

THIS WEEK:

- **Directed Verdicts; Constitutional Speedy Trial Challenges**
- **Motions to Withdraw Plea; Void Sentences**
- **Cross-Examination; Prosecutorial Misconduct**
- **Jury Charges; Jury Nullification**
- **Ineffective Assistance of Counsel; Failure to Object**
- **Sufficiency of the Evidence; Involuntary Manslaughter**
- **Expert Witnesses; Other Acts Evidence**
- **Appeals; Preparation of Transcript**
- **Statements; *Garrity***
- **Trafficking in Cocaine; Sufficiency of the Evidence**

Directed Verdicts; Constitutional Speedy Trial Challenges

State v. Lewis, A19A0470 (6/17/19)

In 2013, Lewis and Harris were indicted for possession of a firearm by a convicted felon. The evidence showed that the weapon was found in the center console of the vehicle in which Harris was the driver and Lewis was the passenger.

In 2018, both filed a motion to suppress and a motion to dismiss on the grounds that they had been deprived of their constitutional right to a speedy trial. Harris' motions came up first and he elected to waive them and plead guilty. Later that same day, Lewis appeared in the same trial court for a hearing on his speedy trial motion. Immediately, the trial court asked the State what it was "trying to accomplish" given that Harris had just entered a guilty plea on the same charge. The State explained that the defendants were not charged with ownership of the firearm, but rather with constructive joint possession because the firearm was found within arm's reach of both men in the vehicle. When the State attempted to address the factors involved in the analysis of Lewis' speedy trial motion, the trial court again turned to the fact that Harris had pleaded guilty to possession of the firearm. The trial court then asked — despite the State's motion for continuance in the absence of the testifying officer — whether it was permitted to dismiss the case by converting Harris' constitutional speedy trial motion to a "motion for directed verdict." Although the State maintained that a directed verdict would not be appropriate, the trial court entered an order dismissing the indictment on the grounds that the State "had not spoken to the arresting officer to clarify the area where the firearm was recovered." The State appealed.

The Court stated that although it was not entirely clear from the record what the trial court intended to do in issuing its order following the hearing on Lewis' speedy trial motion, it was without authority to act as it did. A directed verdict of acquittal is proper if construing the evidence in favor of the State, no rational jury could make the requisite finding. Thus, a motion for directed verdict has no meaning when a case is tried without a jury. Consequently, because there had been no trial — much less a jury trial — the trial court was not authorized to issue a directed verdict. If there had been a bench

trial, the issue would have been whether the evidence was sufficient at trial to support a conviction under the standards of *Jackson v. Virginia*. However, the Court stated, neither the trial court nor it can undertake an analysis of the sufficiency of the evidence prior to trial.

Finally, the Court added, if the trial court intended to dismiss the indictment on speedy trial grounds, it was first required to evaluate Lewis' claim under the framework set out in *Barker v. Wingo*. Thus, because the trial court did not make the required findings of fact or conclusions of law regarding constitutional speedy trial claim, the Court vacated the order and remanded for further proceedings and the entry of an order containing the appropriate findings of fact and conclusions of law.

Motions to Withdraw Plea; Void Sentences

Upton v. State, A19A0024 (6/18/19)

Appellant was indicted on one count of rape (OCGA § 16-6-1), two counts of aggravated sodomy (OCGA § 16-6-2 (a) (2)), two counts of aggravated child molestation (OCGA § 16-6-4 (c)), two counts of aggravated sexual battery (OCGA § 16-6-22.2), one count of incest (OCGA § 16-6-22), one count of child molestation (OCGA § 16-6-4 (a)), and one count of influencing a witness (OCGA § 16-10-93). He entered a negotiated plea to all counts, but then filed a motion to withdraw it. The trial court denied the motion.

The Court affirmed the trial court's denial of appellant's motion to withdraw his plea. However, the Court stated, despite its conclusion that appellant's plea itself was validly entered into, the Court must vacate his sentence for rape, both counts of aggravated sodomy, and both counts of aggravated sexual battery because the trial court imposed a sentence that the law does not allow. A defendant's acquiescence to an illegal sentence, either through plea negotiations or a failure to object to the sentence, cannot render an otherwise illegal sentence valid through waiver because a void sentence in law amounts to no sentence at all.

