

THIS WEEK:

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- **Voir Dire; *McCullum* Challenges**
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- **Out-of-time Appeals; Motions to Vacate, Void, or Correct an Illegal Sentence**

Reconstructing Transcripts; Reopening of Evidence

Bamberg v. State, S19A1052, S19A1054 (2/28/20)

In 2009, appellants, Damon Bamberg and his mother, Sonya Bamberg, were convicted of murder and other offenses arising out of the shooting death of Damon's ex-wife. They contended that the loss and subsequent reconstruction of the transcript of the first day of trial denied them their right to appeal. The Court disagreed.

The record showed that after the transcript was delivered, the parties discovered that, due to an equipment malfunction, most of the first day's testimony had not been transcribed, and the appellants moved for a new trial on that basis. After the hearing on the motion for new trial was continued several times, and after an expert unsuccessfully attempted to recover data from the defective tapes, the State requested a hearing to reconstruct the missing testimony, which the trial court granted and conducted. The appellants objected and insisted upon a new trial.

The Court found that in accordance with OCGA 5-6-41 (f) and (g) and the trial court's detailed order, the State presented testimony from all five original trial witnesses whose testimony had been lost, and, in an effort to verify their testimony, called the Clerk of Court and the only living prosecuting attorney. And while the reconstructed testimony was relevant to the case, it essentially "set the scene" for the jury and recounted the facts surrounding the victim's death, without specifically implicating the appellants. Some of the reconstructed testimony was exculpatory, as one witness testified that footprints and tire impressions on the scene could not be connected with the appellants. In addition to testimony from all of the fact witnesses from the original trial, one of the original prosecutors confirmed that the witnesses testified consistently with their original trial testimony. Finally, the Clerk of Court identified her contemporaneous notes of the witnesses and their testimony as originally given at the trial. And, the Court noted, the trial court then made a factual finding as to whether the record "conform[ed] to the truth." OCGA § 5-6-41 (f). Thus, the Court concluded, this presentation was adequate to support the trial court's reconstruction of the first day of trial.

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Nevertheless, appellants contended, they had no obligation to participate and no burden to meet in the process of reconstructing the record, and that the transcript was still incomplete, as it did not include any objections, bench conferences, or rulings that may have occurred. But, the Court stated, once the State provided the testimony of all the original witnesses, and evidence was presented that the witnesses' testimony was consistent with their testimony at trial, appellants had an obligation to provide evidence in support of their contention that the record was still incomplete, and to raise specific objections rather than merely speculate about possible omissions in the reconstructed testimony. And here, the Court found, appellants failed to avail themselves of the opportunity to participate in reconstruction of the trial testimony, and therefore did not establish any error with regard to the reconstructed transcript. This remains true even if the transcript theoretically could have been made more certain, or if any portion of it could have been undermined by testimony from other participants or observers. Accordingly, the Court found no error.

Next, appellants argued that the trial court erred in declining to reopen the evidence on their motions for new trial. The Court noted that after the hearing on appellants' motions for new trial, their appellate counsel filed motions to reopen the evidence. In Damon's motion, his appellate counsel declared that appellate counsel "decided to watch some of the news stories about the case just for entertainment purposes" and was "shocked" to discover a television show dramatizing his client's case, which, he alleged, included exculpatory evidence. Damon's appellate counsel attached to the motion an unverified document that appellate counsel described as a partial "transcription" of the show, purporting to show statements by a narrator, actors, including an actor playing jail inmate Burtis Taylor (both appellants made incriminating statements to Taylor), and portions of an alleged interview with Taylor. Counsel contended that this "transcription" showed that Taylor was acting as a government agent and was assigned by prosecutors to extract incriminating statements from the appellants. Taylor, however, testified at trial that his conversations, primarily with Sonya, took place as a result of his duties as a jail trustee. He testified specifically that he was never asked by investigators or by the prosecutor to obtain evidence from either of appellants, that neither the police nor the prosecutor made any promises to him or gave him any hope of benefit, and that the State made no agreement or deal with him regarding the charges he was facing at the time of his incarceration.

