

THIS WEEK:

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Rule of Sequestration; OCGA § 17-17-9

Thompson v. State, S20A0245 (6/1/20)

Appellant was convicted of the felony murder of his wife, Peggy. At trial, the court allowed the State to present other acts evidence of violence committed by appellant against his stepson, stepdaughter, and daughter. Prior to the jury being impaneled and sworn, appellant invoked the rule of sequestration as to these other-acts witnesses. The State requested that Peggy's children and stepdaughter be excused from the rule under the Crime Victims' Bill of Rights, in particular OCGA § 17-17-9, as they were qualifying members of the victim's family under the statute. Appellant objected, but the trial court excused these witnesses from sequestration based on OCGA § 17-17-9. All three children were permitted to watch the entirety of the trial, including each other's testimony, and testified tenth, eleventh, and twelfth, respectively out of 15 State witnesses.

Appellant contended that the trial court erred by not applying the rule of sequestration to these three witnesses. The Court disagreed. OCGA § 24-6-616 carves out an exception to the general rule of sequestration and provides that "the victim of a criminal offense shall be entitled to be present in any court exercising jurisdiction over such offense." This exception to the rule of sequestration is subject to OCGA § 17-17-9, which provides in pertinent part that a victim or member of the immediate family of a victim shall not be excluded from trial based solely on the fact that such person is subpoenaed to testify unless 1) it is established that such victim or family member is a material and necessary witness; and 2) the court finds that there is a substantial probability that such person's presence would impair the conduct of a fair trial.

Under OCGA § 17-17-3 (11) (B), when a crime victim is deceased, "victim" is defined to include "[a]n adult child" if the crime victim's spouse is either in custody for an offense or the defendant. And while OCGA §17-17-9 does not explicitly define who constitutes an "immediate family member" under the statute, the Court, citing Black's Law Dictionary (11th ed. 2019), stated that the phrase is commonly understood to include a person's children and stepchildren. Thus, in cases such as this where the crime victim is deceased, the terms "victim" and "immediate family member" may apply to the same individuals. And here, the witnesses were the children, two biological and one by marriage, of the deceased crime victim and thus fell within the plain meaning of both exceptions created by the statute. Therefore, the trial court could properly except these witnesses from the rule of sequestration as either victims or as immediate family members of a victim under the Crime Victims' Bill of Rights.

Furthermore, the Court noted, at trial, appellant did not ask for findings from the trial court that, under OCGA § 17-17-9, Peggy's children and stepchild were material and necessary witnesses, or that their presence would impair the conduct of a fair trial, such that the rule of sequestration should still apply to these witnesses. And, even assuming the witnesses were material and necessary, there was no indication that their presence would impair the conduct of a fair trial. None of the children witnessed Peggy's death and each witness's testimony involved different instances of abuse that, although similar, did not mirror each other or indicate any evidence of fabrication or collusion. Finally, there were no other witnesses who testified at trial concerning these other acts. Accordingly, the Court concluded, the court did not abuse its discretion by not applying the rule of sequestration as to these witnesses.

Hearsay; Prior Testimony

Shealey v. State, S20A0185 (6/1/20)

Appellant was convicted of felony murder and other crimes in connection with the gang-related shooting death of the victim. The evidence, very briefly stated, showed that appellant was one of nine gang members who arrived in two cars at the victim's house. Some of the gang members shot at the house, killing the victim.

Lovelace was one of the gang members who shot at the victim's house. Prior to trial, Lovelace pled guilty, but had not been sentenced. At appellant's trial, Lovelace was called by appellant to testify, but Lovelace asserted his Fifth Amendment rights. Appellant then proffered statements Lovelace made during his guilty plea hearing which, appellant contended, would have supported appellant's "mere presence" defense, which the trial court ruled were inadmissible.