Here, the Court found, each of the statutes for rape, aggravated sodomy, and aggravated sexual battery provide the same punishment options for a sentencing court: (a) life imprisonment, or (b) a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life. But, on each of appellant's convictions for rape, aggravated sodomy, and aggravated sexual battery, the trial court imposed the same sentence: "Life with 25 Years in Confinement."

The Court stated that although the trial court may have intended to comply with the statutory sentencing scheme by imposing a term of imprisonment for not less than 25 years and not exceeding life imprisonment, followed by probation for life, the language used in the final disposition does not reflect such a sentence. The Court construed the sentence on each count as written to impose a life sentence in prison, probated to serve 25 years. This interpretation of the sentence on each count was buttressed by the "sentence summary" portion of the final disposition. In that portion, the trial court indicated that the aggregate sentence it was imposing was "Life with the possibility of parole with the first 25 years to be served in confinement and the remainder to be served on probation[.]"

However, the Court found, because life imprisonment, with the first 25 years in confinement is not a statutorily permitted sentence for any of these conviction, the sentences were void. Moreover, it is well settled that pursuant to OCGA § 17-10-1, a trial court may not probate any portion of a life sentence.

Therefore, the Court concluded, because appellant was unlawfully sentenced on these five counts, the Court vacated those sentences and remanded for further proceedings on those counts. As to these counts, appellant stands in the same position as if he had pled guilty and not yet been sentenced. However, the Court noted, appellant's other convictions and sentences are affirmed in full.

Cross-Examination; Prosecutorial Misconduct

Patterson v. State, A19A0085 (6/18/2019)

Appellant was convicted of one count of aggravated child molestation and eight counts of child molestation. The evidence showed that he molested his two stepdaughters. At trial, the victims' biological mother testified for her husband, appellant. During cross-examination, she testified that a couple of months before trial, the younger victim called her to say that she was "sorry for lying" and that her stepmother had threatened her. Briefly stated, on cross, the prosecutor stated that the mother was "making this stuff up" and asked the mother whether she thought this was "impossible, incredible, unbelievable?"

The mother said she was "shocked to hear what she had to say." The prosecutor then asked whether the mother immediately called defense counsel to tell counsel about this phone call. The mother admitted that she told appellant and defense counsel prior to trial. At which point, the prosecutor asked, "Do you want this jury to believe that you told [Defense Counsel] and that she never told the State this?" The mother replied, "Yes." The prosecutor then asked, "So y'all were preparing to do this at the last minute and spring this story that [the younger child] lied?" Over defense counsel's objection to the "insinuations about my complicity in this[.]" the mother stated, that she did.

Appellant contended that the State's questioning of the mother's account of the conversation she had with the younger victim violated his right to a fair trial because it implied that defense counsel owed a duty to inform the State about the conversation prior to trial. However, the Court found, the State did not accuse defense counsel of withholding evidence but instead directly challenged the mother's assertions that she told defense counsel about the younger victim's alleged recantation. Georgia law favors the admission of any relevant evidence, and any evidence is relevant which logically tends to prove or to disprove a material fact which is at issue in the case, and every act or circumstance serving to elucidate or to throw light upon a material issue or issues is relevant. The purpose of cross-examination is to provide a searching test of the intelligence, memory, accuracy, and veracity of the witnesses, and it is better for cross-examination to be too free than too much restricted. Wherever the purpose is to impeach or discredit the witness, great latitude should be allowed by the court in cross examinations

And here, the Court found, the trial court did not abuse its discretion by allowing the State to challenge the veracity of the mother's statement that the younger victim recanted. The trial court has broad discretion in determining the relevancy of cross-examination. Determining whether the mother's assertion that the younger victim recanted her allegations against appellant was true was a material issue in this case. Moreover, it is the duty of the trial court to control the trial of the case

and to insure a fair trial to both sides. The trial judge has broad discretion in handling these matters and the Court stated it is loath to interfere with that discretion unless it is manifestly abused by clearly demonstrated prejudice or unfairness.

