Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING FEBRUARY 28, 2020
Issue 9-20

THIS WEEK:

- **Restitution; Plea Agreements**
- **Motions for New Trial; Final Orders**
- **Accusations; Timeliness of Challenge**
- **Jurors; Juror Tardiness**
- **Trafficking in Methamphetamine; Sufficiency of the Evidence**
- **Right to Public Trial; Courtroom Closures**
- ***Mallory*; Merger**

Restitution; Plea Agreements

O'Brian v. State, A19A1713 (1/15/20)

Appellant was indicted on two counts of racketeering and 81 counts of theft by taking for events occurring between January 1, 2010 and March 1, 2017, in which she, while serving as a probate judge, was alleged to have stolen more than $430,000 in cash from the probate court. Appellant agreed to plead guilty to ten counts of theft, for incidents occurring in 2010, and agreed that the State would recommend a sentence of between two and four years in prison and an unspecified period of time on probation. She also agreed to a restitution hearing to examine "her finances, her debts, her assets, [and] her ability to work," but the total amount of restitution was not fixed. At the sentencing/restitution hearing, the court asked if the parties had agreed to the amount of restitution, and appellant replied that they had not. Appellant then argued that she should be ordered to pay restitution only on the counts for which she had entered a plea, which amounted to approximately $69,000. The State countered that during plea negotiations, "[t]he correspondence and every single conversation between [defense counsel] and myself was that the State was seeking $433,000 in restitution." The court agreed with the State and ordered the $433,000 in restitution.

Appellant contended that the trial court erred by awarding restitution for the counts that were nolle prossed. The Court stated that absent agreement, a defendant cannot be ordered to pay restitution for a count on which he was not convicted. But, where the record shows that the State requested restitution and the defendant agreed to the amount thereof in exchange for a more lenient sentence, the defendant cannot complain on appeal that the restitution amount was not proven or that she was ordered to pay damages arising out of incidents to which she did not plead guilty.

Here, the Court found, although the trial court ruled in the State's favor, it was unable to determine whether the trial court found as a matter of fact that appellant had agreed to pay the full amount of restitution or whether the court concluded that it was authorized to award the full amount even if appellant had not so agreed, which would constitute error. The court's order was silent on this issue. Therefore, the Court vacated the order of restitution and remanded to the trial court for clarification. If the court awarded the total amount of damages as restitution without appellant's agreement, the restitution award must be reentered so that it reflects only those counts to which appellant elected to plead guilty. If the court determined that appellant agreed to make restitution payments over time in the total amount of damages proved by the State, then the court must enter an order explaining that conclusion and reentering the restitution order. Appellant will be entitled to appeal that decision.

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Motions for New Trial; Final Orders

Allen v. State, A19A2446 (1/16/20)

Appellant was convicted of armed robbery and aggravated assault with a deadly weapon. He contended that the trial court erred by failing to hold a hearing on the claims he raised in his second amended motion for new trial. The Court agreed.

The record showed that after the motion for new trial hearing but prior to the trial court entering a final disposition, Appellant filed a second amended motion for new trial alleging that trial counsel provided ineffective assistance of counsel. Appellant requested a hearing, but the trial court issued an order denying his second motion for new trial without a hearing based on its conclusion that the second motion did not raise new claims.

The Court stated that pursuant to OCGA § 5-5-40 (b), a motion for new trial "may be amended any time on or before the ruling thereon." It is elementary that an oral order is not final nor appealable until and unless it is reduced to writing, signed by the judge, and filed with the clerk. Accordingly, appellant was entitled to amend his motion for new trial after the trial court made its oral pronouncement from the bench until the trial court filed its final order.

Absent a waiver, a movant for new trial is entitled to a hearing on the motion in the trial court before a ruling is made thereon. And here, the Court found, in appellant's second amended motion for new trial, he raised new ineffective assistance of counsel claims regarding why trial counsel failed to clarify the trial court's ruling prohibiting him from asking certain challenged general voir dire questions and why trial counsel did not ask the questions during individual voir dire. Under the facts and circumstances, these ineffective assistance of counsel claims relate to matters outside of the record and require trial counsel's testimony. Therefore, the Court vacated the judgment and remanded the case for a hearing on appellant's second amended motion for new trial. If the trial court denies the motion, appellant may then file another appeal.