Appellant contended that the trial court abused its discretion in by excluding Lovelace's statements. The Court stated that 1) Lovelace's invocation of his Fifth Amendment privilege made him "unavailable as a witness" pursuant to OCGA § 24-8-804 (a) (1); and 2) Lovelace's statements were hearsay. However, appellant

contended, the statements could be admitted under the prior-testimony exception to the hearsay rule, OCGA § 24-8-804 (b) (1). To be admissible under this provision, the testimony must be given at another hearing of the same or different proceeding, and if the party against whom the testimony is offered had an opportunity and similar motive to develop the testimony by direct, cross, or redirect examination.

The Court noted that OCGA § 24-8-804 (b) (1) is materially identical to Federal Rule of Evidence 804 (b) and the federal appellate courts that have considered the similar-motive requirement in Federal Rule 804 (b) (1) under circumstances like the one in this case have consistently held that the government does not have a similar motive to develop testimony at a co-defendant's plea hearing as it does at the appealing defendant's trial.

Here, the Court found, the prosecutor's motive in questioning Lovelace at the plea hearing was to establish that Lovelace's guilty pleas were voluntarily entered and that there was a sufficient factual basis for them. The prosecutor briefly examined Lovelace about who was present at the crime scene when he and others shot at the victim, but the prosecutor had no need at the plea hearing to develop testimony specifically about appellant. Indeed, the ultimate responsibility for ensuring that guilty pleas are voluntarily entered and factually supported lies with the judge, not the prosecutor

By contrast, if Lovelace had testified for the defense at appellant's trial, the prosecutor's motive would have been to test Lovelace's credibility. The prosecutor would have been particularly interested in developing testimony about appellant's interactions with Lovelace and the other co-defendants before, during, and after the fatal shooting and attempting to discredit any testimony Lovelace might have given suggesting that appellant was not a party to the murder. Thus, the State did not have a similar motive to develop Lovelace's testimony at his plea hearing as it had at appellant's trial, and the trial court's ruling that Lovelace's plea-hearing statements were not admissible under OCGA § 24-8-804 (b) (1) was not an abuse of discretion.

Moreover, the Court found, even if the plea-hearing statements had been admissible, any error in their exclusion was entirely harmless. As the trial court noted, Lovelace's proffered statements — that appellant was present in the car with him at the crime scene but was not a shooter — were cumulative of properly admitted testimony from several witnesses at trial that appellant was present but did not shoot at the victim. But those statements, like that testimony, did not prove that appellant was not a party to the crimes. Thus, it was highly probable that the exclusion of Lovelace's statements did not contribute to the jury's guilty verdicts.

General Demurrers; Ineffective Assistance of Counsel

State v. Heath, S19G0967 (6/1/20)

Heath was convicted of homicide by vehicle in the first degree based on reckless driving; homicide by vehicle in the second degree; five counts of serious injury by vehicle; and failure to stop at a stop sign. The Court of

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Appeals reversed Heath's convictions, except for the stop sign conviction, after concluding that trial counsel rendered ineffective assistance by failing to demur to the fatally defective felony counts in the indictment. *Heath v. State*, 349 Ga. App. 84, 89 (2) (2019). The Court granted the State's petition for writ of certiorari.

The State conceded at oral argument that each count in the indictment, except failure to stop at a stop sign, was subject to a valid general demurrer. The State also agreed with the Court of Appeals' determination that had trial counsel properly raised a general demurrer after jeopardy attached, the felony charges would have been dismissed, and that counsel's failure to do so resulted in Heath's convictions and incarceration for crimes set forth in a largely void indictment. Nonetheless, the State contended that Heath was not prejudiced by this failure because she had sufficient notice of the facts underlying the charges such that she could mount a defense and because the State presented evidence from which the jury found that Heath was guilty of the charges beyond a reasonable doubt. The Court disagreed.

The Court found that the State's lack of prejudice argument rested on the faulty premise that it does not matter if the indictment is invalid in substance so long as the defendant had sufficient notice of the charges. But, the Court stated, the lack of notice of the charges or allegations goes to the *form* of the indictment, which is challenged by a special demurrer, rather than a general demurrer.

