

## THIS WEEK:

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## Constitutional Right to a Speedy Appeal; *Barker v. Wingo*

*Mize v. State, A20A1296 (8/24/20)*

Appellant was convicted in 2009 of rape, kidnapping with bodily injury, aggravated sodomy, and aggravated assault. He filed a timely motion for new trial. After a hearing in 2019, the trial court denied the motion.

Appellant contended that the trial court erred by denying his motion for new trial because he was prejudiced by the over 10 year delay in the appellate process. The Court stated that the appropriate analysis for claims asserting due process violations based on inordinate appellate delay is the application of the four speedy trial factors set forth in *Barker v. Wingo*, 407 U. S. 514 (92 SCt 2182, 33 LE2d 101) (1972).

Here, the Court found, the trial court's order listed the *Barker* factors and determined that the length of the delay was excessive, that the reason for delay was not clear, and that "there is no evidence [appellant] did much if anything to assert his appellate rights during the ten year delay." As to the prejudice prong, the trial court stated that "[appellant] has provided no evidence of prejudice resulting from the delay." The trial court concluded that "[c]onsidering all four factors together, it does not appear that [appellant's] due process rights were violated[.]"

But, the Court found, the trial court's finding that appellant provided no evidence of prejudice resulting from the delay was not supported by the record. Appellant presented evidence before the trial court that his trial counsel had been suspended, disbarred, and then died during the delay in hearing his motion for new trial. The trial court did not address this evidence at all, but noted when denying appellant's ineffective assistance of counsel claims that "[w]ithout the benefit of trial counsel's testimony concerning his actions during his representation of [appellant], it is very difficult for th[e] presumption [that counsel's representation was within the wide range of reasonable professional assistance] to be overcome." However, the Court stated, it could not reconcile the trial court's finding that appellant presented no evidence

to support his appellate delay claim with the trial court's implicit finding that he was somewhat harmed by the lack of testimony by his trial counsel when analyzing his ineffective assistance of counsel claim. Instead, the Court found, the record clearly showed that appellant did attempt to demonstrate prejudice, and the trial court abused its discretion by basing its ruling in part on a finding that he did not. Accordingly, the Court vacated the trial court's order denying appellant's motion for new trial and remanded the case for the trial court to reconsider the *Barker* factors.

## **Opinion Testimony; Mental Capacity**

*Moreland v. State, A20A0917 (8/24/20)*

Appellant was convicted of aggravated sodomy. The evidence showed that the middle-aged victim had some mental disabilities. Appellant argued that the trial court erred in admitting "scientific and specialized testimony from a lay witness as to [the victim's] mental age and capacity." Specifically, appellant pointed to a statement from the victim's brother, in which he testified that his sister had "the mindset of maybe a ten-year-old child." Appellant objected that this "called for speculation and medical testimony," but the trial court overruled the objection.

The Court noted that although our case law on this issue focuses on lay testimony about insanity rather than mental capacity per se, it is well settled that if facts are given on which opinions are based, laymen are competent to give opinions on a person's mental condition. Here, the victim's brother also testified that his sister received a Supplemental Security Income check because of her "mental state" and because the government had declared her disabled, that she had gone to a "special needs" school, that he paid bills for her, that she lived with their mother, and that she could walk short distances on her own to the library, park, or a store about five minutes away, but that she did not have a driver's license or a job. He testified that his sister had been this way "since birth," and that he had grown up with her and currently helped his mother care for her. The brother did not testify as to the victim's IQ or any medical causes or diagnoses of her condition. See OCGA § 24-7-701 (a) (3). Thus, the Court agreed with the State that the testimony about the victim's mental capacity explained the rest of the brother's testimony and showed why the victim was naive enough to go into a stranger's house, and why she was too intimidated to immediately leave. See OCGA § 24-7-701 (a) (1), (2). Accordingly, the Court concluded, the trial court did not abuse its discretion in admitting this evidence.

