

## THIS WEEK:

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## Motions for Out-of-time Appeals; Ineffective Assistance of Counsel

*Robbins v. State, A19A0030 (5/2/19)*

In August, 2010 appellant, with the assistance of counsel, pled guilty to attempted murder, participation in criminal street gang activity, and three counts of voluntary manslaughter. The trial court imposed a total sentence of 50 years, with 25 years to be served in confinement and the remainder to be served on probation. On November 12, 2010, appellant filed a motion to modify his sentence, asking the court to consider a shorter term of confinement on the grounds that he was endangered while in custody. After a hearing on October 10, 2011, the trial court denied the motion. Over five years later, appellant filed a pro se motion for an out-of-time appeal, claiming that his plea counsel had failed to inform him of his right to appeal from the denial of his motion to modify his sentence. The trial court denied the motion without a hearing.

Appellant contended that the trial court erred in denying his motion for an out-of-time appeal without holding an evidentiary hearing. The Court disagreed.

An indigent defendant is entitled to representation by counsel only for trial and for the direct appeal from the judgment of conviction and sentence. An indigent defendant who timely seeks to withdraw a guilty plea has both the right to appeal the denial of his motion to withdraw his guilty plea and the right to the effective assistance of counsel as guaranteed by the Sixth Amendment for that appeal. Moreover, a defendant who pleads guilty has a right to file a direct appeal from the judgment of conviction entered thereon and need not file a motion to withdraw the plea as a prerequisite to an appeal.

Here, however, appellant did not file a direct appeal from his guilty plea conviction and he did not file a motion to withdraw his guilty plea which would have triggered the right to appointed counsel to assist with an appeal from the denial thereof. Rather, appellant filed a motion to modify his sentence which gave no indication that he wanted to withdraw his plea. On the contrary, he expressly stated in his motion that he intended to honor the terms of his guilty plea. Thus, the Court held, under such circumstances, appellant was not entitled to appointed counsel to pursue an appeal from the denial

of his motion to modify his sentence. And, because appellant was not entitled to appointed counsel to pursue an appeal from the denial of that motion, it necessarily follows that there could be no denial of the Sixth Amendment right to effective assistance of counsel for such an appeal. Thus, the Court concluded, it was clear from the record that appellant's motion for an out-of-time appeal, based on an allegation of ineffective assistance of counsel, was without merit and the trial court did not abuse its discretion in denying appellant's motion.

### **Rule of Lenity; OCGA § 17-10-6.2 (c) (1)**

*Koroma v. State, A19A0659 (5/2/19)*

Appellant entered an *Alford* plea to sexual battery and two counts of child molestation for the repeated sexual abuse of his twelve-year-old daughter. The trial court sentenced him to 20 years to serve 10 years in confinement with the balance probated. Thereafter, proceeding pro se, appellant filed a "motion to modify the sentence and sentence reduction," which the trial court ultimately denied.

Appellant contended that the rule of lenity required that he only be sentenced for sexual battery, and not child molestation, because the evidence showed that both offenses served as alternative charges for the same conduct. The Court disagreed.

The Court found that under the facts of this case, no ambiguity existed between the sexual-battery statute and the child-molestation statute such that the rule of lenity applies. The indictment did not predicate the three offenses on the same conduct or act. Instead, each offense, as charged, was predicated on a separate sexual act appellant perpetrated on the victim. Further, the offense of child molestation required proof of additional facts which sexual battery did not: that the victim be under the age of 16 and that appellant sought to arouse his own sexual desires. Accordingly, the trial court did not err in finding that the rule of lenity did not apply.

Appellant also argued that the trial court abused its discretion by not reducing his imposed sentence pursuant to OCGA § 17-10-6.2 (c) (1), which permits, at the trial court's discretion, a deviation from the mandatory minimum sentence for certain sexual offenses provided that six factors are found. Thus, the Court noted, the possibility of a less stringent sentence was permitted if appellant had no prior conviction of any of the specified offenses; he did not use a deadly weapon during the offense; there was no evidence of a relevant similar transaction; the victim did not suffer physical harm during the crime; there was no transportation of the victim; and the victim was not physically restrained during the offense. See OCGA § 17-10-6.2 (c) (1) (A)-(F). In its order denying appellant's motion to modify the sentence, the trial court found that the State had presented evidence of relevant similar transactions which would prevent it from deviating from the mandatory minimum.