The record showed that appellant presented his wife, the mother, as a witness on direct examination to rebut the allegations of molestation made by the victims during their testimony. On cross-examination, the mother challenged the younger victim's testimony by stating that the younger victim called her a couple months prior to trial to recant. The State, having been unaware of this alleged call between the mother and the younger victim, was authorized to ferret out the truth through its questioning of the mother. The record reflected that the State's questioning of the mother sought to challenge her credibility as a reliable witness and to get to the bottom of whether the phone call actually took place. Although defense counsel objected to the State's line of questioning, defense counsel did not ask for curative instructions or move for a mistrial on this issue, and the trial court overruled the objection because, if anything, it was the defense's witness and not the State who insinuated that defense counsel was aware of the younger victim's recantation. Regardless of the merits of appellant's contention on this issue, the Court concluded that it was highly probable that the exchange between the mother and the State did not contribute to the verdict. Consequently, the Court found no reversible error.

Jury Charges; Jury Nullification

McCullough v. State, A19A0603 (6/19/19)

Appellant was convicted of armed robbery and other offenses. He contended that the trial court erred when it refused to charge the jury as to the penalty for armed robbery. The Court disagreed.

The Court stated that in essence, appellant's argument is to *require* trial courts to grant requests to charge juries about sentencing so as to encourage jury nullification if the jury believes the legislature's sentencing scheme is unjust. The Court declined to do so. The Court stated that while it is aware that juries sometimes craft verdicts that are not based wholly on the law as charged, it will not necessarily reverse a verdict in such a situation. However, this does not mean that courts should encourage juries to disregard the law. A jury is properly charged to focus solely on the guilt or innocence of the defendant rather than possibly being distracted by premature concerns regarding sentencing. Courts should not substitute their judgments as to the appropriateness of criminal penalties for that lawfully expressed by the General Assembly. It is only when criminal sanctions fail constitutional standards that the judiciary may concern itself with the substance of sanctions. Thus, the Court stated, indulging appellant's request to require courts to promote jury nullification would, therefore, be an improper intrusion on the role of the legislature. Consequently, appellant's argument that the mandatory minimum sentence for armed robbery under the circumstances here is unduly harsh is properly directed at the legislature, not the judiciary. Accordingly, the Court concluded that there was no plain legal error in the trial court's charge of the jury.

Ineffective Assistance of Counsel; Failure to Object

Jones v. State, A190700 (6/19/19)

Appellant was convicted of possession of a firearm by a convicted felon and VGCSA. The evidence showed that Frank Taylor stole a .22 caliber pistol from someone's home. While investigating the theft a few days later, police obtained a description of the person who had purchased the gun and the suspect's vehicle. An investigator went to a Super 8 motel

where he observed the vehicle and appellant, the suspected purchaser. The investigator spoke with appellant outside the motel. Appellant admitted that he purchased the gun from Taylor for \$50. Appellant told the investigator where the gun was hidden in his motel room and gave police permission to enter the room and retrieve the gun. The gun was located where appellant stated it would be located. Methamphetamine was found on appellant's person during a search incident to arrest.

Appellant's girlfriend testified that she and appellant often stayed in hotels around that time. She explained that she had rented the room at the Super 8 motel, but Taylor had paid for it. However, she confirmed that Taylor did not stay in the room with them. Appellant testified in his own defense, denying that he told the investigator that he bought the gun from Taylor. According to appellant, all of Taylor's belongings were in the room and Taylor had placed the gun where it was hidden.

Appellant contended that his trial counsel was ineffective because he failed to object to the investigator's testimony about Taylor's statements on the ground that this testimony violated the Confrontation Clause. The Court agreed.

