Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING NOVEMBER 15, 2019
Issue 46-19

THIS WEEK:

- **Probation Revocations; Due Process**
- **Search & Seizure; Standing**
- **Delays in Transcripts Preparation; Motions for New Trial**
- **Sentencing; Downward Deviations**
- **Statements; Juveniles**

Probation Revocations; Due Process

State v. Huffman, A19A1601 (9/18/19)

In March of 2018, Huffman entered a negotiated plea and was sentenced to 12 years on probation. In November of 2018, the State sought to revoke her probation alleging that she "did commit the new felony offenses of Forgery-First Degree and Theft by Deception, on or about August 10, 2018, in Houston County, Georgia, in violation of a condition of probation." At the probation revocation hearing, Huffman argued that the trial court should dismiss the revocation petition on due process grounds because the State did not give proper notice as to the particulars of the new offense. Specifically, she contended that there were multiple ways to commit the offenses of forgery and theft by deception and that the State was required to give notice of how she violated the particular statutes at issue in order for her to prepare an adequate defense. The State responded that a revocation petition is not required to meet the same standards as an indictment. After the State declined the trial court's offer to amend the petition, the court dismissed the petition, citing *Wolcott v. State*, 278 Ga. 664 (2004). The Court granted the State's petition for discretionary review.

The Court stated that the requirements of due process are flexible and call for such procedural protections as the particular situation demands. And, a probation revocation is not a criminal prosecution and does not require the extent of proof sufficient to sustain a conviction.

The Court agreed that *Wolcott* is applicable here. But, the fact that the crime of forgery can be committed in more than one way was also true of the crime at issue in *Wolcott*, which alleged in the probation revocation petition the new offense of aggravated assault. Yet, *Wolcott* held that the revocation petition comported with due process because it set forth the crime, the approximate date and the particular venue, just as the petition here did. Thus, the Court held, it was bound to follow *Wolcott* in the context of a probation revocation. Accordingly, the Court concluded that the trial court erred when it granted Huffman's motion to dismiss the State's petition to revoke her probation.

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Search & Seizure; Standing

State v. Albritten, A19A1576 (9/18/19)

Albritten was indicted for trafficking in methamphetamine, possession of Methadone, possession of drug-related objects, and possession of marijuana, less than an ounce. Albritten filed a motion to suppress evidence found in a camper located in the backyard of his house. The trial court granted the motion to suppress, and the State appealed.

The evidence, briefly stated, showed that several officers went to a home to do a "knock and talk." When they arrived, several people began running away from the house. The officers managed to gather several of the individuals who attempted to flee the scene in the backyard of the house. Although they did not have a search warrant to enter the home, two officers entered the home and conducted a protective sweep because officers believed that there might still be people inside the home. Based on what those two officers saw in plain view inside the home, a search warrant was obtained.

The search revealed drugs in one of the bedrooms, which belonged to Albritten. A camper, parked about 50 to 100 feet from the back porch, was also searched by officers. The camper was described as uninhabitable and "just a shell." Inside the camper, officers found about 2.75 ounces of methamphetamine. When asked if Albritten claimed any ownership in the camper, an officer responded "[n]ot to my knowledge."

The State conceded that the evidence seized from inside the home pursuant to the search warrant must be suppressed because the search warrant was based on an impermissible protective sweep leading to the observance of items in plain view. The State also conceded that Albritten had an ownership interest in the home because he had lived there for several months and one bedroom was determined to be his, and that the camper likely was in the curtilage of the property. But, the State argued, the trial court erred in granting Albritten's motion to suppress evidence found within the camper outside the home because Albritten lacked standing to challenge the seizure. Specifically, citing *State v. Graddy*, 262 Ga. App. 98 (2003), the State contended that Albritten had no Fourth Amendment expectation of privacy in the camper because he did not claim an ownership interest in it.