The Court noted that in *Evans v. State*, 300 Ga. 271 (2016), the Georgia Supreme Court held that the phrase "relevant similar transaction" in OCGA § 17-10-6.2 (c) (1) (C) includes sexual offenses charged in the same indictment as the crime for which sentence is imposed so long as the acts are separate in time and not part of one sequence of events. And here, the Court found, appellant was convicted of child molestation under Count 5 of his indictment. He was also convicted of a second crime of child molestation as a lesser-included offense to aggravated child molestation under Count 6. The child molestation crimes were alleged to be based upon two separate acts committed upon the victim between May 1, 2013, and October 10, 2013, based on the allegation that appellant perpetrated multiple acts of sexual abuse against the victim over

that period of time specified in the indictment. Thus, because the acts that appellant was convicted of committing were separated in time and were not part of one sequence of events, the trial court was correct to consider one act of child molestation to be a “relevant similar transaction” that precluded a downward modification of sentencing for the other crime of child molestation.

## **Rule 404 (b); Overturned Convictions**

*Hamlett v. State, A19A0141, A19A0142 (5/8/19)*

Twin brothers Hashim and Salim Hamlett were convicted of burglary and theft by taking. Hashim argued that the State violated his due process rights under the federal and Georgia Constitutions by admitting evidence of Salim's 2011 conviction for burglary and possession of tools of a crime, which prejudiced him because the prior conviction was subsequently overturned. The Court disagreed.

The admission of similar transactions under OCGA § 24-4-404 (b) is not limited to conduct resulting in a conviction. And, while the Court found no Georgia cases under the new Evidence Code regarding the admissibility of a conviction later overturned, it noted that it is well-settled that an acquittal of similar charges does not preclude admission of such charges under Rule 404 (b). Moreover, the Eleventh Circuit Court of Appeals recently held that it was not error to admit evidence of a prior conviction that was later invalidated because Rule 404 (b) allows “evidence of relevant offense conduct even when a defendant has been acquitted or never charged in connection with that offense.” *United States v. Rodriguez*, 713 Fed. Appx. 815, 819 (III) (A) (11th Cir. 2017). Accordingly, there was no plain error in the admission of this evidence.

Salim also contended that the trial court violated his constitutional due process rights when it admitted evidence of his prior conviction, where that conviction was later reversed. The Court disagreed with him too.

Here, Salim did not challenge the admission of the evidence as irrelevant, nor did he contend that there was insufficient proof that he committed the other act. And the Court agreed with the trial court that the prior convictions for burglary and possession of tools of a crime were relevant to show knowledge, absence of mistake, and intent with respect to the charges pending against Salim. OCGA § 24-4-404 (b).

Instead, the Court noted, Salim contended that it was error to admit evidence of his prior burglary conviction because it was later overturned, and the State was attempting to use the prior conviction to re-litigate an issue already decided in his favor. But, the Court stated, this argument misconstrues the Court's reversal in the prior case. In *Hamlett v. State*, 323 Ga. App. 221 (2013), the Court found that the trial court should have suppressed the evidence obtained from a GPS device and, without this evidence, there was not enough evidence to support Salim's conviction. This finding did not implicate or call into question Salim's intent, absence of mistake, or knowledge of the underlying crimes. Thus, by seeking to admit the prior conviction in the instant burglary case to show intent, knowledge, or absence of mistake, the State was not re-litigating an issue already decided against it. Moreover, the Court found, the cases on which Salim relied upon to explain the admissibility of this evidence were all decided under the former evidence code inapplicable to the instant case. Finally, the trial court repeatedly instructed the jury on the limited use of this prior conviction, and it is presumed the jury followed its instructions. Accordingly, the Court concluded, because prior bad acts are admissible if the conditions of Rule 404 (b)

are satisfied, and the reversal of the prior conviction was not based on the issue of intent, the trial court properly admitted the evidence even though that prior conviction was later overturned.

## **Motions to Sever; Rule 404 (b)**

*Brown v. State, A19A0197 (5/8/19)*

Appellant was convicted of armed robbery, two counts of aggravated assault, two counts of possession of a firearm during the commission of a crime, and criminal attempt to commit armed robbery. The evidence, very briefly stated, showed that appellant, two other women, and two men, conspired to rob a couple of people other than the victims. However, their plans changed when the victims showed up at the apartment and flashed a lot of cash. They then robbed the victims in appellant's apartment.

Appellant was tried with her two male co-defendants, Mack and Greene. She contended that the trial court erred in denying her motion to sever her trial from that of Greene, who was dressed in prison inmate attire. The Court disagreed.