Damon summarily argued that the "transcription" showed the State violated a host of federal constitutional provisions, while Sonya, in a somewhat lengthier argument, contended that the "transcription" established a "prima facie case" that the witness was acting on behalf of the government to elicit a confession from Sonya in violation of *Massiah*, and that the State might have failed to disclose this agency in violation of *Brady* and *Giglio*.

But, the Court stated, it did not need to consider those questions, because the appellants provided no potentially admissible evidence that Taylor's testimony at trial was false or that he acted at the direction of the State in conversing with appellants. The unverified partial "transcription" of a television show, of uncertain provenance, purportedly containing an interview with a witness, employing actors, and fictionalized to an unknown degree, was "rank hearsay and has little if any probative value." Accordingly, the trial court did not abuse its discretion in declining to reopen the evidence.

Use of Former Testimony; Recusal Motions

State v. Hamilton, S19A1363 (2/28/20)

In 2011, Hamilton was convicted of felony murder based on aggravated assault with a deadly weapon, aggravated assault (family violence), aggravated assault with a deadly weapon, and possession of a firearm during the commission of a felony, but acquitted of malice murder. The evidence presented at trial included evidence that Donaldson, Hamilton's ex-husband, physically abused Hamilton, including instances of severe abuse, over a period of many years. At trial, Hamilton testified on her own behalf and specifically testified that on the night of Donaldson's death, Donaldson was in the midst of attacking Hamilton with his fists in Hamilton's own home when Hamilton grabbed a gun that she kept under a sofa and fatally shot him. The evidence also included Hamilton's earlier statement to police that she shot Donaldson because she "felt like he was going to kill [her] that night."

The trial court granted Hamilton a new trial on the general grounds. The State unsuccessfully appealed from that order. *State v. Hamilton*, 299 Ga. 667, 671 (2016) (*Hamilton I*). When the State sought to retry Hamilton, she filed a motion for immunity. She also requested that the trial court admit into evidence, for the purposes of deciding the immunity issue only, the transcripts of the testimony of the nearly 30 witnesses who testified at her first trial, as well as the transcripts of additional testimony presented at her motion for new trial hearing. The State opposed Hamilton's motion, arguing that the transcripts were not admissible under any of OCGA § 24-8-804 (b)'s hearsay exceptions and that Hamilton was required to elicit "new" live testimony at the hearing on her immunity motion since she was granted a "new" trial. The court granted the motion pursuant to both OCGA § 24-8-804 (b) (1) and OCGA § 24-8-807. In 2019, the trial court conducted a hearing on Hamilton's motion for immunity. Hamilton introduced into evidence the transcripts from her 2011 trial and from the hearing on her motion for new trial, without further objection from the State. Both Hamilton and the State relied on the transcripts during the hearing, and neither presented additional testimony or evidence. The trial court granted Hamilton's motion for immunity and the State appealed.

The State contended that the trial court erred in admitting into evidence, under Rule 804 (b) (1) (and over objection), the transcripts from Hamilton's previous jury trial and motion for new trial hearing in considering Hamilton's motion for immunity. The Court agreed. The Court stated that our current Evidence Code's hearsay rules, and specifically Rule 804 (b) (1), govern the admissibility of former testimony — which was presented in the form of transcripts in this case. That rule provides that under certain circumstances, "[t]estimony given as a witness at another hearing of the same or a different proceeding" "shall not be excluded by the hearsay rule," but only "if the declarant is unavailable as a witness." OCGA § 24-8-804 (b) (1) (emphasis supplied). Thus, by its plain terms, OCGA § 24-8-804 (b) requires that a declarant be "unavailable" for his or her former testimony to be admissible under subsection (b) (1)'s exception to the hearsay rule. Therefore, the trial court's reliance on Rule 804 (b) (1) to admit prior transcripts into evidence was an abuse of discretion, because the trial court did not make any findings about the availability of the witnesses who testified at Hamilton's trial or at the hearing on her motion for new trial.