The transcript showed that after appellant testified, the State recalled the investigator as a rebuttal witness. The prosecutor asked the investigator if he had interviewed Taylor, and if "during that interview, ... you obtained the information from him about the defendant's purchase of the firearm?" The investigator replied that he had. The investigator then explained that he told appellant, "I had information that indicated he had purchased a weapon from Mr. Taylor . . ." Finally, the investigator testified that he did not conduct a fingerprint check on the gun "[b]ecause I had Mr. Taylor advise he sold the gun to Jones [and] Mr. Jones admitted that he had done so." Taylor did not testify at trial.

The Court stated the Confrontation Clause imposes an absolute bar to admitting out-of-court statements in evidence when they are testimonial in nature, and when the defendant does not have an opportunity to cross-examine the declarant. A statement is testimonial if its primary purpose is to establish evidence that could be used in a future prosecution. However, an alleged error involving evidence admitted in violation of the Confrontation Clause is subject to harmless error review.

Here, the Court found, the investigator's testimony that Taylor said appellant purchased the gun was testimonial, as Taylor made the statement to police during the investigation into the robbery. Thus, an objection to this testimony had merit, and counsel's performance, by failing to object, was deficient.

Next the Court addressed whether appellant could show prejudice from counsel's performance. The Court found that the admission of Taylor's statement bolstered the investigator's testimony that appellant had purchased the gun from Taylor. As the crux of the evidence focused on the credibility of the investigator, who testified that appellant admitted buying the gun from Taylor, as compared to appellant's testimony denying that he purchased the gun or made such a statement to the investigator, the Court concluded that the admission of the evidence was prejudicial. The fact that this improper testimony arose in rebuttal does not alter the analysis because there was no waiver of appellant's confrontation rights. Finally, the improper testimony was neither cumulative of other evidence, nor was the evidence so overwhelming as to render the error harmless. The investigator's statement was the critical link between appellant and the weapon, and his credibility — as well as that of appellant — was an issue for the jury. According, the Court concluded, where, as here, the improper testimony served to bolster the investigator's credibility and testimony, the evidence was prejudicial.

Sufficiency of the Evidence; Involuntary Manslaughter

Ayers-Jones v. State, A19A0493 (6/20/19)

Appellant was indicted for felony murder and distribution of methamphetamine. A jury found her guilty of the lesser-included offense of involuntary manslaughter (OCGA § 16-5-3) and acquitted her of distribution of methamphetamine. She argued that the verdict of guilt as to involuntary manslaughter was “contrary to the evidence” because the State failed to prove she committed any non-felony crime. The Court disagreed.

The evidence, briefly stated showed that on June 13, 2015, appellant, Sarah Jones, William Knight, and Matthew Good ingested methamphetamine in Jefferson County. There was evidence that Knight and appellant loaded a methamphetamine mixture into some capsules, and that they put a stronger dose of the drug into one of the capsules, which Good ingested. About 30 minutes after taking the drug, the foursome got into an automobile, with appellant driving, and headed toward Tybee Island, over a hundred miles away. Good began to “trip out” and “act crazy,” and was “speaking in tongues.” The group eventually stopped at a Wal-Mart and Good acted strangely, taking off his shirt, pants, and shoes, and walking around the car. Once he got back in the car, he began talking about demons. The group decided to cancel the Tybee Island trip and head back home, with Knight driving. Good's behavior remained erratic. He rolled down the window and “act[ed] like he was going to jump out” as the car was traveling down the road, and was “hanging halfway out ... of [the] vehicle.” Appellant attempted to pull him back in. They eventually stopped the car on a dirt road in Emanuel County. When appellant opened the car door, Good got out. Good was told that if he did not get back into the car, “we're going to leave you.” Good ran into the woods, barefoot. The remaining members of the group waited for about 35 minutes, but when Good did not return, appellant put Good's clothes into the road, and the group drove back home without Good. Appellant then smoked marijuana and took a nap. About two hours later, the trio went back to look for Good on the dirt road where they had left him. Unable to find him, they picked up his belongings and drove back to Wal-Mart, where appellant and Jones shopped for swimsuits. About 24 hours after Good went missing, Jones called the jail and appellant called the hospital to see if they could locate Good. They did not call 911 or tell the authorities that he was missing, where they had left him, or that he was on drugs, behaving erratically, and possibly overdosing and in need of help. Good's body was found on June 15, 2015, in a wooded area in Emanuel County.