Nevertheless, the State argued, Heath was not prejudiced because had a general demurrer been granted, the State would have corrected its error and re-indicted Heath, and it is reasonably probable that the second trial would have had the same result as the first. But, the Court stated, because a general demurrer challenges the validity of the indictment, a general demurrer may be raised after jeopardy has attached and at any time during trial. Also, setting aside the issue of whether a re-indictment would be barred by double jeopardy, the State's argument for no prejudice suffers from a fundamental flaw: presuming that upon re-indictment, Heath would have been convicted after a second trial. However, even assuming that the State could have re-indicted, the *Strickland* inquiry does not consider the likelihood of a future outcome at a different trial, but rather whether there is a reasonable probability that the result of *this* trial would have been different. Again, there was no doubt that this trial would not have resulted in a conviction on the felony charges if a general demurrer had been asserted. Thus, the Court of Appeals properly concluded that Heath had shown prejudice from her counsel's failure to file a general demurrer after jeopardy attached.

Finally, the Court noted that in *Walker v. State*, 329 Ga. App. 369) (2014), the Court of Appeals concluded that the failure of trial counsel to raise a valid general demurrer does not constitute ineffective assistance of counsel when the "defendant was not misled to his prejudice by any imperfection in the indictment." *Id.* at 373-74 (3) (a). In so ruling, *Walker* erroneously relied on *Coleman v. State*, 318 Ga. App. 478 (2012), which addressed an ineffective assistance of counsel claim in the context of both a special and general demurrer, to characterize the failure to file a valid general demurrer as a "minor and technical" deficiency. Therefore, the Court overruled *Walker* and *Coleman* to the extent that they hold that for purposes of considering an ineffective

assistance of counsel claim, the failure to assert a valid general demurrer cannot prejudice a defendant when the defendant had sufficient notice of the charges.

Accordingly, the Court concluded that Heath demonstrated prejudice under *Strickland* and affirmed the Court of Appeals' reversal of the trial court's denial of Heath's motion for new trial as to the vehicular homicide and serious-injury-by-vehicle convictions.

Jury Charges; Mistake of Fact

Norris v. State, S20A0500 (6/1/20)

Appellant was convicted of malice murder and a related firearm offense in connection with the shooting death of her father. The evidence, briefly stated, showed that appellant, who was 15 years old at the time, took a gun from her brother's room, walked downstairs to the couch where her father was sitting, pointed the gun at the back of his head, and shot him.

Appellant argued that the trial court erred by failing to charge the jury on mistake of fact. The record showed that, during the charge conference, appellant requested the trial court read the suggested pattern jury instruction for mistake of fact, which, tracking the applicable statute, stated that "[a] person shall not be found guilty of a crime if the act (or omission to act) constituting the crime was induced by a misapprehension of fact that, if true, would have justified the act or omission." See OCGA § 16-3-5 (defining mistake of fact). Appellant argued that the charge was warranted based upon her testimony that she did not know whether the gun was loaded prior to its discharge. The trial court disagreed and refused to give the requested charge.

The Court determined that its review was limited to whether there was plain error because appellant did not object to the trial court's ruling and did not lodge an objection at the end of the trial court's final charge to the jury. The Court also noted that through a complex analysis of the Georgia Code and English common law, appellant argued that Georgia law allows a defendant to assert a mistake of fact defense in order to reduce her culpability for an alleged crime, even where the underlying conduct — in this case, pointing a firearm at her father's head and firing — is "unlawful." Because of this, she contended, she was entitled to a mistake of fact jury charge. But, the Court found, appellant's intricate common-law argument was so convoluted and unsupported by Georgia authority directly on point that it could not say that the trial court's ruling amounted to clear or obvious error beyond reasonable dispute.

