

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING SEPTEMBER 19, 2014

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## THIS WEEK:

- **Appeal Bonds**
- **Motions For New Trial**
- **Severance**

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### Appeal Bonds

*Malloy v. State, A14A1957 (9/9/14)*

Appellant was convicted of two counts of Medicaid fraud and sentenced to serve four years in prison. He contended that the trial court erred in denying his motion for an appeal bond. Specifically, he argued that there was no evidence that he was a flight risk.

The Court stated that there is no constitutional right to bond pending appeal and whether to grant an appeal bond to eligible felony defendants lies within the sound discretion of the convicting court. In exercising its discretion, the trial court must answer four questions: (1) whether there is a substantial risk the defendant will flee; (2) whether there is a substantial risk the defendant will pose a danger to others in the community; (3) whether there is a substantial risk the defendant will intimidate witnesses or otherwise interfere with the administration of justice; and (4) whether it appears the appeal is frivolous or taken only for the purpose of delay. An affirmative answer to any one of these questions will support the trial court's decision to deny an appeal bond. The defendant bears the burden of persuading the court to grant an appeal bond, and the court should not grant bond unless the defendant presents sufficient information, evidence, or argument to convince the trial court that none

of the four factors applies. In addition to any evidence offered by the defendant, the trial judge may consider all the evidence adduced at the trial that is pertinent to the appeal bond determination.

Here, the Court found, the trial court denied appellant's request by affirmatively finding that there was a substantial risk that appellant would flee. Although appellant presented evidence of his community ties, the trial court stated that it was not persuaded by appellant's assurances. The Court stated that because appellant was convicted of Medicaid fraud, a crime involving deceit and the theft of public funds, the court's distrust of appellant's assurances was reasonably based in record evidence. Also, at sentencing, appellant showed no acceptance of the jury's verdict and little understanding that it warranted criminal punishment. The record also contained evidence that appellant was older, wealthy, and had family and business connections outside of Georgia, connections that may provide him refuge or aid. Thus, the Court concluded, given that some record evidence supported the court's decision to deny appellant an appeal bond, it could not say that the trial court manifestly abused its discretion.

### Motions For New Trial

*Gordon v. State, A14A1437 (9/3/14)*

Appellant was convicted of armed robbery. He contended that the trial court failed to weigh the evidence in accordance with his motion for new trial pursuant to O.C.G.A. § 5-5-21. The record showed that the trial court's order denying the motion stated as follows: "Upon consideration of Defendant's Motion on the general grounds,

same is hereby DENIED. *Jackson v. Virginia*, 443 U.S. 307 (1979).”

The Court the trial court does not exercise its discretion when it evaluates the general grounds by applying the standard of *Jackson v. Virginia* to a motion for new trial based on the general grounds embodied in O.C.G.A. §§ 5-5-20 and 5-5-21. Thus, because the record failed to indicate that the trial court fulfilled its duty of exercising its discretion under the applicable standard set forth in O.C.G.A. § 5-5-21, the Court vacated the trial court’s decision denying appellant’s motion for new trial on this ground and remanded the case for the trial court’s consideration of appellant’s claim under the proper standard.

## Severance

*Alston v. State*, A14A1018, A14A1019 (9/10/14)

Appellants Alston and Perkins were tried together and each convicted of aggravated assault, armed robbery, theft by receiving, cruelty to children, criminal street gang activity and possession of a firearm during the commission of a crime. Alston contended that the trial court erred by denying his motion to sever. The Court disagreed.

The Court stated that a defendant moving for severance has the burden of making a clear showing of prejudice and of a denial of due process in the absence of severance. In satisfying this burden, a defendant must do more than simply assert that he would have a better chance of acquittal if he were tried separately. Further, the trial court must apply the following factors in deciding a severance motion: (1) whether the number of defendants will create confusion as to the evidence and the law applicable to each; (2) whether there is a danger that evidence admissible against one defendant will be considered against the other despite the court’s instructions, or whether the strength of the evidence against one defendant will engulf the other with a “spillover” effect; and (3) whether the defendants’ defenses are antagonistic to each other or to each other’s rights.

Alston argued that the trial court should have severed his trial based on the second factor, arguing that he was prejudiced by being tried with Perkins because of his visible facial gang-related tattoos. In support of this contention he pointed to the fact that a large number of potential jurors had to be excused

for cause “just based on the viewing of the co-defendant” Perkins. But, the Court found, the transcript of the voir dire proceedings belied Alston’s assertion that this was the reason a large number of jurors were excused. Instead, the transcript showed that 11 potential jurors were excused for cause, but that the majority of jurors who were excused said they had formed an opinion or were biased because the appellants had been charged with numerous crimes, or other reasons unrelated to Perkins’ tattoos. And of the four jurors who did indicate that Perkins’ tattoos, or even more generally appellants’ appearance, would affect their impartiality, one juror stated that her bias against Perkins would not “spillover” over to Alston, and another juror indicated that his impartiality might not spillover to Alston. Moreover, and importantly, these jurors were properly questioned and excused outside the presence of the other potential jurors, thus removing any potential influence their biased opinion might have had on the jury’s deliberations. Moreover, the Court found, the trial court specifically charged the jury to “deliberate separately as to each defendant and return a separate verdict as to each defendant . . . . And I charge you that though you may consider all the evidence as a whole, conviction of one defendant does not necessarily require conviction of the other. You, the jury, must determine the guilt or the innocence of each defendant separately.” Finally, the Court noted, testimony and photographs were admitted that showed that all three defendants had gang tattoos, and such evidence was admissible and relevant to establish defendants’ association with a criminal street gang and O.C.G.A. § 16-5-3(2) clearly contemplates that existence and membership in a criminal street gang may be established by evidence of tattoos, among other things. Thus, the chance of spillover based solely on the jury viewing Perkins’ facial gang tattoos was minimal. Accordingly, the Court concluded, the trial court did not abuse its broad discretion in denying Alston’s motion to sever.