The Court found that a reasonable jury could have found that appellant was criminally reckless. The evidence authorized a finding that appellant prepared a capsule loaded with extra methamphetamine, even though her statements to police indicated that she did not intend for Good to be injured or killed by it. Appellant's testimony also showed that, despite her recognition of the frightening and unusually powerful nature of both her and Good's reaction to the drugs, and his potential need for medical attention, she failed to call for medical aid or contact law enforcement after Good disappeared. A reasonable jury could find that, although appellant did not intend for Good to die, in letting him take an overloaded capsule of methamphetamine and in failing to call for help when she knew he was in drug-induced distress, she “consciously disregarded the substantial and unjustifiable risk that he might die — and that that disregard constituted a gross deviation from the standard of care a reasonable person would exercise in the situation.”

The State also presented evidence from the physician, who also was a forensic pathologist, who performed the autopsy on Good and who was qualified as an expert without objection. He testified that Good died from methamphetamine intoxication. He also testified that even when a person has taken a lethal dose of methamphetamine, as Good did, he

“might well be saved” if he received prompt, competent medical attention, particularly if medical personnel were informed as to which drug had been ingested and when. Thus, the Court found, a reasonable jury could find that appellant's acts and omissions were the proximate causes of Good's death. Accordingly, the Court concluded, the evidence was sufficient to sustain appellant's conviction.

Expert Witnesses; Other Acts Evidence

Lopez v. State, A19A0527 (6/20/19)

Appellant was convicted of four counts of aggravated assault, two counts of possession of a firearm during the commission of a felony, three counts of possession of a firearm by a convicted felon, criminal damage to property in the first degree, and seventeen counts of violation of the Street Gang Terrorism and Prevention Act (“Street Gang Act”). The evidence showed that while the victims were stopped at a red light, a white Ford Explorer rammed them from behind and kept going. The victims followed the Explorer and obtained its tag number. They continued to follow the Explorer into a parking lot of a business. One of the victims testified that two people then jumped out of the Explorer and started shooting at them. Thirty minutes later, and in the same area, a red Nissan Altima passed a white Ford Explorer that was driving slowly. A passenger in the Altima noticed that the Explorer had turned its headlights off. Just after that, people inside the Explorer fired gunshots at the Altima. The occupants of the Altima called 911. The Explorer was registered to appellant's mother and when police located the vehicle, appellant was driving, but he was alone.

During trial, the State presented multiple experts who testified about appellant's membership in SUR-13 and that the predicate acts were committed to further SUR-13's interests. To counter this evidence, appellant attempted to qualify and present his own expert on gang activity and culture. Appellant contends that the trial court erred in granting the State's motion in limine to exclude appellant's gang expert. The Court agreed.

The State argued that the defense expert was properly excluded because he had no formal training, education, or academic background relating to gangs. However, the Court found, this basis for exclusion was legally untenable. The standard for qualifying an expert does not require any specific formal training or academic background. Here, the defense expert's personal experience with gangs, familiarity with their culture and symbols, and professional prosecutorial experience should have allowed him to testify as an expert in this case. Any perceived weaknesses in his qualifications should not have disqualified him as an expert but were matters of weight and credibility for the jury in evaluating his testimony.

Nevertheless, the State contended, if the witness had been permitted to testify, he only would have been able to discuss the customs and culture of the specific gang he belonged to in Florida in the 1970s, and therefore his testimony would have little to no relevance here. However, the Court found, the defense expert's testimony would not have been so restricted. The defense attempted to qualify its witness as an expert in gang activities, symbols, and membership, not as an expert on SUR-13. The law permits expert testimony on gang culture and activities generally, and based on the witness's qualifications, he should have been able to testify on that subject. Moreover, the trial court entered a pretrial order stating that “expert testimony on gangs, their history, activities and culture, including those of the alleged gang in this case, shall be admissible at the trial of this case.” The State presented at least one expert on gang culture generally, and admitted pictures and videos of gang members unrelated to SUR-13. The defense likewise should have been able to present its own expert on criminal street gangs.