## **Ineffective Assistance of Counsel; Failure to Subpoena Favorable Evidence**

*Tumlin v. State, A20A0947 (8/24/20)*

Appellant was convicted of aggravated child molestation and child molestation. Briefly stated, appellant's four year old daughter told her mother that "daddy made me suck his bottom," referring to his penis and that white stuff came out. She repeated these allegations in a forensic interview and to a therapist. At trial, however, the victim testified that she was five years old and that she did not remember who her dad was, she did not remember why she stopped seeing appellant, and she did not remember ever talking to anyone about anything appellant might have done.

Appellant contended that he received ineffective assistance of counsel because of his trial counsel's failure to subpoena favorable evidence. Briefly stated, appellant testified that two days before the outcry, he came home from work and noticed the victim's mother and the victim watching a "Dr. Phil" episode titled "Forgiving the Unforgivable" and the subject matter was child molestation. He and the mother then had an argument over the mother allowing the victim to watch the

show due to its graphic nature. Appellant's counsel then questioned appellant about the "convenience" of seeing a show about child molestation right before the outcry. The State on cross-examination then capitalized on this by asking appellant whether he had "any explanation as to why that show didn't even air in the Atlanta area on Tuesday?" The State on rebuttal called the mother to refute the testimony that she watches Dr. Phil every day. The mother testified that she did not remember seeing that particular show and stated she has only seen a few episodes.

Trial counsel testified at the motion for new trial hearing that the video would have been "great" to have, but she did not think she had the "manpower" to be able to obtain it. Trial counsel testified that the video "was very important to me and to my client." Despite the video's importance, however, trial counsel testified that she never filed a subpoena duces tecum against the television studio to obtain a copy of the video. However, an investigator for appellant's new counsel testified that he was able to subpoena a copy of the Dr. Phil episode titled "Forgiving the Unforgivable" and a copy was introduced into evidence. The Court reviewed the episode and found that it was about two daughters who claimed their stepfather molested them. The stepfather was subsequently jailed.

The Court found that this case was a pure credibility contest between the victim and appellant and thus, trial counsel's failure to introduce available evidence that corroborated appellant's testimony supported a finding that counsel's performance was deficient. Moreover, at trial, the victim did not have any recollection of who her father was, let alone the allegations which led to his arrest. While the State did introduce the child's forensic interview and testimony from her therapist, its case rested in large part on the testimony of the victim's mother, the initial outcry witness. Even more concerning, by his unartful questioning, appellant's trial counsel essentially called into question the existence of the only evidence that could have corroborated his explanation of events. Therefore, the Court found, a reasonable probability existed that this evidence could have impeached the mother's credibility and corroborated appellant's testimony and its introduction would have affected the result of the trial. Accordingly, the Court concluded that the trial court erred by finding that appellant did not receive ineffective assistance of counsel and appellant's convictions were reversed.

## **DUI; Breath Tests**

*State v. Henderson, A20A1293 (8/25/20)*

Henderson was charged with DUI. He filed a motion in limine to exclude the results of his breath test, arguing that the implied consent read to him was misleading. The trial court agreed. Citing extensively from the Supreme Court's recent case of *Elliott v. State*, 305 Ga. 179 (2019), the trial court concluded that the implied consent notice given "was materially and substantially misleading because it suggested that if [Henderson] exercised his constitutional right to refuse the state-administered breath test, such refusal could be used against him at trial." The State appealed.

The State argued that the trial court, in relying solely on the reading of the implied consent notice by the officer, failed to correctly apply the totality of the circumstances test. Specifically, the reading of the notice is only one factor to be considered. Absent evidence showing that a defendant was, in fact, misled, the State argued that suppression of test results was not warranted. The Court agreed.

