

## THIS WEEK:

- **Right to Self-Representation; Merger**
- **Transfer Orders; Psychological Injuries**
- **Judicial Commentary; OCGA § 17-8-57**
- **Felony Shoplifting; Prior Uncounseled Pleas**
- **Constitutional Right to a Speedy Trial; *Barker* Analysis**
- **Jury Deliberations; Improper Communications**

---

### Right to Self-Representation; Merger

*Woodard v. State*, A19A1039 (10/17/19)

Appellant was convicted of four counts of aggravated battery, one count of aggravated assault, one count of kidnapping with bodily injury, two counts of false imprisonment, one count of family violence battery, one count of making terroristic threats, one count of kidnapping, and two counts of reckless conduct. He contended that the trial court erred in failing to allow him to represent himself as required by *Faretta v. California*. The Court disagreed.

The Court detailed the procedural history and quoted at great length the colloquy between the trial court and appellant regarding his asserted right to represent himself. The Court found that although appellant stated several times that he wanted to represent himself, he also acknowledged that his dissatisfaction with his current defense counsel prompted his request. Further muddying the issue, appellant also claimed during the hearing that he wanted to represent himself *and* assert his constitutional right “to be simultaneously represented” or “assisted by counsel, but not [current defense counsel].” Subsequently, after the trial court explained what representation by appointed counsel would entail and asked appellant if he was not willing to accept the court's offer to appoint someone other than his current defense counsel to represent him, appellant confusingly replied, “I would accept it, but I want to represent myself also.” Moreover, despite appellant's apparent agreement to waive representation, when the trial court explained that it, nonetheless, would appoint new counsel, have that counsel meet with appellant, and then ask him again—at the next calendar call—how he wished to proceed, appellant affirmatively responded, “yes.” Finally, and importantly, the Court found that appellant then went to trial with counsel without any objection or even mention of it to the trial court and only complained after trial. But, acquiescence to the substantial participation by counsel at trial obliterates any claim that such participation in question deprived appellant of control over his own defense. Thus, the Court concluded, given these particular circumstances, appellant did not assert an unequivocal request to represent himself, and the trial court did not err in how it handled this matter.

The Court also identified a merger issue not addressed by either party. Count 7 of the indictment alleged appellant abducted the victim “without lawful authority or warrant and held such person against her will, said act resulting in bodily injury to [the victim]” And Count 1 of the indictment charged appellant with aggravated battery, alleging he “did maliciously cause bodily harm to [the victim] by seriously disfiguring her face, a member of said person's body by burning

her.” Counts 2 through 4 were nearly identically worded with the only difference being the part of the victim's body disfigured by the battery. But if, in establishing the commission of a crime, the State relies entirely upon the same evidence used to establish a separate crime charged in the same indictment, as a matter of law the former charge is included in the latter charge. And here, the Court found, given that the injuries in all of the aggravated-battery charges were inflicted by the single act of burning the victim, the evidence required to convict appellant on those charges was the only evidence regarding the manner in which he inflicted the bodily injury described in the kidnapping charge. Accordingly, the Court held, the aggravated-battery convictions in Counts 1 through 4 should have merged with the conviction for kidnapping with bodily injury delineated in Count 7. As a result, the Court vacated the sentences on those counts and remanded the case to the trial court for resentencing.

## **Transfer Orders; Psychological Injuries**

*State v. Dean, A19A1359 (10/17/19)*

Dean was indicted on one count of aggravated sodomy and one count of sexual battery of a child under the age of 16. The indictment alleged that Dean committed aggravated sodomy by performing a “sexual act involving [his] sexual organ and the anus of [the alleged victim], a child under ten (10) years of age, by penetrating her anus with his male sex organ[,]” and sexual battery by making “physical contact with the buttocks of the body of [the alleged victim], a child under the age of 16 years, without her consent.” At the time, Dean was 14 years old and the alleged victim, A. D., was two years old. The trial court transferred the case to juvenile court and the State appealed.

The State argued that the superior court erred in its application of OCGA § 15-11-560 and OCGA § 15-11-562 by making clearly erroneous factual findings. The Court noted that notwithstanding the exclusive original jurisdiction of superior courts over these types of juvenile cases, a superior court is authorized to transfer some of them to juvenile court—i.e., those involving voluntary manslaughter, aggravated sodomy, aggravated child molestation, aggravated sexual battery, and aggravated assault and battery on a public safety officer. But before ordering such a transfer, the superior court must first consider—but is not limited to considering—the eleven criteria listed in OCGA § 15-11-562 (a) (1)-(11).