Accordingly, the Court found, the trial court's exclusion of this testimony deprived appellant of the opportunity to refute the State's experts. Consequently, appellant's inability to present his own expert on gang activity was prejudicial to his defense and required reversal.

Appellant also contended that the trial court erred in allowing the State to present evidence of his past criminal conduct, ranging from 2004 through 2015. Specifically, he contended that each of these prior acts should have been excluded under OCGA § 24-4-404 (b) and were inadmissible under § 24-4-403. The Court disagreed.

The Court found that OCGA § 24-4-404 (b) did not apply to the admission of his prior acts. At the time of his trial, OCGA § 16-15-9 and OCGA § 16-15-3 governed the admission of prior acts in Street Gang Act cases. OCGA § 16-15-9 provided that “[f]or the purpose of proving the existence of a criminal street gang and criminal gang activity, the commission, adjudication, or conviction of any offense enumerated in paragraph (1) of Code Section 16-15-3 [listing several crimes of violence] by any member or associate of a criminal street gang shall be admissible in any trial or proceeding.” And here, the Court found, each of appellant's prior acts in this case met the standard for admission under OCGA § 16-15-9 and OCGA § 16-15-3. As to each prior act, the State presented evidence it was committed by appellant while he was a member of SUR-13. The State also presented either an expert or a police officer who explained that the prior offenses reflected the behaviors of SUR-13. Therefore, the Court concluded, there was no error in the admission of appellant's prior acts.

Nevertheless, appellant argued, the prior acts should have been excluded under OCGA § 24-4-403. However, the Court stated, because the State charged appellant under the Street Gang Act, it was required to prove the existence of SUR-13 as well as appellant's affiliation with it. Appellant's prior acts, which showed he was involved in criminal gang activity, pertained directly to elements of the charged offense. Accordingly, the probative value was not substantially outweighed by the danger of unfair prejudice. Moreover, the Court noted, our appellate courts have repeatedly approved the admission of prior acts that show a defendant is involved in a criminal street gang.

Appeals; Preparation of Transcript

State v. Brienza, A19A0698, A19A0699 (6/20/19)

Brienza was charged by accusation with obstruction of a law-enforcement officer and disorderly conduct. He filed a motion in limine to exclude certain evidence. The trial court granted the motion and the State filed a notice of appeal. Three months later, Brienza moved to dismiss the State's appeal due to a failure to timely request production of the transcript. But, by the time the motion came before the trial court for argument at a scheduled hearing, the appeal had already been transmitted to and docketed in the Court of Appeals, so the motion to dismiss was moot. Nevertheless, the State filed a motion to remand the case because the record had been “mistakenly forwarded . . . without the entire transcript.” Over Brienza's objection, the Court of Appeals granted the motion. Upon return of the case to the trial court, Brienza *immediately* moved to dismiss the State's appeal, filing the same motion as before. The court conducted a hearing, and then denied the motion, finding that the facts did not warrant dismissal. Brienza cross-appealed challenging the denial of his motion to dismiss the State's appeal.

The Court addressed the motion to dismiss the State's appeal first. OCGA § 5-6-42 provides that when "there is a transcript of evidence and proceedings to be included in the record on appeal, the appellant shall cause the transcript to be prepared and filed ... within 30 days after filing of the notice of appeal . . ." And the trial court "may, after notice and opportunity for hearing, order that the appeal be dismissed [when] there has been an unreasonable delay in the filing of the transcript and it is shown that the delay was inexcusable and was caused by such party." It is well-established that a delay of more than 30 days is "prima facie unreasonable and inexcusable, but this presumption is subject to rebuttal if the party comes forward with evidence to show that the delay was neither unreasonable nor inexcusable." When considering a motion to dismiss on grounds of a failure to timely file the transcript, the trial court must determine 1) the length of the delay; 2) the reasons for the delay; 3) whether the appealing party caused the delay; and 4) whether the delay was inexcusable.