It is well established that to compel a criminal defendant to wear distinctive prison garb at his trial is to deny him the presumption of innocence, a violation of his constitutional due process rights. Here, the record showed, Greene appeared for the first day of trial wearing prison garb. Greene knew a week prior that his case was scheduled for trial, and he advised the trial court that he communicated with his family in that time, but that no one brought him other clothes to wear at trial. Appellant moved for severance, arguing that she was prejudiced by "being involved with someone that's dressed that way." The trial court denied the motion, stating, "in my experience, jurors are extremely intelligent and they're able to separate those individuals that they find are, in fact, guilty of crimes and not be prejudiced by the way people are dressed." The trial court also noted that appellant was dressed in civilian attire.

The Court found no reason to believe that Greene's prison attire prejudiced appellant. On the contrary, it was more likely that appellant's appearance in civilian clothes, alongside Greene dressed in prison garb, reinforced a presumption of appellant's individual innocence.

Appellant also contended that the trial court erred in admitting pursuant to OCGA § 24-4-404 (b) ("Rule 404 (b)") evidence that she had been planning a separate robbery the same day. The Court noted that co-indictee Smith pled guilty to all of the charges stemming from the incident. She testified that that she, appellant, and the third female co-indictee, Walton, were supposed to commit another robbery in South Carolina earlier on the same day of the incident at issue in this case, but that it never happened.

The Court stated that Rule 404 (b) does not apply where the evidence of other crimes, wrongs, or acts are intrinsic to the charged offense. Evidence is intrinsic if it is (1) an uncharged offense which arose out of the same transaction or series of transactions as the charged offense, (2) necessary to complete the story of the crime, or (3) inextricably intertwined with the evidence regarding the charged offense. Whether offered under Rule 404 (b) or as intrinsic evidence, the trial court must find that the probative value of the proffered evidence is not substantially outweighed by unfair prejudice and that it meets the other requirements of OCGA § 24-4-403

Appellant contended that the other act evidence was not intrinsic or inextricably intertwined with the robbery at issue in this case because that robbery never took place, and involved different targets, a different time, and a different location from the charged offense. The Court disagreed. The evidence was probative, and inextricably intertwined with the robbery in this case and necessary to complete the story or chain of events explaining the context of the crime. The testimony also established the members of the group and confirmed that all five members were involved in both plans. It further confirmed the group's goal and explained how the conspiracy came about with an initial plan to commit the South Carolina robbery involving two men and money but ultimately transformed into the robbery of the two victims when they showed up flashing a large amount of cash.

Moreover, the Court found, to the extent appellant argued that the evidence should have been excluded under Rule 403 as unduly prejudicial because it was offered simply to suggest propensity, the Court again disagreed. Here, the planned robbery was linked in time and circumstances with the charged robbery as they occurred within hours of each other and involved the same perpetrators conspiring together, and it could not be said that the evidence was dragged in by the heels solely for prejudicial impact. Finally, the Court stated, although the trial court admitted the evidence on other grounds, the Court nonetheless affirmed under the right for any reason theory.

## **Motions to Perfect the Record; Recidivist Sentencing**

*Barber v. State, A19A1182 (5/8/19)*

Appellant was convicted of aggravated assault, possession of a firearm during the commission of a felony, and possession of a firearm by a convicted felon, and the trial court sentenced him as a recidivist under OCGA § 17-10-7 (a) and (c). Following the sentencing hearing, the record showed that certified copies of appellant's three prior felony convictions were not included in the exhibit list created by the court reporter and were not appended to the sentencing hearing transcript. Appellant contended that the trial court erred in granting the State's motion to perfect the record pursuant to OCGA § 5-6-41 (f) with the certified copies of his prior felony convictions. The Court disagreed.

The Court stated that OCGA § 5-6-41 (f) establishes a procedure whereby a party who contends that the transcript or record does not truly or fully disclose what transpired at trial may have the record completed either by stipulation of the parties as to what occurred or the independent recollection of the trial judge. If anything material to either party is omitted from the record, the omission may be corrected and, if necessary, a supplemental record filed. Evidence never actually admitted at trial cannot properly become part of the record on appeal pursuant to OCGA § 5-6-41 (f). The section is solely for the purpose of making the record speak the truth, not for adding evidence to the record or supplying fatal deficiencies after the fact.