Specifically, the State alleged that the trial court erred in its finding that the victim had “apparently recovered” from the attack. OCGA § 15-11-562 (a) (5) provides that the trial court consider “[t]he impact of the alleged offense on the alleged victim, including the permanence of any physical or emotional injury sustained, health care expenses incurred, and lost earnings suffered.” And here, the State argued, the superior court entirely disregarded the potential psychological injury inflicted upon A. D. when it only asked the prosecutor if the child had any permanent physical injuries, and specifically noted that it was “not talking about psychological injuries.” In fact, in its order granting the motion to transfer, the superior court concluded that A. D. “suffered no permanent physical injuries.” The court also noted that A. D. “received a few weeks of counseling immediately following the incident” but her “mother elected to discontinue the counseling.” And in the transfer report created by pretrial services at the superior court's request, the pretrial officer indicated that she had spoken to A. D.'s mother, who informed her that the child “still randomly mentions the incident and that counseling had occurred for a few weeks initially, but [she] discontinued due to [A. D.] not participating at a level that seemed helpful at that time.”

The Court stated that it appeared that A. D. had sustained ongoing psychological injuries, and the superior court's findings of fact and comments on the record suggested that it only considered the permanence of physical injuries when making its decision. Thus, the Court found, to the extent that the court concluded that A. D. had “apparently recovered,” the record evidence of psychological recovery appeared to be far more nuanced. And as a result of the court's failure to reach a conclusion on this particular aspect of the question of permanent injuries, the Court vacated this portion of its order and remanded for additional findings of fact as to the potential evidence of ongoing psychological or emotional injury to A. D.

### Judicial Commentary; OCGA § 17-8-57

*Jones v. State, A19A1014 (10/18/19)*

Appellant was convicted of rape and aggravated battery. The evidence showed that appellant poured gasoline on the victim, lit her on fire, and then after putting the flames out, raped her. Appellant argued that the trial court erred by improperly expressing an opinion on his guilt in violation of OCGA § 17-8-57. The Court agreed.

The record showed that appellant was initially represented at trial by counsel. But, appellant asked that he be allowed to cross-examine the victim. The trial court denied the request, but asked appellant if he would like to represent himself. After a *Faretta* hearing, the court allowed appellant to represent himself. He then recalled the victim for purposes of additional cross-examination (she had previously testified and been cross-examined by defense counsel). Throughout appellant's cross-examination of the victim, he asked numerous improper questions, and the State objected each time that he did so. The court also interrupted appellant several times to explain why certain questions were impermissible. And after appellant asked the victim a string of objectionable questions, the State argued that he was badgering her, noting that she had been on the witness stand for over two days and appellant was not asking her any relevant questions. Immediately thereafter, the court had the following exchange with appellant: “The court: Sir, I've told you you're bound by the same rules of evidence that lawyers are. You can't just say anything you want to. Move on to the next question. Appellant: I just asked the question a bad way. I just want to get some truth of this, what happened that night. The court: Sir, *all of this is the truth*. Move to your next question.”

Because appellant did not object, the Court found that its review was limited to whether the comments amounted to plain error. The Court found that the trial court clearly expressed an opinion as to appellant's guilt. Specifically, during appellant's cross-examination of *the victim* and only eyewitness to the attack, the trial court stated that “all of this is the truth.” Nevertheless, the State contended, taken in context, the statement was merely an attempt by the court to “control the conduct of the trial and guide [appellant][,] who was acting as his own attorney.” The Court disagreed; the damning testimony offered by the victim against appellant right before the trial court's “all of this is truth” statement extensively detailed the violence inflicted on her by appellant during the incident at issue. Additionally, the plain language of OCGA § 17-8-57 (c)—which applies when a trial court expresses an opinion regarding a defendant's guilt—does not remotely suggest that the court's *subjective* intent in making the offending statement is relevant. Indeed, all that matters are the words expressed by the trial court.

Next, the State argued that appellant could not show plain error because he failed to demonstrate that the trial court's comments likely affected the outcome of the trial. But, the Court found, this contention was likewise without merit because, under OCGA § 17-8-57 (c), when a court expresses an opinion as to the defendant's guilt, he or she shall be

granted a new trial. Thus, the Court concluded, the trial court's statement that all of the victim's testimony was "the truth" was equivalent to communicating its belief to the jury that appellant was guilty, even if that was not what it intended. As a result, even though appellant failed to object to the offending statement at trial, the Court held that it was statutorily required to reverse his convictions and grant him a new trial.

