

THIS WEEK:

- **Motions for New Trial; Hearings**
- **Out-of-Time Appeals; Ineffective Assistance of Counsel**
- **Rule 621; Impeachment by Use of Extrinsic Evidence**
- **Speedy Appeals; Due Process**
- **Extraordinary Motions for New Trial; Habeas Corpus**
- **DUI; Juveniles**
- **Juvenile Proceedings; Right of State to Appeal**
- **Rule 414; Prior Sexual Acts**

Motions for New Trial; Hearings

Bundel v. State, S20A0173 (3/13/20)

Appellant was convicted of malice murder. He argued that the trial court erred in denying his motion for new trial without conducting a hearing. The Court disagreed.

The record showed that after appellant was sentenced, new appellate counsel filed a motion for new trial in June 2012. He raised only the general grounds, reserved the right to amend his motion upon receipt of the trial transcripts, and requested that “his grounds for a new trial be inquired into” by the trial court. The trial court then ordered that a hearing would not be scheduled until completion of the transcript and after appellate counsel had a reasonable time to read it and prepare a particularized motion for new trial. However, in April 2019, the trial court denied the motion without a hearing.

The Court stated that although a defendant has the right to a hearing on a motion for new trial, the trial court has no duty to hold such a hearing on its own initiative. It is the duty of the party seeking a hearing to take affirmative steps to request one, and failure to do so results in a waiver of the right to a hearing. Appellant contended that his statement that his motion should be “inquired into” by the trial court constituted an affirmative request. But, the Court stated, the phrase “inquire into” does not constitute an unambiguous request for a hearing, and nothing about appellant’s motion for new trial suggested that the trial court “inquire into” his motion through a hearing. Appellant’s motion for new trial was based solely on the general grounds, which generally require a trial court to weigh the trial evidence and assess the credibility of witnesses and conflicts in the evidence. The consideration of the general grounds is limited to the evidence introduced at trial. Thus, because appellant was asking for a new trial on the general grounds only, there was no need for an additional hearing, as the trial court already had all the evidence it needed to address the general grounds.

Nevertheless, citing *Cooper v. State*, 249 Ga. App. 881 (2001), appellant argued that he did not have to make a formal request for a hearing once the trial court said it was scheduling one. But, the Court stated, even assuming *Cooper* applied, the trial court said that a hearing would not be scheduled until the trial transcripts had been completed and appellate

counsel had prepared a particularized motion for new trial. Yet, the Court found, appellant never filed a particularized motion in the more than four years between the filing of the trial transcript and the trial court's ruling on his motion for new trial. Under these circumstances, the trial court did not err in denying his motion for new trial without holding a hearing.

Out-of-Time Appeals; Ineffective Assistance of Counsel

Moore v. State, S20A0115 (3/13/20)

On February 12, 2019, the trial court sua sponte dismissed appellant's notice of appeal from the court's order denying appellant's motion for an out-of-time appeal, based on its determinations that the judgment was not then appealable and that the questions presented had become moot, citing OCGA § 5-6-48 (b) (2) and (3). Appellant appealed the dismissal and the Court reversed and remanded the case.

The Court stated that trial courts should not dismiss appeals because an appellate court is the sole authority in determining whether a filed notice of appeal or discretionary application is sufficient to invoke its jurisdiction. Although the trial court cited grounds for dismissing appellant's appeal that are authorized under OCGA § 5-6-48 (b), the three specific reasons for dismissing an appeal under that Code section all relate to dismissals by the appellate courts. Thus, because Georgia law does not contemplate the dismissal of an appeal under that Code section by a trial court, the trial court erred in dismissing appellant's notice of appeal. Therefore, the Court reversed that order, and then addressed appellant's appeal challenging the order denying his motion for an out-of-time appeal.