Accusations; Timeliness of Challenge

Kinslow v. State, A19A2460 (1/17/20)

Appellant was convicted of one count of computer trespass. He contended that the allegations in the accusation, even if proven true, were insufficient to establish the alleged violation of the computer trespass statute, OCGA § 16-9-93 (b). Essentially, he argued that the accusation failed as a matter of law to establish the essential elements of the offense. The Court, however, found that the error was not preserved for review.

A challenge to an indictment or accusation is typically made through a demurrer to the indictment. A demurrer may be general or special. A general demurrer challenges the very validity of the charging instrument and may be raised anytime; the special demurrer objects merely to its form or seeks more information and must be raised before pleading to the indictment. On the other hand, because a general demurrer attacks the legality of an accusation, it is permissible to raise this ground after verdict by a motion in arrest of judgment even if there was no earlier objection. A motion in arrest asserts that the accusation contains a defect on its face affecting the substance and real merits of the offense charged and voiding the accusation, such as failure to charge a necessary element of a crime.

A motion for directed verdict of acquittal is not the proper way to contest the sufficiency of an accusation. A motion for a directed verdict of acquittal addresses the sufficiency of the evidence, not the sufficiency of the underlying accusation. When an accusation is absolutely void in that it fails to charge the accused with any act made a crime by the law and, upon the trial, no

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demurrer to the accusation is interposed and the accused is convicted under the accusation and judgment is entered on the verdict, the accused's proper remedy is a motion in arrest of judgment or habeas corpus.

Furthermore, a motion for new trial is not the proper method to attack the sufficiency of an accusation and does not provide a basis for an appellate court to review the accusation. Thus, objections to defects in an accusation can be waived, except when the defects are so great that the accusation is absolutely void. However, when a claim that an accusation is absolutely void is not properly asserted in the trial court, it can be reviewed on appeal only through a habeas corpus proceeding. And consequently, the Court held, because appellant did not file a general demurrer or a motion in arrest of the judgment, his challenge to the accusation is not properly preserved for review.

Jurors; Juror Tardiness

Collier v. State, A19A2216 (1/17/20)

Appellant was convicted of aggravated assault, aggravated battery, cruelty to children, possession of a firearm during the commission of a felony and possession of a firearm by a first offender probationer. He contended that the trial court erred by replacing one juror with an alternate after the seated juror did not report to court on time on the first day of trial. The Court disagreed.

OCGA § 15-12-172 provides, in relevant part: "If at any time, whether before or after final submission of the case to the jury, a juror dies, becomes ill, upon other good cause shown to the court is found to be unable to perform his duty, or is discharged for other legal cause, the first alternate juror shall take the place of the first juror becoming incapacitated." Trial courts are vested with the discretion to discharge a juror and replace him or her with an alternate at any time so long as the trial court has a sound legal basis for doing so. A juror's tardiness may provide a sound basis for his or her dismissal.

The facts, very briefly stated, showed that after the jury and alternates were selected, the court instructed the jurors to return the following morning at 9:30 for preliminary instructions and opening statements and if there was any problem, to call the court. The next morning, one of the jurors did not appear. A deputy called him at home and the juror stated that he had to take care of his mother and could be there in 90 minutes. The court wanted the juror there immediately and noted he loved within 15 minutes of the court. At 11:20 a.m., the juror entered the courtroom. The court then engaged in a colloquy with the juror. The court stated that the juror had failed to report to court that morning; that when the staff person called the juror, the juror said he had to take care of his mother and that he had no transportation; and that the juror had said on the previous day that he would rather earn $75 per hour on his construction job than receive the $25 pay for jury duty, and that he wanted the court to pay his transportation costs. The juror apologized and stated that he should have phoned the court; that his brother told him that morning there would be no one to take care of their mother, who was diabetic; and that he did do construction work but that work was slow at the time. The court remarked that the juror's statements "did not ring true" and concluded that the juror "just didn't want to be here." The juror replied that that was not true. The court reiterated that the juror had been instructed to call the court if there was a problem, but that he had not done so, and that the court did not believe he was capable of serving properly. Over defense counsel's objection, the court dismissed the juror and replaced him with an alternate.