The Court stated that based on *Olevik v. State*, 302 Ga. 228 (2017), *Elliott*, and their progeny, it is clear that when a defendant seeks to suppress evidence of a breath test, the appropriate inquiry remains whether the defendant's consent to

the test was voluntary under the totality of the circumstances. Here, the trial court focused solely on the misleading nature of the implied consent warning. But in determining voluntariness, no single factor is controlling. Thus, the Court stated, although the reading of the implied consent notice may be one factor that is considered in determining whether consent to a breath test was voluntary, the trial court also must consider factors such as a defendant's age, education, capacity, the nature of questioning, and any threats employed. And where, as here, a trial court's order does not reflect consideration of voluntariness under the totality of the circumstances, remand is required. Accordingly, the judgment of the trial court was vacated and the case remanded.

## **Shoplifting; Jury Charges**

*Amosu v. State, A20A1432 (8/27/20)*

Appellant was convicted of shoplifting. He contended that the trial court plainly erred in its instructions to jury on the elements of shoplifting. The Court agreed.

Under OCGA § 16-8-14 (a) (1), “[a] person commits the offense of theft by shoplifting when such person ... with the intent of appropriating merchandise to his or her own use without paying for the same ... [c]onceals or takes possession of the goods or merchandise of any store or retail establishment. ...” Despite the statutory language on intent, the trial court's jury charge on the shoplifting elements omitted any reference to intent: “This defendant is charged with the crime of shoplifting, ... defined ... as follows: A person commits the offense of shoplifting when such person conceals or takes possession of the goods or merchandise of any store or retail establishment.” Criminal intent is a material element of the offense of shoplifting, and reading the jury charge as a whole, the Court found that it was apparent that the trial court failed to mention the requisite intent to appropriate the merchandise without paying for it. This was a clear omission not subject to reasonable dispute. Eliminating the intent element relieved the State of its burden to prove each material element of the crime and allowed the jury to find appellant guilty without finding that he committed the shoplifting offense defined by OCGA § 16-8-14 (a). The Court further found that the omission affected the outcome of the proceeding and seriously undermined the fairness and reputation of the trial. Thus, the trial court's instruction resulted in plain error. Accordingly, the Court reversed the judgment of conviction.

## **Resentencing; Credit for Time Served**

*Thelusma v. State, A20A1076 (8/27/20)*

In 2015, the trial court entered appellant's original sentence of fifteen years, with five years to serve in prison and the remaining ten years on probation. All sentences ran concurrently. After the trial court granted appellant's motion for new trial as to several charges and entered orders of nolle prosequi on those charges, appellant appealed. However, the Court dismissed his appeal as interlocutory and directed the trial court to enter a new written sentence. *Thelusma v. State*, Case No. A19A2306 (Aug. 23, 2019). Following a resentencing hearing, the trial court sentenced appellant to a total of three years with one year to serve in prison. Specifically, the court sentenced appellant to one year in prison for fleeing or attempting to elude an officer (Count 6), one year of probation for discharging a gun near a highway or street (Count 9), and one year of probation for driving with a suspended license (Count 10), with all sentences to run consecutively.

Appellant contended that the Court's order dismissing his prior appeal limited the trial court to reentering its original sentence with regard to Counts 6, 9, and 10, and that the trial court improperly increased his sentence at resentencing. The Court stated that a trial court has discretion in fashioning a sentence that is fair and just. Where that sentencing scheme unravels due to elimination of some of the original counts, the judge should be given a wide berth to fashion a new sentence that accurately reflects the gravity of the crimes for which the defendant is being resentenced. Accordingly, the Court found, the trial court was free to resentence appellant after it entered its order of nolle prosequi on multiple counts and nothing in its order in Case No. A19A2306 limited the trial court's authority in this regard.

Moreover, the Court found, the new sentence entered by the trial court did not increase appellant's sentence; it reduced it. Whereas appellant was originally sentenced to a total of fifteen years with five years to serve in prison, he was resentenced to a total of three years with one year to serve in prison. Also, whereas appellant was originally ordered to pay \$3,000 in fines, his new sentence only included \$2,000 in fines.