Moreover, the Court found, appellant's contention failed because she could not show that the trial court's failure to give the charge likely affected the outcome of the proceedings. The evidence presented at trial established that she fought with her father prior to his death, told her friend she was "fixing to do something" immediately prior to the shooting, was holding the gun to her father's head when it fired, fled the scene and

failed to call for help after the shooting, had her brother throw the murder weapon in a dumpster, went to dinner and hung out with her friend after committing the crimes, admitted to numerous people she had shot her father, lied to law enforcement on numerous occasions about her role in her father's death, and wrote a letter to the District Attorney taking "full responsibility" for her father's death. Thus, given the strength of the State's case, the trial court's refusal to instruct the jury on mistake of fact did not amount to plain error.

Other Act Evidence; Rule 404 (b)

Rouzan v. State, S20A0414 (6/1/20)

Appellant was convicted in 2013 of malice murder and other offenses in connection with the attempted armed robbery of Williams. At trial, the State sought to introduce extensive evidence regarding the death of LaBord that resulted in appellant's entry of negotiated guilty pleas to voluntary manslaughter and burglary in July 2009. The trial court admitted the evidence under *Williams v. State*, 261 Ga. 640 (1991) for the purposes of showing appellant's intent, knowledge, and motive.

Appellant contended — and the State conceded — that the trial court erred when it applied the wrong legal test in deciding whether to admit the other-acts evidence concerning the shooting death of LaBord. The Court then looked to whether the evidence was admissible under Rule 404 (b). First, the Court found that the evidence of appellant's involvement in the December 2006 shooting death of LaBord and appellant's resulting guilty pleas to voluntary manslaughter and burglary in July 2009 was not relevant to the non-character purposes of proving appellant's motive for committing the crimes for which he was on trial or any relevant "knowledge" on his part as that term is used in OCGA § 24-4-404 (b).

However, the Court found, the trial court may have been able to admit at least some of the challenged evidence for the purpose of showing appellant's intent because appellant was charged with malice murder and felony murder based on aggravated assault in connection with both shootings, and he was charged with the armed robbery of LaBord and with felony murder based on the attempted armed robbery of Williams. However, given the sheer volume of the LaBord-related evidence that was admitted, the trial court properly could have exercised its discretion under the current Evidence Code to conclude that the probative value of that evidence on the issue of intent was substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury or by considerations of undue waste of time or needless presentation of cumulative evidence. Specifically, the Court noted that more than half the testimony and more than two-thirds of the exhibits related to the LaBord incident.

Finally, the Court found that any error in the admission of the other acts evidence was not harmless. Specifically, the Court found that the evidence supporting appellant's convictions was not so strong that it was highly

probable that the jury was not improperly influenced by the strength and sheer volume of the other-acts evidence concerning the LeBord homicide.

Thus, according to its precedents for similar errors, the Court vacated the trial court's judgment and remanded the case to the trial court with direction to exercise its discretion to determine under the correct OCGA § 24-4-404 (b) test if the other-acts evidence was properly admitted. If the trial court decides under the correct test that the other-acts evidence was properly admitted, then the court should reenter the judgment against appellant, who could then take another appeal challenging that ruling. If, on the other hand, the court decides that the other-acts evidence should have been excluded, a new trial will be necessary.

Continuing Witness Rule; Juror Review of Evidence

Lyons v. State, S20A0536 (6/1/20)

Appellant was convicted of felony murder, two counts of aggravated assault, one count of home invasion, and two counts of possession of a firearm during the commission of a felony. Appellant contended that the trial court committed plain error by allowing certain state exhibits to be given to the jury during its deliberations in violation of the continuing witness rule. The Court disagreed.

The Court stated that the continuing witness objection is based on the notion that written testimony is heard by the jury when read from the witness stand just as oral testimony is heard when given from the witness stand. But, it is unfair and places undue emphasis on written testimony for the writing to go out with the jury to be read again during deliberations, while oral testimony is received but once. The types of documents that have been held subject to the rule include affidavits, depositions, written confessions, statements, and dying declarations. However, the continuing witness rule does not prevent the replaying of recorded statements in the courtroom at the jury's request during deliberations. Rather, the continuing witness rule applies to recordings that go back with the jury into the jury room.