The record showed that in 2001, appellant was tried for the murders of two victims, the aggravated assaults of two other victims, and four related firearms charges. The State sought the death penalty for one of the murders. At the end of the guilt-innocence phase of the bifurcated trial, the jury returned guilty verdicts on all counts. Appellant then changed his plea to guilty pursuant to a negotiated plea offer according to which he would be sentenced to life in prison without parole for one malice murder count, with consecutive sentences for the remaining seven counts. In 2014, appellant filed pro se a motion for an out-of-time appeal, alleging that he was deprived of his right to a direct appeal due to the ineffectiveness of his counsel, in that, "[i]mmediately following the jury's verdict of guilty relative to the guilt-innocence phase" of his death-penalty trial on August 15, 2001, he "clearly and adamantly informed his trial counsel that he wanted to appeal the judgment of conviction entered against him," and that neither of his trial attorneys ever filed an appeal. The record showed no responsive pleading from the State and no indication that there was any hearing on his motion.

The trial court denied appellant's motion for an out-of-time appeal on November 5, 2018, giving no explanation. In the court's February 2019 order dismissing appellant's timely notice of appeal from the November 2018 order, however, the trial court indicated its reasons for denying appellant's motion for an out-of-time appeal. The court noted that, in 2011, post-conviction counsel had filed a motion to correct a void sentence, based on *Roper v. Simmons*, 543 U.S. 551 (125 SCt 1183, 161 LE2d 1) (2005), as to the murder conviction for which appellant had been sentenced in 2001 to life without parole. In *Roper*, the United States Supreme Court ruled that the Eighth and Fourteenth Amendments forbid imposition of the death penalty on an offender who was under the age of 18 when his crimes were committed. The trial court denied appellant's motion to correct void sentence, but this Court reversed, holding that the sentencing plea agreement entered into by appellant, consenting to imposition of a life sentence without parole, was void as a sentence not allowed by law,

because appellant was 17 years old at the time of the crimes, and remanded for entry of a legal sentence. *Moore v. State*, 293 Ga. 705, 706-708 (2) 2013). On May 21, 2014, the trial court re-sentenced appellant to life in prison for the count of malice murder at issue and left all other sentences intact.

On October 10, 2014, four months after re-sentencing, appellant filed his motion for an out-of-time appeal. Four years passed before the trial court summarily denied that motion without receiving a responsive pleading from the State or giving appellant a hearing. In the February 2019 order, the trial court determined that appellant's motion for an out-of-time appeal was premised on trial counsel's failure to pursue appellant's appeal on the seven counts of his original sentence, "which were not addressed in *Moore*, 293 Ga. 705 (2013)."

However, the Court found, despite appellant's successful challenge to the sentence imposed for one of his eight convictions, the record showed that appellant never directly appealed any of his 2001 convictions. Because the trial court was required to make a factual inquiry into appellant's allegations in his 2014 motion for an out-of-time appeal that his appeal of right was lost as a consequence of his counsel's deficient performance, the trial court abused its discretion when it denied appellant's motion without making such a factual inquiry. Nothing in the record showed that the State asserted any defense or objection to appellant's motion in the trial court. Therefore, the Court held, because the trial court abused its discretion when it denied appellant's motion for an out-of-time appeal without making the required factual inquiry, the order denying his motion and remand must be vacated and the case remanded to the trial court for consideration on the merits of appellant's motion for an out-of-time appeal.

Rule 621; Impeachment by Use of Extrinsic Evidence

Corey v. State, S20A0214 (3/13/20)

Appellant was convicted of murder, aggravated assault, and the unlawful possession of a firearm during the commission of a felony in connection with the fatal shooting of Lorraine Manuel. The evidence, very briefly stated, showed that Manuel and her fiancé, Franklin, completed an application in June 2015 to rent appellant's house. A few days later, the couple decided not to rent the house, and Franklin told appellant that they wanted her to return their rental application (which included personal information, including Manuel's social security number). Appellant was not receptive to this request, and she told Franklin that she would call the police if he came to the house. Manuel went to appellant's house and after an argument about the application, appellant shot Manuel in the head. Manuel was unarmed.