## **Felony Shoplifting; Prior Uncounseled Pleas**

*State v. Athey, A19A1015 (10/22/19)*

Athey was charged with one count of felony theft by shoplifting. Although the value of the shoplifted merchandise was under \$500.00, the misdemeanor shoplifting was enhanced by prior shoplifting convictions. Specifically, as elements of the felony shoplifting charge, the accusation listed five prior offenses of theft by shoplifting. Athey challenged the State's ability to use her prior offenses, alleging that she had not been represented by counsel for the prior convictions and she had not knowingly and intelligently waived her right to counsel. After a hearing, the trial court ordered that the accusation be quashed. The State appealed.

The State argued that the trial court failed to give proper consideration to the presumption of regularity. The Court found that the State introduced evidence that Athey had signed waivers of her right to counsel in each of the prior convictions. By doing so, the State met its burden of showing that the right to counsel was waived. Thus, the presumption of regularity therefore attached, and the burden shifted to Athey to show any alleged irregularities.

At the hearing, Athey presented evidence that her prior guilty pleas had not been entered into knowingly and voluntarily. She testified about her limited education and her drug use, and that she did not read the forms for the prior convictions waiving her right to be represented by an attorney or understand what they meant. Therefore, the Court found, because Athey presented evidence that her guilty pleas were not knowing and voluntary, the burden of proving the constitutionality of the plea shifted back to the State.

The State would have met its burden of proof if it had introduced a "perfect" transcript of the taking of the guilty plea. A "perfect" transcript is one which reflects a colloquy between judge and defendant wherein the defendant was informed of and specifically waived her right to trial by jury, her privilege against self-incrimination, and her right to confront her accusers. If the State introduces anything less than a "perfect" transcript, the judge then must weigh the evidence submitted by the defendant and by the State to determine whether the State has met its burden of proving that defendant's prior guilty plea was informed and voluntary, and made with an articulated waiver of the three *Boykin* rights.

And here, the Court found, the State did not introduce a "perfect" transcript. Nor did the State present any other evidence. Consequently, the trial court had the responsibility to weigh the evidence submitted by Athey and by the State to determine whether the State met its burden of proving that Athey's prior guilty pleas were informed and voluntary, and made with an articulated waiver of the three *Boykin* rights. The State argued that Athey's testimony was biased and vague and was insufficient to overcome the presumption of regularity. However, the Court stated, this argument goes to the credibility of the witness and the weight to be given to her testimony, which are matters within the purview of the trial court. Thus, the trial court was authorized find that Athey's prior guilty pleas were not informed and voluntary. Accordingly, the Court

concluded, the trial court did not err in finding that Athey's previous uncounseled convictions could not be used to enhance the misdemeanor offense of shoplifting to that of felony shoplifting and quashing the accusation.

## **Constitutional Right to a Speedy Trial; *Barker* Analysis**

*State v. Dixon, A19A1089 (10/23/19)*

Dixon was arrested in July 2014 for two misdemeanor charges arising out of a domestic dispute. Dixon was later indicted in January 2016 for one felony count of aggravated assault family violence and obstruction of a 911 call arising out of the July 2014 incident. Dixon filed a motion to dismiss the indictment on the ground that his constitutional right to a speedy trial was violated. Following a hearing, the trial court granted the motion. The State appealed.

Under the four part *Barker v. Wingo* analysis, the Court first looked at the length of the delay. The Court noted that at the hearing on Dixon's motion to dismiss, the State proffered no explanation for the delay between Dixon's arrest and indictment or what factored into the State's decision to charge Dixon with a felony 18 months after his arrest. Investigative delay is acceptable, whereas delay undertaken by the government solely to gain tactical advantage over the accused is not acceptable. As the trial court found here, the State did not adequately explain its failure to expeditiously pursue this relatively simple domestic incident except to say that the delay was the result of negligence and delays within the court system itself. Thus, the Court found no error in the trial court's analysis that this factor should be weighed against the State.

As to the reason for the delay, the Court noted that the trial court found it difficult to fathom any investigative reason for the State's delay given that the State bound the case over to the superior court in August 2015 but did not indict Dixon on until January 2016. Thus, as to this aspect of the case, the Court found that the trial court properly weighed this factor solely against the State. Further, the trial court concluded that the post-indictment delays in this case were necessitated by the State based upon their efforts to strengthen their case and/or gain a tactical advantage. Because the record supported the trial court's conclusion, and the State proffered no reasonable explanation other than negligence for the delay, the Court found no error in the trial court's analysis of this factor.