Nevertheless, appellant argued, the trial court erred to the extent it limited his credit for time served. The Court agreed. Based on the record, it appeared that appellant completed his original five-year term of imprisonment. The exact time spent in prison was not clear from the record, but appellant stated that he was sentenced in April 2015 and served time in prison before being paroled in 2017. It was also not clear whether appellant began serving the probationary term of his original sentence upon his release from prison. The trial court, however, stated at resentencing that appellant was entitled to credit for time served only for the one-year prison portion of the new sentence, and not the two-year probation term. The trial court said that appellant had never started probation so he was required to serve the full two years of probation beginning from the date of the resentencing hearing. In so doing, the trial court erred.

Under OCGA § 17-10-11 (a), a person is entitled to full credit for time "spent in confinement awaiting trial and for each day spent in confinement, in connection with and resulting from a court order entered in the criminal proceedings for which sentence was imposed . . ." Here, appellant spent more than one year in prison following his original sentence, and he was entitled to credit for all the time he served in prison or on probation against his new sentence, including the two years of probation in his new sentence.

Nevertheless, the Court concluded, reversal of his conviction is not required. The new written sentence entered by the trial court did not purport to limit appellant's credit for time served, and the written sentence controls over the trial court's oral pronouncements regarding sentencing. Thus, the Court stated, to the extent the trial court's oral pronouncement purported to limit the credit given for time served, the trial court was directed that credit for time served shall be extended for any time appellant spent either incarcerated or on probation following the original conviction and sentence.

## Record Restriction; Clerk's Files

*Rich v. State, A20A1017 (8/27/20)*

Appellant was charged with sexual assault of a student in violation of OCGA § 16-6-5.1 (b) (1), which prohibits sexual contact between a teacher and a student. Appellant successfully moved to quash the indictment because OCGA § 16-6-5.1 did not apply to appellant's alleged sexual conduct with two students because she was a substitute teacher at the time

— a contract employee — and the conduct occurred outside of school. The Court affirmed. *State v. Rich*, 348 Ga. App. 467 (2019).

Thereafter, appellant moved to seal the records of the clerk of court pursuant to OCGA § 35-3-37 (m). Following a hearing, the trial court denied the motion, “find[ing] by a preponderance of the evidence, that due to the allegations in the case and the benefit of record restriction enjoyed by [appellant], the harm resulting to [her] privacy interest is not clearly outweighed by the public's right to know.”

Appellant argued that the trial court erred because (a) the public has no interest in criminal history information if there has been a judicial determination that the defendant has not committed a crime; (b) the trial court applied the wrong standard; and (c) the publicity and prior published opinion in this case did not diminish her privacy interest in the clerk's file. The Court disagreed.

The Court noted that the parties stipulated that appellant's criminal history record information had been restricted. Accordingly, the sole issue was whether the trial court abused its discretion by finding by a preponderance of the evidence that the harm otherwise resulting to appellant's privacy did not clearly outweigh the public interest in the public availability of her criminal record.

The Court stated that to satisfy the preponderance-of-the-evidence standard, appellant was required to demonstrate that the superior weight of evidence upon the issues involved, which, while not enough to free the mind wholly from a reasonable doubt, is yet sufficient to incline a reasonable and impartial mind to one side of the issue rather than to the other. At the motion hearing, appellant's attorney argued that “[a]ppellant's privacy interest ... [that] she is concerned about, in talking to her, her main concern is the curiosity of her children. Her children are starting to become of age and, I think, have had some questions about what happened to her. And so I know on a personal level that's one of the things that she's most concerned with, is them coming to the courthouse and looking. But there's also neighborhood, extended family, social, and church connections. She does have a ... good job. It is not involving children. She works in the veterinary sciences, is — is pursuing higher education in that field.”