Appellant contended that the trial court erred when it excluded extrinsic evidence to impeach Franklin's testimony about a rent dispute that he and Manuel had with a prior landlord. During her cross-examination of Franklin, appellant asked if he and Manuel had ever been served with an eviction notice. Franklin responded that they had not, and appellant was permitted to cross-examine Franklin about a rent dispute with a prior landlord that allegedly resulted in an eviction. Appellant was also permitted to present Franklin with court papers to refresh his recollection about the dispute. And after Franklin testified that he did not remember going to court over the dispute and that he and Manuel moved out of the property at issue before any eviction, appellant sought to present extrinsic evidence to impeach Franklin's testimony. But the trial court excluded the evidence after concluding that the issue of the prior dispute was not "germane or material" to the relevant issues at trial (primarily, whether appellant was justified in shooting Manuel).

The Court noted that OCGA § 24-6-621 provides that "[a] witness may be impeached by disproving the facts testified to by the witness," but the use of extrinsic evidence to impeach a witness by contradiction is not unlimited. The language in OCGA § 24-6-621 is substantively identical to former OCGA § 24-9-82 (which provided that "[a] witness may be impeached by disproving the facts testified to by him"). And although former OCGA § 24-9-82 (like OCGA § 24-6-621) did not include any express limitations on the ability to impeach a witness, it was well settled under our old Evidence Code that impeachment by contradiction was limited in regard to matters that are collateral to the material issues at trial.

The Court stated that our new Evidence Code requires analysis of the new law, not blind reliance on the cases decided under the old law. Nevertheless, there are limited situations where it may be appropriate to rely upon cases decided under the old Evidence Code. Such cases may be relevant where, as here, our new rule was "carried over from our old Evidence Code" and has no counterpart in the Federal Rules of Evidence. Even so, the applicability of the old cases is also limited by other newly adopted provisions of the current Evidence Code. For example, OCGA §§ 24-4-401, 24-4-402, and 24-4-403 overlay the entire Evidence Code, and are generally applicable to all evidence that a party seeks to present. In addition, OCGA § 24-6-621 also may be read in conjunction with OCGA §§ 24-6-607 and/or 24-6-613 (b), as well as their federal counterparts. And, the Court noted, it has previously held that impeachment with a prior inconsistent statement under OCGA § 24-6-613 (b) does not allow the introduction of extrinsic evidence related to issues that are collateral to the subject matter of the case. Similarly, the Court held, it is within a trial court's discretion to determine if a party is improperly attempting to use extrinsic evidence to impeach a witness by contradiction under OCGA § 24-6-621 on a matter collateral to the relevant issues at trial. And, here, the Court concluded, the trial court did not abuse its discretion when it excluded the extrinsic evidence at issue.

Speedy Appeals; Due Process

Mattox v. State, S20A0026 (3/13/20)

Appellant was convicted of murder and other offenses. He contended that his due process rights were violated by a lengthy post-trial delay. The record showed that appellant was convicted and sentenced in October 2005, he filed a motion for new trial (with new counsel) in November 2005, he amended that motion in October 2018 (again with new counsel), and the trial court finally ruled on his motion in May 2019.

The Court stated that it reviews appellate due process claims under the four-factor analysis used for speedy trial claims set forth in *Barker v. Wingo*, 407 U.S. 514 (92 SCt 2182, 33 LE2d 101) (1972), which include the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. But in considering whether an appellate delay violates due process, prejudice, unlike in the speedy trial context, is not presumed but must be shown. And the failure to make a showing of prejudice in an appellate delay claim is fatal to the claim, even when the other three factors weigh in the appellant's favor.