As to the assertion of the right to a speedy trial, the trial court properly reasoned that because Dixon did not have counsel between the time of his arrest and his indictment, his failure to assert any demand during that time could not be counted against him.

Lastly, the Court addressed prejudice to the Dixon. During the hearing on the motion to dismiss, Dixon proffered that certain evidence such as the phone Dixon was alleged to have thrown at a wall no longer existed, the wall Dixon was alleged to have damaged when he threw the phone had been repaired, and no photographs of either item were ever taken. The trial court concluded that by the time Dixon was indicted, any defense he may have raised would have been impaired by passage of time and his pre-indictment inability to gain access to either item or to photograph them. Where that delay results from government conduct, it will compel relief for the defendant unless the State can rebut that presumption. Such a rebuttal can be achieved by showing either: (i) that the defendant acquiesced in the delay by failing to timely assert his right to a speedy trial; or (ii) otherwise benefitted from the delay. And here, the Court found, the State did neither, but instead argued that Dixon's failure to show any attempt to secure the evidence for himself or that the evidence's absence

actually prejudiced his defense should weigh against him. However, the Court found, because evidence supported the findings made by the trial court in its analysis of this factor, there was no abuse of discretion.

Finally, in balancing the four factors, the trial court concluded that the delay was presumptively prejudicial, and resulted in actual prejudice against Dixon in that certain evidence was lost or not preserved. The trial court weighed the first two factors against the State, refused to weigh Dixon's failure to assert his right to a speedy trial against him because Dixon was "out on bond and without counsel" until after indictment, and weighed the prejudice factor heavily against the State because Dixon's defense had been impaired by the loss and/or lack of preservation of certain evidence. Under these particular circumstances, the Court concluded that the trial court did not abuse its discretion in weighing the relevant factors and granting Dixon's motion to dismiss based on a violation of his constitutional right to a speedy trial.

## **Jury Deliberations; Improper Communications**

*State v. McCargo, A19A0950 (10/24/19)*

McCargo was convicted of child molestation offenses and enticing a child for indecent purposes. McCargo moved for a new trial, alleging that an improper communication between a bailiff and the jury occurred during jury deliberations. At the hearing on his motion, McCargo presented evidence that the bailiff had informed the jury that there had been an earlier mistrial in the case, and the State conceded on appeal that an improper communication occurred. However, the State argued, there was no showing of harm and thus, the trial court erred in granting McCargo a new trial. The Court disagreed.

Where an improper communication from the bailiff to the jury is shown in a criminal case, a presumption of harm arises and the State bears the burden of rebutting that presumption. Here, the State made a proffer of evidence that 11 of the jurors in the case would testify that the bailiff's comments regarding the earlier mistrial did not affect their verdict. However, McCargo offered the twelfth juror as a witness. In a series of private Facebook messages, this juror stated that "a few sentences from the really old lady bailiff was all that it took to stir the pot. And in the end, those sentences are what found him guilty, NOT what is in the transcripts that you will read. . . ." Also, that she was the lone holdout and that she "caved" to the pressure. "Despite me reminding them that the information they were discussing was 'unknown' and 'not a part of our trial,' it was evident that this did not matter to the hoard. I was alone in objection - and admittedly, it haunts me to this day. . . . She told us that this was the second time trying the case . . . . [P]revious one the jury couldn't agree. [M]istrial. I have no idea if that was tru[e] or false, but *from then on, it was about how we were going to make it right.*"

The juror who made these statements in private messages also testified at the hearing on the motion for new trial. She admitted making those statements. She testified that the bailiff had either stated or implied to the jury that McCargo "had a mistrial the first time," that the jurors discussed the bailiff's statement during deliberations, and that in the context of those discussions some of the jurors stated that they were going to "[m]ake[ ] the verdict right." She testified that the issue "came up multiple times[.]" Although at the hearing the juror also testified that she might have exaggerated in the private messages the impact of the bailiff's comments, and she testified that the comments did not affect her verdict, the trial court was not required to credit those aspects of her testimony.

*Prosecuting Attorneys' Council of Georgia*

# CaseLaw UPDATE

WEEK ENDING DECEMBER 27, 2019

Issue 52-19

The Court found that given this evidence, the trial court was authorized to find that the State's proffer did not rebut the presumption of harm. Even if the trial court believed the proffered evidence that the comments did not affect the verdict of eleven of the jurors, the trial court could conclude from the twelfth juror's private messages that she had been influenced by the reaction of the jurors to the bailiff's comments.

In so holding, the Court rejected the various arguments the State made regarding the lack of evidence showing harm to McCargo.