Based on this record, the Court held that the trial court had a sound basis for dismissing the absent-then-tardy juror and replacing him with the alternate juror — the juror had not reported to court at the scheduled time and did not contact the court as instructed when a problem arose. The trial had not yet begun when the juror was replaced, and appellant did not show prejudice by the trial court's act. Accordingly, the Court concluded, there was no abuse of discretion.

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Trafficking in Methamphetamine; Sufficiency of the Evidence

Denson v. State, A19A2307 (1/17/20)

Appellant was convicted of trafficking in methamphetamine. He contended that the evidence was insufficient to support his conviction. The Court agreed.

The evidence showed that a police officer was patrolling a neighborhood when he noticed a black pickup truck with a trailer that was sticking out of a driveway and blocking a lane of traffic. The officer approached the house to address the situation and saw two men outside. Once the officer made his presence known, one of the men ran to the back of the house and the other person identified himself as Bobby Henry. Henry told the officer that he had come to the house to sell a motor and that the truck belonged to his girlfriend. Finding the situation "odd," the officer called for back-up and knocked on the front door. Ten minutes later, Robert Clifton, the owner of the house, answered the door and consented to a search of the house. The officers found Harold Green in a laundry room and appellant in the main bathroom. When the officer found appellant, appellant told the officer that he had spent the night and that he "did not know what was going on." During the search of the house, the officers found multiple ingredients and paraphernalia commonly used to manufacture methamphetamine. The house smelled strongly of the same smell that is usually found in methamphetamine labs, and methamphetamine lab components were found in every room of the house except the bathroom where appellant was found. Methamphetamine was not being "actively cooked" at the time of the search, and the police officer who conducted the search testified that he was not certain as to how long ago anything had been made in the house.

The Court found the evidence was insufficient to support appellant's conviction because there was no evidence that appellant shared the intent to traffic methamphetamine. The evidence of the strong smell and the widespread drug paraphernalia in the house, while sufficient to show that a reasonable person might be aware of some sort of illegal venture being conducted in Clifton's house, was not, in and of itself, sufficient to eliminate all reasonable doubt as to whether appellant was a party to the crime of trafficking. The circumstances of the situation simply did not present anything that could be pointed to which would show that appellant shared with the codefendants the intent to manufacture methamphetamine or that would exclude the reasonable doubt that appellant was simply an indifferent bystander. There was also no evidence that appellant benefitted financially from the venture, procured supplies, equipment, or knowledge for the venture, or otherwise participated in the manufacturing, marketing, or distribution of the methamphetamine. Moreover, the evidence showed that the methamphetamine lab was not functioning at the time of the search, and there was no evidence presented that appellant regularly spent time at Clifton's house such that a jury could presume that he was present or participated when methamphetamine was being manufactured. Because the evidence presented showed nothing more than appellant's mere presence in Clifton's house, at a time when methamphetamine was not being actively manufactured, the Court concluded that the evidence was insufficient to support appellant's conviction for trafficking in methamphetamine because mere presence, without proof of participation, is insufficient to support a conviction.

Right to Public Trial; Courtroom Closures

Spikes v. State, A19A1706 (1/21/20)

Appellant was convicted of rape and child molestation of a thirteen year old girl. He contended that the trial court erred during trial when it completely closed the courtroom during the victim's testimony without first engaging in an analysis under the

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Supreme Court of the United States' decision in *Waller v. Georgia*, 467 U. S. 39 (104 SCt 2210, 81 LEd2d 31) (1984). The Court agreed, reversed his convictions and ordered a new trial.

The record showed that after the State announced the victim as its first witness, the prosecutor asked that the courtroom be cleared except for the victim's mother. Over appellant's objection that his family be allowed to remain, the court closed the courtroom with the exception of the bailiff, court security, clerk, prosecutor, client and mother. The courtroom reopened after the victim's testimony.