And here, the Court found, the record showed that during the course of their deliberations, the jury was permitted to re-read the written statements of two witnesses and re-watch certain recorded statements and a surveillance video in open court. Appellant did not show by reference to the record that any of the evidence at issue was, at any time, viewed by the jury in the jury room. Consequently, the Court held, there was no error, let alone plain error, with respect to these exhibits.

Motions for New Trial; Orders

Treadaway v. State, S20A0410 (6/1/20)

Appellant was convicted of the felony murder of her husband. The record showed that on April 1, 2019, following the hearing on appellant's motion for new trial, the trial court allowed the parties to present their arguments by briefing rather than oral argument. Appellant timely filed her brief three weeks later. When the State's deadline passed, appellant's counsel inquired as to the status of the State's brief and learned that the State had made an ex parte request for an extension of time, which the trial court had granted. On July 10, 2019, the trial judge's administrative assistant called the assistant district attorney to request, for the court's consideration, an order denying appellant's motion for new trial. The following day, the assistant district attorney prepared a proposed order using a template that is standard in the judicial circuit. The trial court issued an order on July 17, 2019, denying appellant's motion, which stated: "Upon a consideration of the evidence presented and the argument of counsel, the Defendant's motion is hereby DENIED." The State never filed a brief in opposition to appellant's motion for new trial.

Appellant contended that the summary order denying her motion for new trial, which was prepared by the State following an ex parte request by the trial court, should be vacated and remanded to include findings of fact and conclusions of law. The Court disagreed.

The Court stated that generally, there is no requirement that a trial court issue written findings of fact and conclusions of law in ruling on a motion for new trial. This is true both when the trial court is assessing an ineffective assistance of counsel claim, and when considering whether to grant a new trial on the general grounds. In the absence of affirmative evidence to the contrary, the Court will presume that the trial court understood the nature of its discretion and exercised it.

However, appellant contended, the general rules and presumptions did not apply in her case because the ex parte contact between the trial court and the State resulted in the summary denial of the motion for new trial, even though the State never directly or explicitly responded to appellant's arguments. Thus, the Court stated, it must address whether the presumption that the trial court properly understood the nature of its discretion and exercised it applied under these circumstances.

The Court noted that it is well established in Georgia that a trial court may request and adopt a proposed order from either party. However, when a trial court requests a party to submit a proposed order, it should apprise the other party of the request and allow an opportunity to respond to any proposed findings and conclusions.

But here, the State never submitted argument for the trial court's review, and the trial court requested that the State draft the summary order without apprising appellant's counsel. However, the Court stated, appellant bore

the sole burden on her motion for new trial. And where appellant presented her arguments in support of her motion for new trial through briefing filed more than two months before the trial court's request for the State to submit a proposed order, the trial court had the opportunity to review appellant's arguments as well as the evidence presented at the hearing. In the absence of evidence to the contrary, the Court stated it must presume that the trial court properly exercised its discretion and applied the correct standards but was not persuaded by appellant's arguments on which she bore the burden of proof. In addition, because the record reflected that the trial court directed the State to draft an order denying the motion for new trial and the State provided a proposed order consistent with that direction, this was not a case in which findings were prepared by the prevailing party without judicial guidance, and it could not conclude that the trial court abdicated its adjudicative function.

Finally, the Court stated, it need not decide whether the trial court's contact with the State violated the prohibition on certain ex parte contacts in Rule 2.9 (A) of the Code of Judicial Conduct and Uniform Superior Court Rule 4.1 because even orders prepared ex parte do not violate due process and should not be vacated unless a party can demonstrate that the process by which the judge arrived at them was fundamentally unfair. And here, the Court found, although the circumstances of this case are indecorous, appellant failed to show that the trial court did not fully review the evidence or her claims or that the process was otherwise fundamentally unfair.