Next, the State argued that the trial court erred in admitting the prior transcripts under OCGA § 24-8-807 (Rule 807, also known as the residual clause). The Court disagreed. The Court stated that unlike Rule 804 (b) (1), Rule 807 does not by its text require a declarant to be unavailable to admit the declarant's statement into evidence. But, Rule 807 is not indifferent to availability. Rule 807 has a built-in requirement of necessity, and its probativeness requirement necessitates,

by its plain terms, some determination by the court that the statement at issue is more probative on the point for which it is offered than any other evidence which the proponent can procure through reasonable efforts. And, the Court stated, it is that aspect of Rule 807's text that was critical to the trial court's alternate holding.

Here, having concluded that it was “undisputed” that the transcripts were trustworthy — a finding that many federal courts consider the “lodestar of the residual hearsay exception analysis,” — the trial court focused its Rule 807 analysis on the probativeness of the prior transcripts relative to whether Hamilton could “offer[] any other evidence which” she could “produce through reasonable efforts.” And under the unique circumstances presented in this case, the Court concluded that the trial court did not abuse its discretion when it concluded that it would be “unreasonable” for Hamilton to “subpoena each of” the “nearly thirty witnesses that testified at [her] trial ... and discard[] the eight days of testimony already given during her trial” and admitted the transcripts into evidence under Rule 807.

The State then argued that the trial court erred in granting Hamilton's motion for immunity. The Court again disagreed. Here, the trial court correctly noted that Hamilton bore the burden of proving immunity by a preponderance of the evidence and set forth a detailed summary of the relevant evidence. That summary included more than just Hamilton's own statements that Donaldson had physically abused her for years, that he was attacking her at the time she shot him, and that she shot him because she “felt like he was going to kill [her] that night”; it also included, among other things, the testimony of several witnesses about Donaldson's routine and ongoing physical abuse of Hamilton. Based on that evidence, the trial court was within its discretion to find that “Donaldson's threat to use deadly force against Hamilton on the night in question was, in fact, imminent under the circumstances. And Hamilton was justified in defending herself.”

Finally, the State argued that the trial court erred by declining to recuse itself from this case on remand from *Hamilton I*. The State's theory was that the trial court's “disregard for the jury's verdict” by granting a new trial and “the detailed content of the order of the trial court granting a new trial, inclusive of specific references to the trial transcripts,” particularly in its analysis of trial counsel's ineffectiveness in failing to seek pretrial immunity — a specific claim raised by Hamilton in her motion for new trial — “has the appearance of being a part of the trial court's ‘personal agenda’ as to how this trial should have turned out.”

But, the Court stated, it is not uncommon for a trial judge to preside over the new trial he granted after having presided over the initial trial. Dissatisfaction with a trial court's decision to grant a new trial does not amount to an “appearance of impropriety” that requires recusal, and, the Court found, the State raised no other legitimate legal grounds warranting the trial court's recusal. Thus, the Court stated, “We will waste no more time entertaining the State's borderline-frivolous contention — unsupported by evidence or relevant legal citation — that the trial court erred by rejecting the State's request for recusal and reject that contention outright.”

Voir Dire; McCollum Challenges

Hogan v. State, S19A1448 (2/28/20)

Appellant, who was tried with a codefendant, was convicted of malice murder and other offenses. The record, very briefly stated, showed that during voir dire, the State challenged defense counsel's preemptory strikes as to three jurors – Jurors 11, 22 and 29 – who were then reseated after a hearing pursuant to *Georgia v. McCollum*, 505 U. S. 42 (112 SCt 2348,

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120 LE2d 33) (1992). Although white prospective jurors made up 50% of the initial jury venire and approximately 47% of the eventual jury pool from which the strikes were made, the defendants — who had combined their peremptory strikes — used all nine of their peremptory strikes for jury members and their two peremptory strikes for alternate jurors on white prospective jurors.