As to the length of the delay, the Court noted that the trial court properly found that delay of 84 days between the filing of the notice of appeal and the request for the entire transcript was in excess of 30 days thus, prima facie unreasonable and inexcusable. However, the Court also noted that the trial court found this lengthy delay was not "unreasonable" because of the trial court's heavy caseload. The Court disagreed. The Court found that the trial court's heavy caseload bears no relation to the State's ability—and *its duty*—to request the appropriate transcript for its appeal and then monitor the progress of that transcript's preparation.

As for the reason and cause for the delay, the Court found that the trial court's findings did not support its conclusion that the State's delay was not inexcusable, particularly in light of the State's burden to come forward with evidence to rebut the presumption that the delay was inexcusable when it far exceeded 30 days. Instead, the Court found, these findings show the State was responsible for the delay by failing to request an extension, was negligent, and made no efforts to check on the progress of the portion of the transcript it requested, which was not even the appropriate transcript necessary for the State's appeal, as evinced by the fact that the State later requested both preparation of the entire transcript and that the Court remanded the initial appeal for the same reason.

As to prejudice, the trial court summarily concluded that "no prejudice exists for the slight delay." But, the Court found, the trial court's findings of fact actually *supported* the presumption that the delay was unreasonable and inexcusable because the State 1) did not request an extension, 2) was negligent, and 3) did not present evidence of monitoring the portion of the transcript that it requested, which, again, was not even the correct transcript because the State apparently needed the entire transcript for its appeal.

Finally, the Court stated, a delay is unreasonable if it affects an appeal either by directly prejudicing the position of a party by allowing an intermediate change of conditions or otherwise resulting in inequity, or by causing the appeal to become stale, for instance by delaying docketing and hearing in the appellate court. Indeed, the Court added, "justice delayed for even one day is justice denied to the litigant who was successful in the lower court and who is entitled to his judgment unless the case is properly reversed." And here, the initial docketing of this appeal was discernibly delayed when the State's notice of appeal was filed on April 10, 2017, but the case was not docketed with the Court until some five months later on August 22, 2017—and was then *remanded* at the State's request.

Accordingly, the Court concluded, because the trial court's findings of fact did not support its conclusions of law, the trial court erred in denying Brienza's motion to dismiss the State's appeal.

Statements; Garrity

Zeigler v. State, A19A0392 (6/21/19)

Following a stipulated bench trial, appellant was convicted of possession of methamphetamine with intent to distribute, distribution of methamphetamine, conspiracy to violate the Georgia Controlled Substances Act, violation of the terms of her oath as a public officer, and crossing the guard lines with drugs. The evidence, very briefly stated, showed that appellant worked as a front desk operator, or “dispatcher,” in the county jail. She was not a P.O.S.T.-certified law enforcement officer, this was her first law-enforcement-related job, and she had received no training when she started working at the jail. Appellant testified that she had read and understood the internal policies of the Sheriff's Office. The trial court found that “[t]hose policies ... state that refusal to comply with an internal investigation by the internal affairs deputy or his designee is only a grounds for dismissal or discipline if there has been an order to answer said questions.”

Based on information received by the Sheriff, law enforcement conducted an investigation of whether someone was bringing drugs into the jail to give to inmates. The investigation led to appellant. Agents Bridges and Shearer were part of the investigation team. Appellant was intercepted in the jail parking lot prior to her shift and escorted to an administration building. There she was interviewed, but did not receive *Miranda* or *Garrity* warnings. Statements she made led to her arrest. Immediately prior to trial, the trial court denied appellant's motion to suppress, finding these statements to be voluntarily made.

Appellant argued that the trial court erred in admitting her statements into evidence and in finding that it was not reasonable for her to believe that, under the circumstances, she had to either answer questions or face termination. The Court agreed.