The Court noted that courtroom closures are characterized as either partial or total. A partial closure occurs when some members of the public are permitted to attend, while a total courtroom closure involves exclusion of all members of the public. The State argued that the trial court only partially closed the courtroom pursuant to the mandatory closure rule encapsulated in OCGA § 17-8-54 and that the legislature does not require trial courts to make *Waller* findings on the record when acting in accordance with OCGA § 17-8-54. But, the Court stated, to the extent that a question remains regarding whether a trial court must first engage in a *Waller* analysis before effecting a partial closure under OCGA § 17-8-54, it did not need to decide that issue here because the closure of the courtroom was not, in actuality, a partial closure in accordance with OCGA § 17-8-54.

Here, the trial court plainly ordered that the only persons who would be allowed to remain in the courtroom were the court reporter, the bailiff, court security, clerk, prosecutor, the victim, and the victim's mother (whose presence the State explicitly requested). The trial court then required any other friends and family members to leave. And even after appellant's counsel repeatedly explained that appellant's family members were present in the courtroom, the trial court made no inquiry whatsoever regarding their relation to appellant, nor did it order that appellant's immediate family members would be permitted to remain. Thus, the Court determined, the trial court's closure here was not a partial closure that comported with OCGA § 17-8-54. Instead, the courtroom closure was total because the State requested that the courtroom be closed to the defendant's extended family and non-courtroom personnel, and the trial court cleared the courtroom of all persons who were not law enforcement or involved in the court system.

Although the trial court permitted the victim's mother to remain at the State's request, allowing the presence of that single individual did not obviate the need for case-specific findings. Georgia law regarding the public aspect of hearings in criminal cases is more protective of the concept of open courtrooms than federal law. Our state constitution point-blankly states that criminal trials *shall* be public.

In giving content to the constitutional and statutory commands that an accused be given a public trial, an accused is at the very least entitled to have his friends, relatives and counsel present. And it is the general policy of our law that a trial of a case in court be open and public and free from secrecy save the deliberations of the jury. And here, while the victim's mother was permitted to observe the victim's testimony, all of the defendant's family members were ordered to leave and the record suggested that no other spectators were present. Therefore, the Court found, the closure in this case implicated the same secrecy concerns as a total closure. Accordingly, the Court concluded, the closure here constituted reversible error, but because the evidence was sufficient to support appellant's convictions, he may be retried.

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Mallory; Merger

Torres v. State, A19A1989 (1/23/20)

Appellant was convicted of one count of forcible rape, four counts of incest, two counts of aggravated child molestation, and one count of aggravated sexual battery. Appellant's daughter, who was eighteen years old at the time of trial, testified that appellant sexually abused her from when she was eight years old until she was sixteen years old.

Appellant contended that the trial court erred in allowing the police investigator to testify about his failure to come forward for an interview with law enforcement prior to his arrest. At trial, the State produced evidence that 1) appellant departed from Georgia to Texas on the day the victim disclosed the sexual abuse to her family; 2) he failed to meet with the investigator to address the allegations after stating to her that he was eager to meet and clear things up; and 3) he failed to return to Georgia, ultimately resulting in his arrest in Virginia. The court admitted the evidence for the limited purposes of showing flight and inconsistencies between appellant's statements to the investigator and his behavior.

Appellant contended that even if the categorical rule imposed by *Mallory* was abrogated in *State v. Orr*, 305 Ga. 729, 739 (3) (2019), evidence of his pre-arrest failure to come forward to speak with the investigator should have been excluded under *Orr* because it did not meet the requirements of an adoptive admission under OCGA § 24-8-801 of the new Evidence Code. But, the Court stated, *Orr* made clear that the adoptive-admission theory is not the only way that evidence of a defendant's silence or failure to come forward might be admissible. And, here, the trial court admitted evidence of appellant's pre-arrest conduct to show appellant's flight from Georgia and to show inconsistencies between appellant's statement that he was eager to meet with the investigator to clear things up and his behavior in failing to make any effort to contact the investigator to set up an interview and his decision to travel to Virginia rather than return to Georgia. Such evidence was admissible not as an adoptive admission, but rather as circumstantial evidence of appellant's consciousness of guilt. Accordingly, the Court concluded, appellant failed to show any abuse of discretion by the trial court.