As to Juror 11, although defense counsel gave a couple of seemingly race neutral reasons, he said he struck Juror 11 because she “lives in Alpharetta, ... far outside the perimeter, a predominantly overwhelming white community, historically more of a white-flight community because they don't want to live in the city,” and “living in Alpharetta brings up flags for us, whether or not she can actually relate to the goings on of the inner city,” and “her husband had been a CEO of several companies that socioeconomically [were] very elite.” The court found that these explanations were “proxies for race” and ultimately, after hearing from the prosecution and defense counsel, resealed Juror 11.

As to Juror 22, the only reason appellant's counsel gave for striking her was that “she lives in Alpharetta. She was certainly somebody that was on the cusp. I saw some things that I liked about her. We talked about it and it's a primary location, differential between her and some of the other jurors that we looked at.” And as to Juror 29, although counsel gave a seemingly race neutral reason for striking her, the court found that she too was struck because she lived in Alpharetta.

Appellant contended that the trial court err in its finding of discriminatory intent as to his peremptory challenges of the three jurors. The Court disagreed. Even assuming — without deciding — that under some set of circumstances, the socio-economic condition of a juror's predominantly single-race community can serve as a facially race-neutral reason for a jury strike, the trial court still must ultimately decide the *credibility* of such an explanation. And here, the circumstances surrounding appellant's use of peremptory strikes supported the trial court's determination that residence in Alpharetta was a pretext for racial discrimination. First, defense counsel's initial identification of Alpharetta as “a predominantly overwhelming white community, historically more of a white-flight community” supported the trial court's finding that Alpharetta was used as a proxy for race. Second, the statistical evidence showed that the defendants used all nine of their peremptory strikes against white prospective jurors even though those jurors made up only half of the initial jury venire and less than half of the eventual jury pool from which the strikes were made.

Third, although the record did not reveal disparate questioning of prospective jurors of different races, appellant's apparent failure to question potential jurors during voir dire nonetheless supported an inference of discriminatory purpose. Specifically, the transcripts suggested that appellant's counsel failed to engage in any meaningful voir dire examination of certain white jurors, thus suggesting that the explanation for the peremptory strike was a sham and pretext for discrimination. In fact, the Court noted that appellant conceded on appeal that he did not question the stricken jurors about the effect of their residence and socioeconomic status on their ability to decide the case fairly and impartially. Given this lack of questioning, the trial court was authorized to infer a discriminatory purpose in appellant's use of peremptory strikes.

Finally, the Court stated, a comparison of prospective jurors who were struck and not struck supported the trial court's ruling that residence in Alpharetta was a pretext for race. In this regard, appellant's primary argument before the Court was that the trial court should not have compared jurors living in Alpharetta with jurors living in Roswell and Sandy Springs because those jurors were not similarly situated in light of the significant “socioeconomic differences” between their cities and Alpharetta. But, the Court stated, the prosecutor was not required to identify an *identical* juror of a different

race for the side-by-side comparison to be suggestive of discriminatory intent, and appellant's attempts to explain the socioeconomic differences between Alpharetta and the other cities at issue — for example, by invoking the availability of public transportation in Sandy Springs and Census data — were unavailing. The transcript showed that the trial court grappled with differences between jurors who were stricken and those who were not, expressing that the differences in city of residence, expected hardship of jury service, and past experience of close relatives with crime were not significant with respect to the jurors who ultimately were reseated, even while relying on differences with respect to other jurors who had been stricken. The trial court's consideration of similar prospective jurors who had not been stricken provided additional circumstantial support for its inference of a discriminatory purpose. Accordingly, the Court concluded, the trial court had a sufficient basis to reject appellant's peremptory challenges, and to reseate those jurors for his trial, and its findings were not clearly erroneous.

General Demurrers; Indictments

Mosby v. State, A19A1871, A19A2054 (2/20/20)

Appellant was convicted of numerous sexual offenses against his four daughters. He contended that the trial court erred in overruling his general demurrer to Count 6 of the indictment, which charged him with committing aggravated child molestation involving an act of sodomy “by having sexual intercourse with [the victim],” in violation of OCGA § 16-6-4 (c). The Court agreed and the State conceded the issue.