In *Garrity v. New Jersey*, 385 U. S. 493, 497-498 (87 SCt 616, 17 LE2d 562) (1967), the Supreme Court concluded that the *express* threat of a job loss was sufficient to render statements involuntary, holding the protection of the individual under the Fourteenth Amendment against coerced statements prohibits use in subsequent criminal proceedings of statements obtained under threat of removal from office, and that it extends to all, whether they are policemen or other members of our body politic. In *State v. Aiken*, 282 Ga. 132 (2007), our state Supreme Court, in cases involving *implied* threats of job loss, adopted a totality-of-the-circumstances test for determining whether the statements that a public employee makes during an investigation into her activities are voluntary.

Here, the Court concluded, under the totality of the circumstances, the trial court erred in finding that appellant's subjective belief that she would be terminated if she did not answer the agents' questions was not objectively reasonable. The Court found that appellant had no investigatory experience, she had only been employed in law enforcement for 15 months, worked in the front office of the jail, and she was never advised of her rights under either *Garrity* or *Miranda*. Furthermore, appellant initially denied that she had brought drugs into the jail for more than 20 minutes in the recorded portion of the interview. It was not until she said she loved her job and Shearer responded “*that's what we're trying to help*

you save,” that appellant admitted to bringing in methamphetamine to an inmate the prior week. Accordingly, the Court reversed and remanded the case to the trial court with direction to grant appellant's motion to suppress.

Trafficking in Cocaine; Sufficiency of the Evidence

Blue v. State, A19A0307 (6/21/19)

Appellant was convicted of trafficking in cocaine and possession of a firearm during the commission of a crime (possession of cocaine). The evidence, very briefly stated, showed that the police used a CI to make a controlled buy at a house on Lucky Street rented by Walker, appellant's girlfriend. Appellant was at the house at the time and greeted the CI on the porch before the two walked inside. Sometime between 24 and 72 hours later, the police executed a search warrant at the house. Cocaine in excess of 200 grams and three sets of scales were found inside. Appellant was not located there at the time. An officer drove by the house three days later to check on it since the tenant (Walker) was incarcerated. The officer found appellant and a woman in the living room. Appellant had a key to the Lucky Street house and \$1,332 in cash.

Appellant contended that the evidence was insufficient to support his convictions. The Court agreed. It was undisputed that appellant did not own or lease the house where the contraband was found. Thus, there was no presumption that he possessed the contraband. Officers found no bills in appellant's name in the house, as “[e]verything was in another name.” Appellant's mother testified that he lived with her at her house. At most, appellant “sometimes stayed” at Walker's residence and had some clothing in a basket there. While investigators saw appellant on the premises for a few minutes on the date of the controlled buy, and he entered and exited the house at the same time as the confidential informant, there was no evidence that appellant witnessed or was involved in that (or any other) transaction; the informant did not testify at trial and the transaction was not witnessed or recorded by law enforcement officers, and appellant did not possess any marked currency from the controlled buy. Further, appellant did not leave the premises with the confidential informant; he left on a bicycle while the informant left in a car. Appellant was not present when the search warrant was executed (it was days after that officers saw him there), though Walker was present. The cocaine was found inside a purse in Walker's closet, in a shoe box in her bedroom, and in a makeup-type case on a nightstand next to her bed; the handgun was found on the nightstand in her bedroom.

Appellant's possession of a key to the house — three days after police searched the house and as many as six days after the controlled buy — did not connect him to the drugs. Indeed, Walker explained that her mother had given the key to appellant to retrieve her children's clothing while she was in jail. Similarly, that appellant possessed \$1332 in unmarked cash when he was arrested was insufficient to connect him to the drugs found in the house, in light of the time lapse and evidence that he was employed. The evidence did not exclude every reasonable hypothesis save that of constructive possession by appellant. Accordingly, because the State's evidence did not show essential links between appellant and the drug trafficking charge, the evidence was insufficient to support his conviction.

Finally, the Court found, because there was no evidence from which a rational trier of fact could have found that appellant possessed the cocaine found in the house, the State's failure to prove the predicate felony, possession of cocaine, required reversal of appellant's conviction for possessing a firearm during the commission of that crime.