Here, the Court noted, appellant did not dispute that the prosecutor had *introduced* certified copies of the three convictions at the sentencing hearing, he argued that the certified copies were never *admitted* into evidence by the trial court. In contrast, the State argued that the certified copies had been introduced by the prosecutor and admitted into evidence by the trial court, and that the record should be made to conform to the truth of what transpired under OCGA § 5-6-41 (f). After hearing from the parties, the trial court found that certified copies of the three prior felony convictions had been admitted into evidence at the sentencing hearing and that to make the record conform to the truth, the court would supplement the record pursuant to OCGA § 5-6-41 (f) with certified copies of those convictions as "appropriate substitutes

for the missing evidence.” And, the Court stated, a trial court's findings regarding the correctness of the record are final and not subject to appellate review. Accordingly, the Court deferred to the trial court's finding that certified copies of the three prior felony convictions were admitted into evidence at the sentencing hearing and that the record should be supplemented with substitute certified copies of those convictions.

Appellant also contended that the trial court erred in sentencing him as a four-time recidivist under OCGA § 17-10-7 (a) and (c) because one of the three prior convictions was invalid. However, the Court found, since this issue was raised by appellant for the first time on appeal, the issue was waived.

Nevertheless, appellant contended, the issue was not waived because a void sentence can be raised at any time. But, the Court noted, in challenging the validity of his prior conviction, appellant was contesting the validity of an underlying predicate offense used for recidivist sentencing, and whether a recidivist sentence is void depends not upon the existence or validity of the factual or adjudicative predicates for the sentence, but whether the sentence imposed is one that legally follows from a finding of such factual or adjudicative predicates. Hence, in the context of a challenge to a recidivist sentence imposed pursuant to OCGA § 17-10-7 (a) and (c), a claim that one of the predicate felonies used in aggravation of punishment is invalid does not raise a cognizable claim that the recidivist sentence is void, and consequently, such a claim can be waived, as it was here.

## **Right to Resist Unlawful Arrest; Official Duties of a Police Officer**

*Horton v. State, A19A0311 (5/9/19)*

Appellant was convicted of aggravated assault on a police officer and five counts of obstruction of an officer. The facts, briefly stated, showed that Deputy Morris a uniformed officer, received a dispatch around 6:15 p.m. to a specific address for a “physical domestic” in which “the suspect had a chain that he was using.” When he arrived, he saw no signs of a domestic disturbance, but appellant came to the door in an agitated state with a chain around his neck. Appellant told the officer he was not needed and started yelling that “his wife needed to come get her a\*\* back in the house because she had food burning on the stove.” Morris asked appellant to put the chain down. Appellant refused. Appellant tried to go back inside. Morris and other officers, who had arrived as back-up, would not let him. The situation escalated. Appellant was tased when it looked like he was going to use the chain. Appellant then used the chain and hit Deputy Morris. Appellant was tased again and eventually it took five officers to subdue him.

Appellant contended that plain error resulted from the trial court's failure to charge the jury, sua sponte, on his right to resist an unlawful arrest or excessive force. The Court disagreed. With regard to the obstruction charges, appellant could not establish error, much less plain error, as the trial court instructed the jury that the State must prove beyond a reasonable doubt that the officers were “in the lawful discharge of official duties” at the time of appellant's obstruction. As the lawful discharge of an officer's duties was an essential element of the crime, rather than an affirmative defense, the charge as a whole adequately covered the principle.

However, the Court stated, unlike the offense of obstruction, aggravated assault upon a peace officer is not defined to require that the officer be engaged in the “lawful discharge of his official duties,” but instead requires the State to prove that the assault occurred when the officer “is engaged in, or on account of the performance of, his or her official duties.”

OCGA § 16-5-21 (c). Accordingly, this charge can be subject to the affirmative defense that the defendant is resisting an unlawful arrest or excessive force.

Appellant contended that he was resisting an unlawful arrest or, in the alternative, excessive force, at the time he swung the chain at Deputy Morris. In his view, Deputy Morris' conduct in preventing him from going back inside his home constituted an unlawful arrest. But, the Court found, at the time Deputy Morris stopped appellant, he had not determined the location of appellant's wife or verified appellant's claim that she was not inside the home. A dispatcher who reports a crime at a specified location gives police an articulable suspicion to investigate and detain individuals at the scene, particularly where police observations on arriving at the scene corroborate the dispatcher's report. Appellant's appearance at the door with a chain around his neck corroborated the dispatcher's report of a domestic situation in which the suspect was using a chain. Accordingly, the officer's conduct in preventing appellant from going back inside the home could not be construed as an unlawful arrest or detention. Similarly, the evidence in this particular case could not be said to support a charge on the right to resist excessive force where Deputy Morris discharged the taser in an attempt, albeit a failed one, to prevent appellant from hitting him with the chain. Accordingly, the Court concluded, because a charge on the right to resist an unlawful arrest or excessive force was not authorized by the evidence, the trial court did not commit plain error by failing to charge it sua sponte.