Court stated that to withstand a general demurrer, an indictment must either (1) recite the language of the statute that sets out all the elements of the offense charged, or (2) allege the facts necessary to establish a violation of a criminal statute. In other words, if the accused can admit all the indictment or accusation or citation charges and still be innocent of having committed any offense, the indictment or accusation or citation is defective.

“A person commits the offense of aggravated child molestation when such person commits an offense of child molestation which act physically injures the child or involves an act of sodomy.” OCGA § 16-6-4 (c). But here, the Court found, Count 6 of the indictment did not charge appellant with committing aggravated child molestation by physically injuring the victim, but charged him with committing aggravated child molestation by committing an act of sodomy. Sodomy is defined as “any sexual act involving the sex organs of one person and the mouth or anus of another.” OCGA § 16-6-2 (a) (1).

As the State conceded, sexual intercourse is not an act of sodomy, and therefore, the Court held, Count 6 as drawn in the indictment did not constitute the crime of aggravated child molestation and could not stand. Accordingly, the Court reversed appellant's conviction on this count and vacated his sentence.

Co-conspirator Statements; Effect of Reversal of Co-conspirator's Convictions

Womack v. State, A19A1720 (2/21/20)

In 1995, appellant, Robinson and Tollette robbed an armored Brinks truck, and Tollette shot one of the guards in the head, killing him. Tollette pled guilty and after a sentencing hearing, was sentenced to death. In 1998, Robinson alone

was tried for malice murder, felony murder, armed robbery, possession of a firearm by a convicted felon, possession of a firearm during the commission of a felony, and two counts of aggravated assault. The jury acquitted Robinson of malice murder, felony murder, and both aggravated assault charges, but could not reach a verdict on the armed robbery and firearm charges. In 1999, Robinson was re-tried on the armed robbery and firearm charges alongside appellant, who faced charges of malice murder, felony murder, armed robbery, possession of a firearm during the commission of a felony, possession of a firearm by a convicted felon, and two aggravated assault charges. The jury found Robinson guilty of armed robbery, and acquitted him of the firearm charges. The jury found appellant guilty of only armed robbery, and acquitted him of all other charges.

The Court affirmed appellant's conviction. *Womack v. State*, 273 Ga. App. 300, 300 (2005). In so holding, the Court rejected appellant's contention that the trial court erred in admitting, under the co-conspirator exception to the rule against hearsay, the testimony of Robinson's girlfriend regarding Robinson's statements to her that he and appellant had tried to rob a Brinks truck. In Robinson's appeal, the Court found that under the doctrines of collateral estoppel and issue preclusion, because Robinson was acquitted of malice murder, felony murder, and aggravated assault in his first trial, the "only rational conclusion from the first trial is that the jury determined that Robinson was not a party to the crimes, and therefore, the State could not propound these theories against him in the second trial for armed robbery." *Robinson v. State*, 334 Ga. App. 646, 651-652 (2) (2015). Accordingly, the Court reversed Robinson's armed robbery conviction.

Appellant then filed an extraordinary motion for new trial. He argued that because the Court found that Robinson was not a co-conspirator, his conviction must be reversed, as Robinson's girlfriend's testimony about what Robinson told her after the robbery did not qualify under the co-conspirator exception to the rule against hearsay. Accordingly, appellant argued, he was entitled to a new trial. The trial court denied the motion and the Court granted appellant's petition for a discretionary appeal.

The Court stated that the specific question of whether a subsequent acquittal of the co-conspirator who made the hearsay statements retroactively affects a co-defendant's trial is a matter of first impression for the Court. Relying on *United States v. Hernandez-Miranda*, 78 F3d 512, 513 (11th Cir. 1996) as persuasive authority, the Court held that the admission of testimony under the co-conspirator exception to the hearsay rule is not rendered retroactively improper by the subsequent acquittal of the alleged co-conspirator. Thus, the Court concluded, the court did not err in admitting Robinson's girlfriend's testimony about statements made by Robinson. The fact that Robinson's conviction subsequently was reversed based on the doctrines of issue preclusion and collateral estoppel did not negate the evidence presented at appellant's trial establishing that a conspiracy existed for purposes of the hearsay exception. Accordingly, the trial court did not abuse its discretion in denying appellant's extraordinary motion for new trial.