Batson; Race-Gender Composition

Hughley v. State, A20A0402 (5/21/20)

Appellant was convicted of two counts of armed robbery, two counts of aggravated assault, and one count of possession of a firearm during the commission of a felony. He contended that the trial court erred in overruling his *Batson* challenge asserting that the State had improperly used two of its peremptory strikes against the only two African-American males on the venire panel. The Court disagreed.

The record showed that there were 47 prospective jurors on the venire panel, and 32 of them would be qualified for potential selection. At the end of voir dire, appellant raised a challenge pursuant to *Batson*, asserting that Jurors 6 and 24, both African-American men, had been improperly struck. The trial court then asked about the racial and gender composition of the venire panel and the jury that had been selected. The attorneys and the trial court seemed to agree that there were five qualified African-Americans on the panel and that the State struck two of them. The State argued that there were three African-Americans in the jury pool that the State had accepted, but that appellant had struck. One African-American woman was empaneled on the jury. Based on this information, the trial court ruled that appellant had not made a prima facie case under *Batson*.

Appellant argued that the trial court erred in this ruling because his *Batson* challenge was not to the strikes of African-American jurors in general, but the striking of all available African-American males from the jury pool.

But, the Court noted, appellant cited no United States Supreme Court or Georgia precedent ruling that the protections of *Batson* extend to combined race-gender groups. However, in a similar case, the Eleventh Circuit has declined to recognize a race-gender group as a "cognizable racial group." See *U. S. v. Dennis*, 804 F.2d 1208 (11th Cir. 1986).

Thus, the Court stated, as an initial matter, the relevant cognizable racial group, for the purposes of analysis, was the group of blacks generally and not just black males. Such a group is one that is a recognizable, distinct class, singled out for different treatment under the laws, as written or as applied.

But, appellant failed to show that black males constitute a distinct, recognizable subclass of individuals who have been singled out for different treatment under the laws not simply as blacks, but as black males. Therefore, the Court concluded, it would be inappropriate to narrow the "cognizable racial group," to include only black males and exclude black females.

And here, the Court found, the State used only two of its peremptory challenges during the selection of the twelve jurors who decided the case to strike African-American men. Appellant also used two of his peremptory challenges to strike African-Americans that had been accepted by the State. Thus, it was obvious that the State did not attempt to exclude all blacks, or as many blacks as it could, from the jury. Accordingly, because appellant failed to make out a prima facie case of purposeful discrimination under *Batson*, the trial court did not err in denying his *Batson* challenge.

Challenge to the Poll; Judicial Estoppel

Purnell v. State, A20A0526 (5/22/20)

Appellant was convicted of first degree burglary. Prior to trial the State informed the court and appellant of its intent to seek a recidivist sentence under OCGA § 17-10-7. The State subsequently moved in limine to exclude any reference to the sentence appellant was facing if convicted, which the court granted.

Appellant argued that the trial court erred in denying his two motions for a mistrial after two potential jurors commented on punishment and parole during voir dire. He contended that the comments were prejudicial because they distracted the jury from considering the lesser included offense of theft by taking. The Court disagreed.

The Court noted, as an initial matter, that the time for making a motion for mistrial is not ripe until the case has begun, and the trial does not begin until the jury has been impaneled and sworn. In response to prejudicial comments before the venire, the proper procedural vehicle is a "challenge to the poll" or a motion to strike the panel and impanel new jurors who had not heard the remark. However, where the clear import of the motion is that the jury panel be excused and another panel be made available, the defendant's use of incorrect

nomenclature may be disregarded. And here, appellant sought to strike the venire and restart the process. Thus, despite the nomenclature of the motion, the trial court appropriately considered the merits of appellant's motion for mistrial.

In determining whether a trial court is required to excuse a jury panel for remarks made during voir dire, the inquiry is whether the remarks were inherently prejudicial and deprived appellant of his right to begin his trial with a jury free from even a suspicion of prejudgment or fixed opinion. If so, then the trial court's failure to excuse the panel constitutes an abuse of discretion. Generally, dismissal of a jury panel is required when, during voir dire, a prospective juror relays information that is specific to the defendant and germane to the case for which the defendant is on trial. Dismissal is not required, however, when the statements establish only gossamer possibilities of prejudice.