The Court noted that in *Graddy*, it held that the defendant lacked standing to assert a Fourth Amendment objection to the contraband discovered in the shed because Graddy "disclaim[ed] ownership or an interest in the two buildings." *Id*. at 104 (4) (b). But here, the Court found, unlike in *Graddy*, there was no direct testimony that Albritten affirmatively disclaimed ownership over the trailer. Rather, different officers testified that Albritten "never claimed ownership of it," that they did not know whether Albritten owned the camper at any point, and that officers were unaware whether anybody on the property claimed ownership of the camper. There was no testimony in the motion to suppress hearing that Albritten was directly asked and answered whether he had an ownership interest in the camper. Further, the trial court's written order granting Albritten's motion to suppress did not make a finding of fact as to whether Albritten had an ownership interest in the camper and failed to rule on the State's argument that he lacked standing. Accordingly, the Court stated, because the trial court's order lacked sufficient detail for it to provide appellate review as to whether Albritten has standing to contest the search of the camper, the trial court's

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grant of the motion to suppress was vacated and remanded for the trial court to make additional findings on the limited scope of standing.

Delays in Transcripts Preparation; Motions for New Trial

Cook v. State, A19A1291 (9/18/19)

Appellant was convicted of armed robbery, aggravated assault, and possession of a knife during the commission of a crime. He argued that the inordinate delay in preparation of the trial transcript violated his due process rights and that the trial court erred in denying his motion for new trial on this ground. The Court disagreed.

The Court noted that a defendant may be denied due process of law where there is an inordinate delay in the appellate process, including an excessive delay in the furnishing of a trial transcript necessary for completion of an appellate record. The similarity of a defendant's interests in a speedy trial and a speedy appeal are such that the balancing test adopted for speedy trial violations in *Barker v. Wingo*, 407 U. S. 514 (92 SCt 2182, 33 LE2d 101) (1972), should be applied to situations in which a defendant claims that a delay in the appellate process is violative of due process of law. The four factors enunciated in *Barker v. Wingo* are the length of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. However, unlike in the speedy trial context, prejudice is not presumed but must be shown. Indeed, the mere passage of time is not enough, without more, to constitute a denial of due process. Unless it clearly appears that the delay in filing the transcript prevented the presentation of an adequate appeal or impaired a defense which would otherwise be available to an appellant where a new trial is ordered due to trial error, an appellant has not suffered the prejudice which turns a transcript delay into a violation of due process of law.

Here, the Court found, the delay in preparing a complete transcript totaled more than three years. The record showed that the delay resulted from the court reporter's apparent difficulties in completing a correct transcript of the trial proceedings. Thus, the Court weighed this factor against the State. The Court also found that appellant promptly brought the issue to the trial court's attention and continued to assert his right throughout the three-year delay. However, appellant made no showing that the delay in preparing the transcripts prevented him from presenting an adequate appeal or impaired a defense that would otherwise be available to him. Furthermore, the period of post- conviction incarceration is not, in and of itself, a violation of his due process rights. Therefore, the Court concluded, because appellant failed to make the requisite showing of prejudice, the delay in filing the transcript did not deprived him of due process.

Appellant also contended that the trial court erred in vacating his convictions on the "general grounds." The Court noted that the trial court found that "[t]he evidence admitted at trial consisting of testimony from the victim . . . and [the investigator] is sufficient under the standard set forth in *Jackson v. Virginia*." And, given the wording of the trial court's order and its finding with regard to the sufficiency of the evidence, it was clear that the trial court failed to apply the proper standard for determining whether appellant was entitled to a new trial on the general grounds.

Accordingly, the judgment was vacated and the case remanded to the trial court for consideration of the motion for new trial under the proper legal standard.

Sentencing; Downward Deviations

State v. McCauley, A19A1121 (9/18/19)

McCauley entered a negotiated plea to eight counts of sexual exploitation of children after pictures of minors engaged in sexually explicit conduct were found on his cell phone in violation of OCGA § 16-12-100 (b). Over the State's objection, the court exercised its discretion to deviate from the mandatory minimum sentencing requirements set out in OCGA § 17-10-6.2 (b), finding that all the conditions set out in OCGA § 17-10-6.2 (c) (1) were met. The trial court imposed a probation only sentence and the State appealed.