Search & Seizure; Consent to Search

Montgomery v. State, A19A1761 (2/24/20)

Appellant was convicted of multiple counts of VGCSA. He contended that the trial court erred in denying his motion to suppress. Briefly stated, the evidence showed that officers received a tip from a confidential informant that appellant, who was on probation and parole, was selling methamphetamines and marijuana from his home. Mobbs, another man on probation and parole, was living with appellant. When officers went to appellant's home to conduct a "knock and talk"

investigation, Mobbs answered the door and consented to the officers' request to search. Upon entering the house, the officers smelled a strong odor of marijuana. The officers found appellant asleep in a bedroom and awakened him. After the house was secured, appellant granted consent to search.

Appellant contended that the trial court erred in denying his motion to suppress because the officers conducted an unlawful warrantless search of the house. The Court disagreed.

The Court noted that it was undisputed that Mobbs lived in the house with appellant and the officers obtained Mobbs' consent to search the house. As appellant conceded, the officers reasonably believed that Mobbs had authority to allow them to enter and search the common areas of the house. Nevertheless, appellant argued, his own subsequent consent to the search was tainted by the officers' illegal entry into his bedroom. However, the Court found, there was no evidence that the officers' entry into the bedroom was illegal.

Rather, the evidence showed that the officers only entered the bedroom upon discovering that appellant was in it and that they did not conduct any search of the bedroom until after appellant had consented to a search. Given the totality of the circumstances — appellant's lengthy felony drug history, the reliable information that appellant was selling drugs from the house, appellant sharing the house with another parolee, and the strong odor of marijuana in the house — the officers had the authority to awaken appellant and secure the scene before conducting a search. Moreover, the Court found, the State presented unrefuted testimony that none of the officers threatened, intimidated, or coerced Mobbs or appellant in any way before they each consented to the search. Accordingly, the Court concluded, the trial court did not abuse its discretion in denying appellant's motion to suppress.

Sufficiency of the Evidence; Interference with Custody of a Minor

Owens v. State, A19A2208 (2/25/20)

Appellant was convicted of child molestation; criminal attempt to commit felony child molestation; three counts of enticing a child for indecent purposes; and four counts of interfering with custody of a minor. The evidence, briefly stated, showed that M. P. was a 15-year-old special education student who lived with her grandmother, who was also her guardian. On October 15, 2014 appellant picked M. P. up from school and took her to his house, where she spent the night before appellant drove her back to school the next day. M. P.'s grandmother never gave appellant permission to take M. P. from school or for M. P. to spend the night at his home. On October 30, M. P. and two friends, S. B. and M. I., left school at lunch time, and appellant picked them up down the street from the school. They went to appellant's house and out to lunch before returning to school that same afternoon. Neither M. P.'s grandmother nor S. B.'s mother gave permission for the girls to leave school with appellant. On November 21, police received a call that M. P. had not gone to school that morning. They went to appellant's home to investigate. When asked if M. P. was there, appellant denied it, acknowledging that he was not to have any contact with her, but the police ultimately found M. P. hiding in appellant's attic.

Appellant argued that the trial court erred in denying his motion for a directed verdict on the interference with custody of a minor counts because the children were not in the custody of their legal guardians when he picked them up during school. The Court agreed as to three of the counts.

Under OCGA § 16-5-45 (b) (1) (A), “[a] person commits the offense of interference with custody when without lawful authority to do so, the person ... [k]nowingly or recklessly takes or entices any child ... away from the *individual* who has lawful custody of such child[.]” (emphasis supplied). As defined by statute, “lawful custody” includes “that custody inherent in the natural parents, ... or that custody awarded to a parent, guardian, or other person by a court of competent jurisdiction.” OCGA § 16-5-45 (a) (3).