Here, the Court found, the potential jurors' comments on sentencing and parole were not inherently prejudicial. The comments did not relate to appellant specifically and did not imply that appellant was guilty of the crime with which he was charged. Moreover, the trial court instructed the jury that it was not to concern itself with punishment, and qualified jurors under oath are presumed to follow the instructions given by the trial court. Accordingly, the Court concluded, the trial court did not abuse its discretion in denying appellant's motion for mistrial and declining to strike the jury panel.

Nevertheless, appellant argued, the State was estopped from opposing his motion for a mistrial because the State sought and received a motion in limine ruling excluding discussion regarding appellant's potential sentence. The Court again disagreed.

First, the Court noted, while appellant contended that the estoppel was from a "record or judgment unreversed" under OCGA § 24-14-26 (b) (1), his arguments were more akin to judicial estoppel. Under the doctrine of judicial estoppel, where a party assumes a certain position in a legal proceeding, and succeeds in maintaining that position, that party may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party who has acquiesced in the position formerly taken by him.

Second, in a criminal prosecution, application of the doctrine of judicial estoppel is inappropriate. Judicial estoppel should not be applied in criminal proceedings against either the State or the defendant. But, in any case, the State did not adopt a contrary position to its motion in limine because it did not solicit or capitalize on the prospective jurors' comments. Accordingly, the Court held that the State was not estopped from opposing appellant's motion for mistrial.

Records Restriction; First Offender Act

Hayes v. State, A20A0621 (5/26/20)

Appellant, a high-ranking police officer, was indicted in another county on two counts of homicide by vehicle in the second degree, speeding in a construction zone, and driving too fast for conditions. After the State determined that it could not prove that appellant's speeding caused the death of the victim, who had run a stop sign, the trial court apparently entered an order of nolle prosequi on the original indictment. Thereafter, appellant was charged under a new accusation with an amended charge of speeding in a construction zone, for driving 41 miles-per-hour in a 35 miles-per-hour zone. Appellant entered a negotiated guilty plea and was sentenced to, among other things, a fine as a term of probation, and fees, together totaling \$1,315, which it was undisputed that he paid. The trial court granted appellant's consent motion to have his sentence modified and entered under the First Offender Act. Appellant then moved to seal the record. Following a brief hearing, the trial court denied the motion.

Appellant contended that the trial court erred in confusing media interest in his records with public interest. The Court disagreed. The Court noted that at the hearing, the State indicated it had received two Open Records Act requests. Although the trial court's order states that these were media requests, nothing in the record revealed the identity of the requester(s). Further, the trial court's order by its plain language clearly stated that because it found "*reasonable public interest*" in the records, it "*will not block media or public access[.]*" (Emphasis supplied.)

Appellant also contended that given the dearth of argument on the State's part, the trial court failed to correctly weigh any public interest versus harm to him. However, the Court found, in the trial court, appellant presented no argument as to how he would be harmed. At the hearing, he contended only that the misdemeanor speeding arrest he seeks to seal "doesn't appear to [present] any general interest as to why that's so overwhelming or necessary that the public needs to keep an interest in that." Likewise, in his motion to seal, he contended only that his "privacy clearly outweighs the public interest in Defendant's criminal history record information being publicly available[.]"

And here, the Court found, there was little evidence presented by either side. Nevertheless, the Court found that it was clear from the language of the trial court's order that it weighed the scant evidence presented — public interest exhibited in the form of two Open Records Act requests versus appellant's very general statement that he would be harmed — and did not find by a preponderance of the evidence that the harm otherwise resulting to the privacy of appellant outweighed the public interests in the criminal history record being publicly available." OCGA § 42-8-62.1 (d) makes clear that the discretion required to weigh whatever evidence has been presented rests squarely with the trial court. Accordingly, the Court found no error.