed a speedy trial motion. The Court held this to be reasonable trial strategy. Moreover, even assuming that there was no strategic reason for not filing a timely challenge to the indictment (like the desire not to delay the trial), and thus, that trial counsel performed deficiently, Brooks failed to show prejudice. If a timely motion to quash had been filed, the indictment likely would have been dismissed because a convicted felon served on the grand jury in violation of O.C.G.A. § 15-12-60(c). The State would have been free, however, to obtain the identical indictment from a properly constituted grand jury. A dismissal would have been the first in this case, allowing the State to re-indict. The State would have faced no imminent deadlines under the statute of limitations for the crimes with which appellants were charged. Under these circumstances, Brooks could not show a reasonable probability that, but for the failure of trial counsel to file a timely motion to quash the indictment, the outcome of the trial would have been different.

Search & Seizure

Bowman v. State, A15A0257 (5/27/15)

Appellant was indicted for attempt to manufacture methamphetamine, possession of ephedrine, possession of pseudoephedrine, and theft by receiving stolen property. The evidence showed that a detective received information that a stolen Ford F-250 truck could be found on appellant's property. Around midnight, the detective and other officers approached the front door of appellant's home, knocked, and identified themselves. An individual opened the door and, upon seeing uniformed officers, immediately slammed it shut. While the door was open, the detective saw a battery charger inside the house that was the same color as a charger reportedly located within the truck when it was stolen. Concerned that someone might try to escape through the back door, the detective sent a deputy to the rear of the residence. The deputy went behind the house and saw a Ford F-250 tailgate that appeared to have been spray-painted leaning against the back porch. He reported this discovery to the detective, who began the process for obtaining a search warrant. While waiting on the warrant, the deputy drove further back into the property and found the stolen truck under a tarp. The search warrant eventually arrived, and officers located a methamphetamine lab, as well as items belonging to the truck's owner, inside appellant's home. The trial court suppressed all evidence of the truck discovered under the tarp, but not the items found in the house.

The Court stated that the officers' initial approach to appellant's house constituted a permissible, first-tier "knock and talk" encounter. Thus, the detective was entitled to be at the front door when it opened. His view of the battery charger, therefore, was permissible.

But, the Court stated, the deputy's discovery of the tailgate was "problematic." An officer may not enter a home or its curtilage without a warrant absent consent or a showing of exigent circumstances. The yard immediately surrounding a dwelling falls within the curtilage of a home. The deputy did not have a warrant or consent when he went behind the house, and the State offered no evidence of an emergency situation. In fact, the Court noted, the State conceded the deputy was not authorized to be in the backyard. Consequently, his observation of the tailgate was illegal, provided no basis for a probable cause finding, and required suppression of the tailgate evidence.

The Court then addressed whether the detective's observation of the battery charger, standing alone, supported the search warrant. The burden of showing that the search and seizure were lawful is on the State. This burden is satisfied by production of the warrant, its supporting affidavit, and by showing either by those documents or by other evidence that the warrant is supported by probable cause. Here, however, the State did not tender the warrant or supporting affidavit into evidence at the suppression hearing, and neither document otherwise appeared in the record. Because the search warrant affidavit was absent from the record, the Court stated that it was not privy to the information given to the magistrate judge. Thus, it could not know whether the affidavit provided details about the stolen truck, the battery charger, or any connection between the charger and the truck. And because the Court could not determine whether it demonstrated a fair probability that contraband or evidence of a crime would be found in appellant's home, the State failed to show that the magistrate had probable cause to issue the search warrant. The trial court, therefore, should have suppressed all evidence seized pursuant to the warrant.