## **Possession of a Firearm during the Commission of a Felony; Essential Elements**

*Lewis v. State, A19A0343 (5/14/19)*

Appellant was convicted of possession of methamphetamine with intent to distribute, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. The facts, briefly stated, showed that a uniformed officer was dispatched in response to an anonymous call about traffic in and out of a vacant house. The officer noticed the main front door was open but a glass storm door was closed, and he could hear people moving around inside. The officer testified that it appeared the carpet in the home was being replaced. When no one answered the officer's knock, he announced "sheriff's office" and entered the home's living room. As the officer turned the corner from the living room to the den, he noticed appellant, and the two men "scared each other." When the officer again announced "sheriff's office," appellant pulled out a firearm, and pointed the barrel of the gun directly at the officer. The officer pulled out his firearm, and just as he was about to shoot, appellant threw his weapon in a closet and put his hands in the air. The officer arrested appellant and the methamphetamine was discovered on his person.

Appellant testified that he was a carpet installer and had been on the job for three days when the officer showed up. He explained that he had been at the house for only fifteen minutes when the officer arrived and that a carpet subcontractor he had hired was mad at him, had left the job, and "probably ... ha[d] called" the police to complain of trespassers. He denied pulling a gun on the officer and stated that the gun did not belong to him. He also testified that the first time he saw the gun was when another officer arrived, searched the home, and "came back out with a pistol."

Appellant contended that the trial court committed plain error by failing to instruct the jury on the definition or elements of possession of a firearm during the commission of a crime. The Court agreed.

OCGA § 16-11-106 (b) provides that “[a]ny person who shall have *on or within arm's reach of his or her person* a firearm ... during the commission of, or the attempt to commit: ... (4) Any crime involving the possession, manufacture, delivery, distribution, dispensing, administering, selling, or possession with intent to distribute any controlled substance ... as provided in Code Section 16-13-30 ... and which crime is a felony, commits a felony. ... (Emphasis supplied.).

The Court found that the trial court's omission to be error in light of the evidence presented at trial. On the element of possession, the trial court only read the indictment which did not include the definition of possession as provided in OCGA § 16-11-106 (b). And here, appellant presented at least some evidence that he did not pull the gun on the officer and that it may have belonged to the disgruntled carpet subcontractor. Under the charge as given, the jury could have convicted appellant of possession of a firearm during the commission of a crime simply because the officer found the gun in the home where appellant had been working, even though the law requires that appellant had the firearm “on or within arm's reach of his ... person.” Thus, the Court concluded that this omission affected appellant's substantial rights and likely contributed to the outcome of the case in that it allowed the jury to convict appellant without considering one of the essential elements of the crime. Accordingly, the Court reversed appellant's conviction on the charge of possession of a firearm during the commission of a crime.

## **Search & Seizure; Ineffective Assistance of Counsel**

*State v. Walker, A19A0198 (5/17/19)*

Appellant was convicted of burglary, criminal trespass, and two counts of armed robbery. The court granted a new trial based on its conclusion that Walker received ineffective assistance of counsel due to his counsel's failure to file a particularized motion to suppress.

The evidence, briefly stated, showed that Officer Drummond noticed Walker loading a large flat-screen television into the trunk of a Honda. Drummond drove up and parked behind the Honda, but before he stopped, the Honda sped off with the trunk still open, leaving Walker behind. The officer got out of his vehicle and noticed a duffel bag sitting on the grass next to Walker. Walker told the officer the television belonged to his cousin and that he did not know who was driving the Honda or why it sped off. The officer placed Walker in his patrol car after frisking him. A “Halloween mask” was discovered in the front pocket of Walker's pants. Immediately upon placing Walker in the patrol car, a man walked up. He identified himself as Jabari Nibbs and stated the television and duffel bag belonged to him. Nibbs was arrested when the officer determined he had an outstanding warrant. As soon as Nibbs was placed in the patrol car, Drummond received a BOLO on an armed robbery that occurred at a nearby residence. The description of the perpetrators matched Walker and Nibbs. They were then both arrested.