Appellant argued that he was prejudiced by the post-trial delay because, by the time the trial court conducted a hearing on his amended motion for new trial in February 2019, his trial counsel had died and was therefore unavailable to answer questions about his ineffective assistance claim. But, the Court found, pretermitted whether trial counsel could have offered any evidence in support of that claim appellant did not even make such a claim in his 2005 motion for new trial (despite being represented by new counsel). Instead, he waited until October 2018—by which time his trial lawyer had

died—to assert an ineffective assistance claim. As a result, there was not a reasonable probability that appellant's claim of ineffective assistance would be decided differently had the trial court more promptly ruled upon his motion for new trial. Thus, the Court concluded, his due process claim failed because he did not demonstrate any prejudice caused by the delay.

Extraordinary Motions for New Trial; Habeas Corpus

Davis v. State, A19A1844 (2/27/20)

Appellant appealed from the denial of his extraordinary motion for new trial in which he alleged 1) he did not knowingly and intelligently waive his right to counsel both for his trial and his appeal; 2) the trial court failed to warn him of the dangers and disadvantages of proceeding both to trial and on appeal without counsel; 3) a new trial was necessary because his right to confront the witnesses against him was violated when the trial court allowed expert testimony by Skype without first making a finding that face-to-face confrontation was unnecessary and 4) by allowing the expert to testify regarding DNA evidence despite not signing the testimonial certificate or performing the DNA test.

The Court stated that this case is controlled by the Supreme Court's recent decision in *Mitchum v. State*, 306 Ga. 878, 880 (1) (a) (2019) in which the Court addressed the question of whether a post-appeal challenge to a criminal conviction based on the alleged deprivation of a defendant's constitutional rights could be properly pursued through an extraordinary motion for new trial, or whether such a challenge must be pursued exclusively through a petition for a writ of habeas corpus. The *Mitchum* Court held that following the enactment of the Habeas Corpus Act of 1967, "if a prisoner convicted in a Georgia court seeks, post-appeal, to assert the denial of a constitutional right through an extraordinary motion for new trial rather than a petition for a writ of habeas corpus, such claim is not properly raised." *Mitchum*, 306 Ga. at 885 (1) (1).

And here, the Court found, just as in *Mitchum*, appellant alleged a deprivation of his constitutional rights required the trial court to grant his extraordinary motion for a new trial pursuant to OCGA § 5-5-41 (a). However, constitutional matters that are exclusively governed by the adequate remedy of habeas corpus cannot be pursued through an extraordinary motion for new trial. Thus, the Court concluded, because habeas corpus provides appellant with an adequate remedy to pursue his constitutional claims, and an extraordinary motion for new trial was not an adequate vehicle to pursue such claims, the trial court should have dismissed the motion. Accordingly, the Court vacated the trial court's denial of appellant's extraordinary motion for a new trial and remanded the case with direction that the extraordinary motion for new trial be dismissed.

DUI; Juveniles

In re R. M., A19A1880 (2/28/20)

After R. M. entered a negotiated plea to driving under the influence of alcohol-less safe, the juvenile court adjudicated him delinquent. Over a period of several months, the juvenile court held various hearings and eventually entered an order of dismissal. The State appealed.

First, the State argued that the juvenile court erred in not reporting the disposition and adjudication of R. M.'s charge to the Division of Driver Services. Specifically the State argued that only proceedings dismissed for lack of evidence are exempt

from reporting to the Division of Driver Services. The Court noted that the State cited no on-point legal authority in support of its arguments. Instead, the Court found, the plain language of OCGA §§ 15-11-600 (a) (1), (d) and 15-11-630 (i), authorized the juvenile court's decision.

