

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING SEPTEMBER 2, 2011

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## THIS WEEK:

- **Speedy Trial; *Barker v. Wingo***
- **Search & Seizure**
- **Possession of Tools for Commission of a Crime**
- **Photographs; Re-Opening Evidence**

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### **Speedy Trial; *Barker v. Wingo***

*Ward v. State, A11A1426 (8/16/11)*

Appellant appealed from the denial of his motion to dismiss and acquit based on his 6<sup>th</sup> Amendment right to a speedy trial. The Court found that the 34 month delay was presumptively prejudicial, thus triggering a *Barker v. Wingo* analysis. First, the Court concluded that the delay in this aggravated assault, robbery, and kidnapping case was uncommonly long and thus weighed against the State. The Court attributed the reason for the delay (problems with finding conflict free counsel for appellant who was indigent) was attributable to the government and therefore attributable in part to the State. However, the Court noted that the county in which the case arose was had only two terms of court per year, thus making it difficult to indict an individual, complete discovery, and reach trial within twelve months. Nevertheless, the delay in finding funds to find counsel for appellant was attributable to the State.

As to the third factor, the assertion of the right to a speedy trial, the Court found that this was properly weighted heavily against appellant because of his failure to assert until 30 months had past.

Finally, the Court found no prejudice to appellant. A defense witness who died would only testify regarding something one of the victims told him. As to an alleged second missing defense witness, appellant testified that he had no current telephone number for the witness but did not describe any attempts by him or his counsel to locate her. And as to a co-defendant the State did not produce for the anticipated trial, as the trial court noted, appellant had the power to subpoena the co-defendant himself, and appellant had remained incarcerated locally with the opportunity to communicate with his counsel. Thus, the State's failure to produce the co-defendant did not prejudice appellant because he could have subpoenaed the co-defendant himself instead of relying on the State to produce him simply because he was included in the State's witness list. Thus, the trial court did not abuse its discretion in denying appellant's motion for dismissal and acquittal.

### **Search & Seizure**

*Rogue v. State, A11A1373 (8/16/11)*

Appellant was convicted of possession of cocaine. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant was a passenger of a vehicle stopped for a traffic violation. The officer asked and received permission from the driver to search the vehicle. He asked appellant to step out of the vehicle and then asked him if he had any weapons or contraband on his person. Appellant said no, but he appeared very nervous. The officer then acted in accordance with his standard practice and proceeded to pat appellant down for weapons to make sure that he was not armed and presented no threat to the officer's safety. The officer then asked

appellant for identification. Appellant took out his wallet and began fumbling through it looking for his ID. The officer asked if he needed help and appellant gave him his wallet. As the officer was looking through it, he found a clear plastic baggie with cocaine inside.

Appellant argued that the officer's search of the wallet was not based on valid consent because the search followed almost immediately after an illegal frisk of his person; and that therefore the cocaine evidence found in the wallet should have been suppressed. The Court agreed that the frisk was illegal because it was based on general policy and not on information specific to the person frisked. Thus, it was insufficient to establish that the officer harbored a reasonable suspicion that appellant was armed and dangerous or otherwise posed a threat to officer safety.

However, the contraband was not uncovered during the unlawful pat-down. During a valid traffic stop, an officer could properly request consent to search the vehicle and could properly ask the occupants to exit the vehicle and provide identification. Here, the evidence supported the trial court's conclusion that appellant voluntarily consented to the officer's search of his wallet. The officer testified that after the pat-down, appellant was free to leave at any time. According to the officer's testimony, which was credited by the trial court, appellant did not suffer from a language barrier and he understood the officer's questions; in particular, he understood that the officer asked for his ID. The trial court found that when appellant had trouble finding his ID, he voluntarily handed his wallet to the officer after the officer offered to help. Thus, the trial court did not err in denying appellant's motion to suppress.

## **Possession of Tools for Commission of a Crime**

*Jackson v. State A11A1345 (8/16/11)*

Appellant was convicted of possession of tools for the commission of a crime. The indictment alleged that appellant had in his "possession certain devices, to wit: a bundle of one dollar bills with one hundred dollar Federal Reserve Notes on the outside of the bundle and a document in the bag indicating that \$10,000.00 was in the bag with the bundle, devices commonly used in the commission of

the crime of theft by deception, particularly a scheme known as a "pigeon drop," and did intend to make use of these devices in the commission of a crime. . . ." He argued that United States currency cannot be considered a "device" for purposes of OCGA § 16-7-20, and also contended that the currency and the note are not tools "commonly used" in the commission of a theft.

OCGA § 16-7-20(a) provides: "A person commits the offense of possession of tools for the commission of crime when he has in his possession any tool, explosive, or other device commonly used in the commission of burglary, theft, or other crime with the intent to make use thereof in the commission of a crime." The Court held that the indictment did not merely charge appellant with possession of currency, but rather possession of currency bundled in a specific manner to make it appear that the bundle contained more money than was actually there, along with a document stating that there was \$10,000 in the bundle. Thus, in the manner fashioned, it became more than mere currency—it was basically "pigeon bait." The investigating officer testified that he himself had investigated 15 to 20 of these "pigeon drop" scams and it always involved a bundle of what appears to be a large sum of money and a note. Both of appellant's co-defendants also testified that this was how the scam worked using the bundle of money. In addition, appellant himself testified as to how this particular "flim-flam" was carried out, stating that it had been known as a "pigeon drop" since the 50's and that it always involved a "bundle of money."

Accordingly, the Court concluded that there was sufficient evidence from which the jury could find that the currency and note were "devices commonly used" in the commission of the crime of theft by deception. Therefore, there was sufficient evidence for the jury to find that appellant was guilty of the crime charged beyond a reasonable doubt.

## **Photographs; Re-Opening Evidence**

*Riley v. State, A11A1302 (8/17/11)*

Appellant was convicted of armed robbery, aggravated assault and possession of a firearm during the commission of a crime. The evidence showed that appellant and other coconspirators robbed a pizza delivery woman

at gunpoint. At trial, appellant's defense was coercion. On cross-examination, appellant was asked to identify a photograph of him taken on the day of the robbery. In the photograph, appellant was wearing a shirt with the words "Thug Life" printed on it. Appellant was asked "[w]hat does thug life mean to you?" He replied that it was "[j]ust a plain, old shirt to me," and when pressed by counsel he stated that "I don't know what thug life means." For impeachment purposes, appellant was then shown another state's exhibit, a photograph of a tattoo on his upper left arm that said "Thug Life." Appellant again stated that he did not know what the term "Thug Life" meant and that had he gotten the tattoo when he was young without knowing its meaning. At the close of evidence and during the charge conference, the prosecutor pointed out to the trial court it had inadvertently rested its case without tendering the photograph of appellant's tattoo, into evidence. Over objection, the Court reopened the evidence to allow the State to tender the photograph into evidence. Defense counsel, however, did not object that the photos were unfairly prejudicial.

Under the circumstances of this case, the Court affirmed the conviction. The record showed that the State had laid the foundation for the photo, authenticated it, and shown it to the jury. Although defense counsel was not shown the photograph tattoo prior to the trial, the trial court ruled that appellant had notice of tattoos upon his own body. Appellant's ability to present a defense was not prejudiced by the court's action. Accordingly, the trial court did not abuse its discretion by reopening the evidence.