Relying on *Thompson v. State*, 245 Ga. App. 396, 397 (1) (2000), the Court stated that under the plain language of the statute, a defendant must entice the child away from an individual having custody. And here, it is undisputed that, on October 30, M. P. and S. B. left school in the middle of the day, the defendant picked them up, and the defendant brought them back before the school day ended. It is also undisputed that, on November 21, M. P. was at appellant's home when she was supposed to be in school. As neither M. P.'s grandmother nor S. B.'s mother would have had custody of the girls at the time they were with appellant, the trial court should have granted the motion for directed verdict as to these counts. Therefore, the convictions for interference with custody of a minor on these counts must be reversed, and the case remanded for resentencing without those three convictions.

However, the evidence relating to the October 15 incident was sufficient. Here, the Court found, the evidence established that appellant interfered with M. P.'s grandmother exercising her right to lawful custody. Specifically, with respect to the October 15 incident, appellant kept M. P. at his home overnight without the grandmother's permission.

Nevertheless, the Court also found that the sentence appellant received was void. Specifically, interference with custody of a minor is a misdemeanor, and the first conviction authorizes a sentence of one to five months' imprisonment under OCGA § 16-5-45 (b) (2) (A). Thus, appellant's sentence of 12 months' imprisonment for this count was outside the statutory maximum and void. Accordingly, the Court stated, on remand, the trial court must limit the sentence imposed on this count to no more than five months' imprisonment.

Possession of Open Container; General Demurrers

Sexton-Davis, A19A2066 (2/26/20)

Appellant was convicted of felony obstruction of an officer and possession of an open container of alcoholic beverage while operating a vehicle. She contended that her trial counsel rendered ineffective assistance by failing to pursue a motion to quash the open container charge, asserting that it was subject to a general demurrer.

Here, the Court found, the indictment charged appellant “with the offense of POSSESSION OF OPEN CONTAINER OF ALCOHOLIC BEVERAGE WHILE OPERATING A VEHICLE (O.C.G.A. 40-6-253) for the said accused . . . did possess an open container of an alcoholic beverage . . . while operating a vehicle . . . said container was not in the possession of a passenger and was not located in a locked glove compartment, locked trunk, or other locked non-passenger area of the vehicle. . . .”

Appellant contended that operation of a vehicle contemporaneous with possession of the open container is not an essential element of the crime. She argued that in order for the State to have charged her sufficiently with an open container violation

under OCGA § 40-6-253, the State needed to allege that she possessed the open alcoholic beverage containers in the passenger area of the motor vehicle on the roadway or shoulder of a public highway. The Court agreed.

The Court noted that OCGA § 40-6-253 (b) (1) (B) provides that "[a] person shall not . . . [p]ossess any open alcoholic beverage container in the passenger area of any motor vehicle which is on the *roadway or shoulder of any public highway*." (Emphasis supplied). Thus the Court found, appellant could have admitted all the allegations and still not be guilty of a crime. Indeed, it might be possible for one to possess an open container of alcoholic beverage while operating a motor vehicle in a parking lot or driveway and not be guilty of violating OCGA § 40-6-253. Thus, had trial counsel filed a motion to quash the open container charge, asserting that it was subject to a general demurrer, the trial court would have been required to dismiss the charge. Accordingly, the Court concluded, trial counsel's failure to challenge this count constituted deficient performance, contributed to her conviction on a void count, and therefore harmed her and prejudiced her case. Therefore, the Court reversed her conviction on this count.

Right to Trial Transcripts; Felony Cases

Brock v. State, A19A2037 (2/27/20)

Appellant was convicted of felony obstruction of an officer. He filed a motion for new trial and requested that the State file a transcript of the trial proceedings so that he could purchase a copy of the transcript. The trial court found that he was not entitled to a transcript because he was not indigent.

The Court noted that without question in Georgia an indigent, on appeal, is entitled as a matter of right to a free copy of the transcript of trial court proceedings in which he has been a party. Conversely, a non-indigent defendant is not entitled to a free transcript of the trial court proceedings. And here, appellant neither claimed that he was indigent nor that he was entitled to a free copy of the transcript of the trial court proceedings. Instead, he contended that the State had an obligation to ensure that the trial transcript was prepared so that he could purchase a copy. The Court agreed.