Next, the State argued that the juvenile court's dismissal order, which found that R. M. was not in need of treatment, rehabilitation, or other services, is a "judicial reprimand" that is "not in accordance with the spirit of the law." In support, the State cited OCGA § 15-11-630 (g) (1), which provides that "[i]f the court finds on the admission of a child ... that the child committed the offense charged, it may make one or more of the following orders: (1) Reprimand, counsel, or warn such child and his or her parent... provided, however, that *this disposition order shall not be available for any act of delinquency.*" (Emphasis supplied.) The Court disagreed. Here, the Court found, the juvenile court's order contained specific findings about R. M.'s apparently self-initiated counseling, substance-abuse treatment, and rehabilitation. It also contained findings about his compliance with court-ordered restrictions regarding driving, alcohol, and behavior. Because the juvenile court did impose restrictions on R. M., the Court stated that it could not say that its order amounted to merely the type of reprimand, counseling, or warning which the statute permits only for juvenile traffic offenses, and not for juvenile delinquency offenses.

Moreover, OCGA § 15-11-600 (a) (1) provides that "[a]fter a finding that a child has committed a delinquent act, the court shall hear evidence and determine *whether*: (A) Such child is in need of treatment, rehabilitation, or supervision[...]" (Emphasis supplied.) OCGA § 15-11-600 (d) further provides that "[i]f the court finds that a child who has committed a delinquent act is not in need of treatment, rehabilitation, or supervision, *it shall dismiss the proceeding* and discharge such child from any ... restriction previously ordered." (Emphasis supplied.) Thus, the Court stated, to interpret the statute as the State suggests would have the effect of rendering meaningless both the discretionary language of OCGA § 15-11-600 (a) (1) (giving juvenile courts the authority to decide whether a child needs rehabilitation, treatment, or services) and the mandatory language of OCGA § 15-11-600 (d) (requiring the juvenile court to dismiss a proceeding if, as here, it finds that the delinquent child is not in need of treatment, rehabilitation, or services).

Finally, the State argued that a conflict exists between the dispositional requirements for juveniles adjudicated delinquent for driving under the influence, as provided in OCGA § 15-11-600, and the requirements for OCGA § 40-6-391, the statute applicable to adults convicted of driving under the influence. The State contended that given the "silence" of the Juvenile Code as to the disposition of a DUI delinquency, the more specific provisions of OCGA § 40-6-391 (c) requiring specified punishments govern even in the juvenile context. The Court again disagreed.

The Juvenile Code is not silent as to the disposition of a driving under the influence delinquency. OCGA § 15-11-630 (g) provides that if a juvenile court finds upon the evidence or the child's own admission that the child has committed the offense charged, it "*may* make one or more of the following orders[.]" (Emphasis supplied.) The statute then lists possible punishments or services which the juvenile court may order, but is not required to order, including suspension of the child's driver's license, community service, and participation in substance abuse programs. See OCGA § 15-11-630 (g) (2) - (6). Additionally, the statute provides that the juvenile court may "[p]lace such child on probation subject to the conditions and limitations imposed by Title 40 governing probation granted to adults for like offenses . . ." OCGA § 15-11-630 (g) (7). Thus, the Court found, by its own terms, the statute specifically gives the juvenile court the authority to determine the proper course of treatment, services, punishment, or rehabilitation applicable to the child at issue. In addition, OCGA § 15-11-630 (i) provides that if a juvenile court finds a child delinquent of an act which, if committed

by an adult, would violate Title 40, and if the juvenile court does not dismiss the case, then the “Department of Driver Services shall record the adjudication and disposition of the offense on such child's permanent record, and such adjudication and disposition shall be deemed a conviction for the purpose of suspending or revoking such child's driver's license.”

Furthermore, the specific language of OCGA § 40-6-391 (c), provides that “[e]very person *convicted* of violating this Code section” be subject to various punishments. (Emphasis supplied.) But, an adjudication of delinquency is not a conviction of a crime. It is well-settled that a juvenile court cannot convict a juvenile of a crime as defined by Georgia law. A juvenile court convicts a child for being delinquent, and such an adjudication is not a conviction of a crime or crimes. Therefore, the Court affirmed the juvenile court’s order of dismissal.