The State contended that the trial court erred in finding that Walker's trial counsel's failure to file a particularized motion to suppress constituted deficient performance, arguing that trial counsel made a reasonable strategic decision not to file a motion after investigating the facts surrounding the seizure of the evidence. The Court agreed. Based on the attorney's testimony at the motion for new trial, the Court found that the record showed that counsel's failure to file a motion to suppress was not the result of negligence or oversight, but resulted from a reasonable conscious decision she made after considering all of the circumstances presented. Moreover, Walker had been represented by other attorneys prior to trial counsel taking over his case, and none of those attorneys had filed a particularized motion to suppress in this case, either.

As a result, the Court found, Walker was unable to show that trial counsel's decision not to file such a motion was so patently unreasonable that no competent attorney would have made the same decision.

The State also contended that the suspicious circumstances observed by Officer Drummond upon encountering Walker authorized the officer to briefly detain Walker while he (the officer) tried to gather additional information to explain what was going on and determine whether a crime was being (or had been) committed. The Court again agreed. The Court found that the undisputed evidence showed that Officer Drummond's initial approach of Walker was a legal, first-tier encounter. Furthermore, there was no evidence that, prior to patting down Walker and placing him in the patrol car, Officer Drummond prevented Walker from walking away from the encounter.

When Officer Drummond patted down Walker and had him sit in the patrol car while the officer tried to figure out what was going on, however, their encounter rose to the level of a second tier. Specifically, the undisputed evidence (including Walker's own trial testimony) showed that, when Officer Drummond initially observed Walker, Walker was attempting to load a large, flat-screen television into the trunk of a Honda that was parked partially in the grass on the side of a street, where the only houses in the immediate vicinity were located on the other side of a wooded area. When the officer turned around and pulled up behind the Honda, the driver sped off, leaving Walker standing there with the television and duffel bag. Walker told Officer Drummond that the television and duffel bag belonged to his cousin and that he was helping his cousin move. When the officer asked Walker who was driving the Honda, however, Walker claimed that he did not know. Thus, the Court concluded, these circumstances were sufficient to create a reasonable suspicion that Walker may have been involved in criminal conduct, so that Officer Drummond was authorized to briefly detain Walker while investigating the situation further.

Moreover, after conducting a pat-down search for safety purposes, Officer Drummond placed Walker in the patrol car without handcuffs. Almost immediately thereafter, Nibbs spontaneously walked up to the officer and said that he knew Walker and that the television and the items in the duffel bag belonged to him (Nibbs). This demonstrated that there was some relationship between Nibbs and Walker, and the contradiction between Nibbs's claim to the items, and Walker's statement that the items belonged to his cousin, justified Officer Drummond's further investigation into the situation. Then, when the officer assisting Officer Drummond checked Nibbs's criminal history, the officer found out that Nibbs had an outstanding arrest warrant and placed him under arrest. And, within moments, the officers heard the armed robbery dispatch alert describing suspects who matched Walker's and Nibbs's appearance, so Walker was placed under arrest, also. Significantly, it was undisputed that the pre-arrest investigatory detention of Walker by Officer Drummond lasted less than ten minutes.

Thus, the Court concluded, the trial court erred in concluding that Officer Drummond illegally detained Walker in the patrol car for "several minutes" without a valid reason. Instead, under the circumstances presented, Officer Drummond legally conducted a brief investigatory detention of Walker. Consequently, a motion to suppress that was dependent upon a finding of an illegal detention would have lacked merit, so trial counsel cannot be deemed ineffective for having failed to file such a motion.

Finally, the Court found, Walker effectively waived any standing to contest the seizure of the television and duffel bag. Walker testified at trial that Nibbs and Nibbs's cousin had given him a ride to the area and had left him standing on the side of the street while they walked through the woods to the house where the armed robbery took place. According to

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Walker, shortly before Officer Drummond arrived on the scene, Nibbs's cousin ran out of the wooded area, handed Walker the television, mask, and duffel bag, and told Walker not to leave while he (Nibbs's cousin) went to get the car. In contrast to that testimony, Officer Drummond testified that, during his initial encounter with Walker, Walker said that the items belonged to his (Walker's) cousin and that he was helping his cousin move. Thus, the Court found, regardless which version of the events was true, Walker clearly disavowed any ownership interest in the items and indicated that his actual possession of the items was intended to be brief and temporary. Further, after walking up to Officer Drummond minutes later, Nibbs claimed ownership of the items, and Walker did not dispute Nibbs's claim. Consequently, the Court concluded, under these circumstances, there was no legal basis to exclude the television and duffel bag at trial, and any motion to suppress them would have been futile. Therefore, the trial court erred in finding that trial counsel's failure to file a motion to suppress those items constituted deficient performance.