Appellant also argued that the trial court erred in failing to merge two counts of incest for sentencing purposes. The Court noted that under Georgia law, a person commits the offense of incest when he engages in sexual intercourse or sodomy with a person whom he knows he is related by blood or marriage, which includes the relationship of father and child. OCGA § 16-6-22 (a) (1). OCGA § 16-6-22 (b) addresses punishment and provides that a person convicted of incest shall be sentenced from 10 to 30 years in prison. However, if the victim was under 14 years old, the trial court must impose an enhanced sentence from 25 to 50 years in prison.

Here, Count 2 of the indictment alleged that appellant committed incest by having sexual intercourse with his biological daughter, "a child under the age of 14," "between the 1st day of August, 2008, and the 24th day of August, 2012, the exact date of the offense being unknown to the Grand Jury." Count 3 alleged that appellant committed incest by having sexual intercourse with his biological daughter, "a child over the age of 14," "between the 25th day of August, 2012, and the 30th day of November, 2014, the exact date of the offense being unknown to the Grand Jury." Count 4 alleged that appellant committed incest by engaging in sodomy with his biological daughter, "a child under the age of 14," "between the 20th day of May, 2010, and the 24th day of August, 2012, the exact date of the offense being unknown to the Grand Jury." Count 5 alleged that appellant committed incest by engaging in sodomy with his biological daughter, "a child over the age of 14," "between the 25th day of August, 2012, and the 30th day of November, 2014, the exact date of the offense being unknown to the Grand Jury." After the jury found appellant guilty on all four counts, the trial court sentenced him to consecutive sentences of 50 years in prison on Count 2; 30 years in prison on Count 3; 50 years in prison on Count 4; and 30 years in prison on Count 5.

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Appellant argued that the trial court should have merged Count 2 with Count 3 (both of which alleged sexual intercourse with the victim), and Count 4 with Count 5 (both of which alleged sodomy with the victim), because the range of dates of the offenses set forth in the indictment were not material averments and each pair of counts otherwise were identical. The Court disagreed. It is true that if the counts in the indictment are identical except for the dates alleged, and the dates were not made essential averments, only one conviction can stand. To make such dates a material allegation, the indictment must specifically allege that the date of the offense is material. And, here, the indictment did not specifically allege that the dates of the incest were material.

However, the Court found, the fact that the ranges of dates were not material averments did not end the merger analysis. Where an averment in one count of an accusation or indictment distinguishes it from all other counts, either by alleging a different set of facts or a different date which is made an essential averment of the transaction, the State may on conviction punish the defendant for the various crimes. Thus, irrespective of whether the ranges of dates were made material averments of the pairs of incest counts, each pair of counts did not otherwise allege identical facts. Count 2 alleged sexual intercourse with the victim when she was under fourteen, while Count 3 alleged sexual intercourse with the victim when she was over fourteen. Count 4 alleged sodomy with the victim when she was under fourteen, while Count 5 alleged sodomy with the victim when she was over fourteen.

Furthermore, the Court found, whether the victim was over or under 14 years old was a material factual distinction between the counts because of the sentencing scheme for incest under which the mandatory minimum and maximum sentences are increased if the victim was under 14 years old. And, any fact that increases the mandatory minimum or maximum sentence for a crime is an essential element of the crime that must be found by the jury beyond a reasonable doubt. Hence, apart from the ranges of dates, Counts 2 and 4 alleged an additional material fact that had to be submitted to the jury and proven beyond a reasonable doubt — that the victim was under 14 years of age — that distinguished those two counts from Counts 3 and 5, which alleged that the victim was over 14 years of age. Accordingly, the Court held, because the pairs of incest counts did not allege identical material facts, Count 2 did not merge with Count 3, and Count 4 did not merge with Count 5. The trial court thus did not err by not merging appellant's incest convictions.

Nevertheless, the Court found, although not raised by appellant on appeal, his sentences on the four incest counts are void because they did not each include a split sentence of incarceration and probation as required by the former version of OCGA § 17-10-6.2 (b) applicable at the time he committed those offenses. Accordingly, the Court vacated appellant's sentences imposed on his incest convictions and remand for resentencing on those four counts consistent with former OCGA § 17-10-6.2 (b).