Juvenile Proceedings; Right of State to Appeal

In re A. L., A19A2463 (3/3/20)

The State filed a delinquency petition alleging that A. L., then age 16, was in need of supervision, treatment, and rehabilitation because she drove 106 miles per hour in a 70-mph zone in violation of several traffic laws. Following an adjudication hearing, at which A. L. admitted to the alleged speeding, the court “ordered and adjudged that [A. L.] did commit delinquent acts which would be the crime of speeding, 106 mph in a 70 mph zone if committed by an adult.” (Emphasis omitted.). At the ensuing disposition hearing, A. L.'s intake officer recommended that she be placed on unsupervised probation, and the State requested the suspension of her license. However, the court held that A. L. was not in need of treatment, rehabilitation or supervision, but that she would be fined \$506. The court held that under OCGA § 15-11-630 (g) (1), it did not have the authority to notify DDS of the adjudication regarding A. L.'s speeding, and then stated that “the Petition was dismissed.” The State appealed.

The Court stated that the State’s authority to appeal is found in OCGA § 5-7-1 (a), which allows the State to appeal from the dismissal of a “petition” for juvenile delinquency. Specifically, the legislature chose to allow the State to appeal only from “an order, decision, or judgment setting aside or dismissing *any ... petition* alleging that a child has committed a delinquent act.” (Emphasis supplied.) OCGA § 5-7-1 (a). That statute does not give the State authority to appeal from the dismissal of a juvenile court *proceeding* following an adjudication of delinquency.

And here, the Court found, the juvenile court had already held an adjudication hearing and adjudicated A. L. delinquent prior to dismissing the case following the disposition hearing. Thus, despite the wording of the juvenile court's order, at that point the court could only dismiss the “proceeding,” not the petition. Indeed, the court cited OCGA § 15-11-600 (d) as the authority for its dismissal. Consequently, the Court held, the State did not have authority to appeal the dismissal of the proceeding. Therefore, the Court held, it lacked jurisdiction to hear the appeal and dismissed it.

Rule 414; Prior Sexual Acts

Wilson v. State, A19A2174 (3/4/20)

Appellant was convicted of two counts of incest, one count of statutory rape, and one count of child molestation. The victim, was his 13-year-old step-daughter. At trial, the State was permitted to present evidence of prior sexual acts pursuant

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to Rules 413 and 414. P. W. testified that she and appellant lived in the same home in upstate New York between 1984 and 1985, shortly after appellant moved in with his father and step-mother. On multiple occasions, when P. W. was approximately six years old and appellant was between eleven and thirteen years old, appellant penetrated P. W.'s vagina with his hand and oral sodomy upon P. W. She also testified that she recalled two distinct occasions when appellant had sexual intercourse with her in the basement of their home.

Appellant argued that the evidence presented at trial failed to show that the prior instance of child molestation was even a crime, in that he was perhaps under the age of accountability, and therefore incapable of forming the requisite intent. The Court noted that appellant was between the ages of 11 to 13 years old at the time of the prior child molestation incident, but it was unclear because witnesses were unsure of when P. W.'s disclosure occurred. Although appellant's exact age at the time of the prior instance of child molestation was unclear, a trial court should consider a defendant's youth at the time of a similar transaction when deciding whether to admit such evidence. Additionally, regardless of appellant's age at the time, witnesses testified that appellant was sent to a juvenile detention facility in New York, indicating some level of responsibility for the prior instance of child molestation. Accordingly, the Court held, the trial court did not abuse its discretion in concluding that the evidence of the prior instance of child molestation involving P. W. was admissible for a relevant purpose under Rule 414 (a).

Appellant also contended that the prior instance of child molestation was inadmissible because it was irrelevant to any material fact. The Court disagreed. Although P. W.'s testimony was remote in time, the trial court did not abuse its discretion in allowing the prior instance of child molestation to be admitted, because it was relevant to show the appellant's lustful disposition with respect to younger females.