The record showed that McCauley testified at the sentencing hearing that he was seventeen years old at the time of the offenses alleged in the indictment, he had obtained the images through the "KIK App" and viewed them on his cell phone, and he had first viewed images of this type using the same application approximately 12 to 18 months before the offenses alleged in the indictment. The State argued that McCauley was disqualified from a downward modification of his sentence since he admitted to engaging in relevant similar transactions for approximately 12 to 18 months prior to his indictment. The Court disagreed.

Citing *Evans v. State*, 300 Ga. 271 (2016) and *Yelverton v. State*, 300 Ga. 312, 317 (1) (2016) as "instructive," the Court found no merit to the State's contention. The Court found that the State presented scant evidence about McCauley's previous conduct other than to show when he first started using the KIK App to view child pornography, and the trial court gave sound reasons why it rejected the State's assertion and refused to treat this earlier conduct as a separate sexual offense and McCauley as a repeat offender. The Court also noted that the trial court's findings were in accord with how our Supreme Court has construed OCGA § 17-10-6.2 (c), and thus, there was no error in the trial court's refusal to accept the State's characterization of the evidence.

The State, citing *Evans*, also argued for the first time on appeal that each count of sexual exploitation set out in the indictment should be treated as a relevant similar transaction to the other counts for purposes of OCGA § 17-10-6.2 (c) (1) (C). However, the Court stated, while *Evans* held that in some circumstances such evidence may be treated by the sentencing court as a relevant similar transaction under OCGA § 17-10-6.2 (c) (1) (C), the Court did not set out a hard and fast rule about how to treat such multi-count indictments. Further, it was clear from *Yelverton*, 300 Ga. at 319-320, in which the Court remanded the case for the lower court to find whether evidence admitted at trial as a similar transaction constituted a relevant similar transaction for purposes of OCGA § 17-10-6.2 (c) (1) (C), that generally, it is for the sentencing court to make this determination in the first instance. But here, the State did not raise this argument before the trial court and the trial court did not make any findings concerning this contention in its order setting out the reasons in support of the downward deviation in sentencing. Accordingly, the Court remanded the case to the sentencing court for consideration of this issue in the first instance.

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Statements; Juveniles

Tanksley v. State, A19A1370 (9/19/19)

Appellant, who was 15 years old at the time of the alleged offenses, was convicted of armed robbery, aggravated assault, burglary in the first degree, and possession of a firearm during the commission of a crime. She contended that the trial court erred by admitting her statement to law enforcement into evidence because the legal requirements for a juvenile *Miranda* waiver were not met. The Court agreed and reversed.

The Court stated that under *Riley v. State*, 237 Ga. 124, 128 (1976), the following factors must be used in determining whether a juvenile's custodial statement was voluntarily and knowingly given: (1) age of the accused; (2) education of the accused; (3) knowledge of the accused as to both the substance of the charge and the nature of her rights to consult with an attorney and remain silent; (4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) methods used in interrogations; (7) length of interrogations; (8) whether vel non the accused refused to voluntarily give statements on prior occasions; and (9) whether the accused has repudiated an extra judicial statement at a later date.

Here, the Court found, appellant was a 15-year-old who had dropped out of the ninth grade. She had been brought to the police department for questioning about her cousin's murder, not about the armed robbery. And, even though he knew that appellant thought she was going to be questioned about her cousin's murder, the investigator did not tell her what he was going to question her about until after she had signed the *Miranda* waiver. But, the investigator used an adult *Miranda* waiver form even though he had juvenile *Miranda* waiver forms available. Appellant did not have a parent present during questioning, and the investigator did not ask her if she wanted to contact a parent or another relative. The investigator did not tell her the substance of the charges against her until after he had finished questioning her about the armed robbery. Thus, the Court held, considering the totality of the circumstances, the State did not meet its burden of showing that appellant's statement was made voluntarily after a knowing and intelligent waiver of her rights. Thus, the trial court erred by admitting appellant's statement as evidence at her trial.

Nevertheless, the State argued, any error in admitting the statement was harmless. The Court again disagreed. After reviewing the evidence, the Court found that the evidence was not overwhelming as to appellant's guilt. Thus, the Court concluded, appellant was entitled to a new trial.

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