However, the Court found, appellant did not testify at the hearing on the motion to seal her record, nor was there an affidavit from her in the record. And her attorney's representations about what appellant relayed to him are not evidence. Furthermore, even assuming the representations were testified to by appellant, they lacked sufficient detail and specificity to meet the burden of showing by a preponderance of the evidence that her privacy interests clearly outweighed the public's interest in the records. Accordingly, the Court concluded, it could not say that the trial court abused its discretion by denying her motion.

## **Possession of Cocaine; Sufficiency of the Evidence**

*Kimble v. State, A20A1329 (8/28/20)*

Appellant was convicted of possession of cocaine. The evidence showed that Floyd, who had worked with appellant for several years, moved into appellant's trailer. Less than two weeks later, the two men went to a friend's house and consumed alcohol. Later that evening, appellant and Floyd began arguing, a physical altercation ensued, and Floyd left the apartment in his vehicle. Floyd called 911 and claimed that appellant had pistol whipped him. Officers took a statement from Floyd,

and subsequently made contact with appellant at his residence. Appellant agreed to allow officers to search the residence, and there, in a tall dresser drawer, an officer discovered a paper bag containing two crack pipes. Chemical testing confirmed the presence of cocaine in the samples tested.

Appellant argued that the evidence was insufficient to support his conviction because the State failed to prove that he was in actual or constructive possession of the cocaine found in the trailer. Emphasizing the lack of evidence that the cocaine was discovered in his room, he contended that any evidence of constructive possession was purely circumstantial, and the evidence submitted to the jury did not rule out all other reasonable hypotheses except for appellant's guilt. The Court agreed.

The Court noted that at trial, the officer who discovered the crack pipes in appellant's trailer testified that he did not ask appellant if the crack pipes were his, nor did the State present evidence that the room in which the contraband was found was appellant's. Indeed, the officer admitted that it was equally likely that the pipes belonged to appellant or Floyd because they both lived in the trailer. And, the State conceded there was insufficient evidence to support the conviction for possession of cocaine and the State failed to meet its burden to rule out all other hypotheses. Accordingly, appellant's conviction was reversed.

## **Jurors; Replacement with Alternates**

*Brown v. State, A20A1356, A20A1358 (9/1/20)*

Appellants were convicted of five counts of cruelty to children resulting from the malnourished state of those children, as well as the physical abuse of one of the children. The record showed that on two occasions the trial court had to address Juror 14 for arriving late to court by inquiring why the juror was late and conveying the importance of her timely arrival. The first time the trial court did not believe that the juror's demeanor indicated that she appreciated the importance of her service, and on the second occasion the juror started crying while explaining her tardiness to the judge.

The trial court also noticed Juror 14 appearing to fall asleep on more than one occasion during the presentation of evidence. At one point, during the testimony of one of the first responders, the trial court addressed Juror 14 to wake her up. On a different day of trial, another juror had to nudge Juror 14 to wake her up, though Juror 14 denied to him that she had been asleep. The trial court was concerned that Juror 14's behavior was becoming a distraction to this other juror. Even if the juror was not actually asleep, the trial court observed that Juror 14 was not paying attention to the evidence. The trial court did not address the issue of falling asleep with Juror 14 again because that would have been the fourth occasion the trial court had individually chastised the juror. Prior to the deliberations of the jury and over appellants' objections, the trial court removed Juror 14 from the panel and replaced her with an alternate.

Appellants contended that the trial court erred in failing to question Juror 14 before replacing her with an alternate. But, the Court found, in light of the numerous issues presented by Juror 14 and the number of times the trial court had to counsel the juror, the trial court did not abuse its discretion in removing her from the panel. Moreover, the trial court did not need to conduct any further inquiry of the juror because the multiple bases for the juror's removal were obvious. The trial court's concern with continuing to single out a specific juror with whom there were ongoing issues was a valid one.

Finally, because Juror 14 was removed prior to jury deliberations, there was no concern that she was targeted as a hold-out juror preventing a conviction.