OCGA § 5-6-41 (a) provides that "[i]n all felony cases, the transcript of evidence and proceedings shall be reported and prepared by a court reporter as provided in Code Section 17-8-5 or as otherwise provided by law." In all felony trials that result in a guilty verdict, the testimony of the case "shall be entered on the minutes of the court or in a book to be kept for that purpose." OCGA § 17-8-5 (a). Thus, in the event of a guilty verdict in felony cases, the State is responsible for ensuring that a correct and complete transcript is created, preserved, and provided to the defendant upon his request. Accordingly, the Court held, the trial court erred by denying appellant's request to have the State ensure that a trial transcript was created and preserved. Furthermore, as the State failed to ensure that the trial transcript was prepared, despite appellant's request, the Court vacated the trial court's denial of his motion for new trial and remanded the case to allow appellant to file an amended motion for new trial with the aid of a trial transcript.

Out-of-time Appeals; Motions to Vacate, Void, or Correct an Illegal Sentence

Jones v. State, A20A0309, A20A0310 (2/27/20)

In October of 2014, appellant entered a negotiated plea of guilty to false imprisonment and trafficking of persons for sexual servitude. With the assistance of different counsel, he then filed a timely motion to withdraw his plea. The trial

court denied the motion in November of 2014. In 2018, appellant filed a motion for out-of-time appeal from the denial of his motion to withdraw his plea. He also filed a motion to vacate, void or correct an illegal sentence. The trial court denied both motions without a hearing and appellant appealed. Appellant also appealed from the trial court's denial of his motion for appointment of appellate counsel. The Court consolidated both appeals.

Appellant contended that the trial court erred in denying his motion for an out-of-time appeal from the denial of his motion to withdraw his guilty plea. The Court agreed.

The Court noted that in his motion for an out-of-time appeal, he asserted that he was entitled to such an appeal based on the ineffective assistance rendered by his second counsel, who failed to file a timely notice of appeal on his behalf. The Court stated that when a defendant is deprived of his right to appeal from the denial of his motion to withdraw his guilty plea due to ineffective assistance of counsel, the defendant is entitled to an out-of-time appeal. But here, the Court noted that it could not determine from the existing record whether appellant's counsel was deficient in failing to timely file a notice of appeal, given that the trial court denied appellant's motion for an out-of-time appeal without conducting an evidentiary hearing. Furthermore, our Supreme Court had not yet issued its decision in *Ringold v. State*, 304 Ga. 875, 878 (2019) when the trial court entered its order in this case, and thus the trial court and parties did not have the benefit of that decision to guide them. Accordingly, the Court vacated the trial court's order to the extent that it denied appellant's motion for an out-of-time appeal, and remanded the case for the court to conduct an evidentiary hearing and determine whether appellant's second counsel was ineffective in failing to file a timely notice of appeal from the denial of the motion to withdraw the guilty plea, consistent with the principles set out in *Ringold*.

Next, appellant contended that the trial court erred in denying his motion to vacate, void, or correct an illegal sentence. The Court disagreed.

The Court noted that in his motion, appellant asserted that he pled guilty as the result of ineffective assistance rendered by his plea counsel, that the indictment, arrest warrant, and search warrant were invalid, and that he had been improperly detained and questioned by law enforcement. However, the Court found, all of appellant's assertions about the alleged errors in his case clearly went to the validity of the judgment of conviction entered on his guilty plea, not the validity of his sentence. Where, as here, the defendant fails to present a cognizable void-sentence claim, the trial court does not have jurisdiction of the motion. Thus, the Court affirmed the denial of the motion although the trial court should have dismissed the motion for lack of jurisdiction.

Finally, appellant argued that the trial court erred in denying his motion for appointment of appellate counsel. However, an indigent defendant is entitled to representation by counsel only for trial and for the direct appeal from the judgment of conviction and sentence. Consequently, appellant was not entitled to the appointment of counsel to appeal the denial of his motion for out-of-time-appeal or the denial of his motion to vacate, void, or correct an illegal sentence.