## **Sovereign Citizens; Right to be Present at Trial**

*Morman v. State, A20A1456 (9/3/20)*

Appellant was convicted of armed robbery, kidnapping, and related crimes. Very briefly stated, the record showed that due to his erratic behavior, the trial court became concerned about appellant's mental health, ordered a psychiatric evaluation, and severed his trial from his two codefendants. He was initially found incompetent to stand trial, but was eventually deemed competent to do so. Subsequently, during a pretrial hearing in which the court ensured he wished to proceed pro se, appellant declared that the trial court lacked jurisdiction over him because he was a sovereign citizen and indicated that he would not appear at trial.

From the beginning of his trial, which began a week later, appellant was uncooperative and refused to dress in the street clothes provided to him for court appearances or even in his orange jail-issued jumpsuit. He stated for the record that he was "completely naked" and in a "six-point strapped chair." The judge returned him to jail after appellant stated that he did not wish to appear in court because he was not the person on trial. The next day, appellant was brought back into court and again stated he did not want to be there. Then, he said he "would remain silent" because, as a sovereign citizen, he was not on trial. When the court asked if he wished to remain in the courtroom, he did not respond. So, the judge left him in the courtroom and arranged it so the jury would not see his shackles. During a break, while using the restroom, appellant removed the clothes he had been wearing and refused to redress. Thus, after returning to the courtroom, appellant was wrapped in a blanket outside of the jury's presence and was carried shackled to a chair into the courtroom. Appellant refused to address the judge and say whether or not he wished to remain in the courtroom so the judge let him remain. But, after the lunchbreak, the judge decided it was best to remove him from the courtroom for the rest of the trial unless appellant indicated a desire to return to court in which case the judge was to be informed immediately.

A photograph in the record showed appellant slouched in a high-backed chair with his bare chest exposed and his lower body wrapped in a thick, quilted black blanket. His arms appeared to be strapped to the chair at the wrist, but while it was impossible to tell from the photographs whether his legs were shackled, there appeared to be no question that they were. The photographs taken from the jury's perspective showed only appellant's upper half and did not reveal any portion of his strapped arms or shackled legs because a black cloth or garbage bag was taped around the edges of the defense's table, obscuring the jury's potential view of the lower portion of his body. As a result, all that was visible to the jury was most of appellant's bare upper torso and a small portion of the blanket over the top of the desk.

Appellant contended that the trial court erred by allowing him to be seen by the jury while naked, wrapped in a blanket, shackled, and strapped to a chair. But, the Court found, the photographs in the record showed that these restraints on appellant were not visible to the jury, and there was no indication that the jury was otherwise made aware of them. As a result, appellant failed to show that these forms of restraint interfered with his ability to receive a fair trial.

Next, the Court addressed whether the trial court erred by permitting the jury to see appellant wrapped in a blanket but otherwise undressed. The Court noted that appellant was provided with civilian clothes and an opportunity to dress; but he repeatedly declined that offer. Indeed, when presented with this option, appellant chose instead to undress and refused

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to redress, at which point he was wrapped in a blanket so as not to expose himself in court. So, by his own actions, he waived his right to appear in civilian clothing (or even to appear in his prison jumpsuit after he removed it), and thus, the trial court did not err by requiring him to appear in court wrapped in a blanket.

However, the Court stated, it still needed to consider whether the trial court erred by requiring appellant to remain in the courtroom after he had already advised it that he did not wish to participate in the proceedings. After reviewing the court proceedings at length, the Court found that the trial court was placed between the proverbial rock and a hard place by appellant's conduct in refusing to dress or state on the record his express desire to waive the right to attend the proceedings. And based on this record, the Court found that the trial court may very well have concluded that appellant waived his right to attend the proceedings at the outset by his disruptive conduct in refusing to dress. But the court admirably did its best to balance appellant's rights to appear in street clothes, represent himself, and be present during his own trial. As a result, under the particular facts and circumstances of this case, the Court concluded that the trial court did not abuse its discretion when appellant appeared before the jury in a state of undress for a brief portion of his multi-day trial.