Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE
WEEK ENDING NOVEMBER 20, 2020
Issue 47-20

THIS WEEK:

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- **Indictments; Merger of Offenses**
- **Due Process; Constitutional Right to a Speedy Appeal**

Probation Revocations; Right to Counsel

Newbern v. State, A20A0853 (9/17/20)

In 2017, appellant pled guilty to one count of exploitation and intimidation of a disabled adult, elder person, or resident and agreed to pay $9,438.59 in restitution to the victim and spend ten years on probation. In 2019, his probation was revoked for failure to make restitution payments to the victim.

He argued that the trial court erred by failing to (1) inform him of his right to request appointed counsel, (2) determine whether he was entitled to appointed counsel, and (3) state reasons on the record for refusing to allow him to have appointed counsel. The Court agreed.

The Court stated that there is no Sixth Amendment right to counsel at a revocation proceeding, but a probationer does have a more limited due process right to counsel under the Fourteenth Amendment. Thus, a probationer is entitled to be informed of his right to *request* counsel and this right is not waived merely by a party unknowingly failing to insist upon a lawyer in a proceeding in which he is *not even advised* that he might request counsel.

In *Gagnon v. Scarpelli*, 411 U.S. 778 (93 SCt 1756, 36 LE2d 656) (1973), "presumptively," counsel should be appointed when requested based on a timely and colorable claim (1) that the probationer has not committed the alleged violation of the conditions upon which he is at liberty; or (2) that, even if the violation is a matter of public record or is uncontested, there are substantial reasons which justified or mitigated the violation and make revocation inappropriate, and that the reasons are complex or otherwise difficult to develop or present.

Here, the Court found, it was evident from the record that the trial court never advised appellant of his right to request appointed counsel, as it should have done. In fact, the Court found, even after appellant stated on the record that he wished to have counsel, the trial court never determined whether he was, in fact, entitled to have counsel appointed. Additionally, the trial court never stated any reasons on the record for not appointing counsel. Instead, the transcript of the hearing

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revealed that the court gave no consideration whatsoever as to whether appellant should be given such assistance. Consequently, the Court held, in failing to do so, the trial court erred.

Nevertheless, relying on *Banks v. State*, 275 Ga. App. 326 (2005), the Court stated that a remand to apply the *Gagnon* test would not be necessary if (1) the probationer admitted to the probation violation; (2) he did not claim any reasons justifying or mitigating her violations; and (3) the record reflected that he capably spoke for himself. And here, the Court found that although appellant admitted not making restitution payments, he contended that he had been unable to repay the victim due to ongoing medical issues from which he suffered that required MRIs on his back, and going to court so that he and his wife could take in family members' children who had been placed into the custody of DFCS. The Court also found that appellant was not able to represent himself at the probation revocation proceedings because he did not call the right witnesses in support of his alleged medical disability and did not put into evidence medical records that he had brought to court in his defense.

Thus, the Court held, under these circumstances, a remand was necessary. Accordingly, the Court vacated the order of revocation and remanded the case so that the trial court may either state its reasons for not appointing counsel when appellant indicated that he wished to have an attorney represent him at the hearing or, alternatively, proceed with a new revocation hearing, in which appellant is afforded the opportunity to be represented by counsel.

Statutory Double Jeopardy; Actual Knowledge of Prosecutor

Massengille v. State, A20A1161 (9/18/20)

In 2018, a deputy sheriff attempted to stop appellant's vehicle for a stop sign violation. Appellant failed to stop and led the deputy on a high speed chase. Because of poor visibility, the deputy cut off his pursuit, but radioed in a vehicle description. A city police officer noticed the vehicle and attempted, albeit unsuccessfully to stop appellant's vehicle. The city officer also lost contact with the vehicle. However, about 15 minutes later, appellant crashed his vehicle into a tree.

Appellant was cited by the city for driving with a suspended license, fleeing police, and reckless driving; he pleaded guilty to those charges in June 2018. In November 2018, appellant was charged in the superior court with fleeing or attempting to elude a police officer, failing to stop at a stop sign, speeding, failure to maintain lane, improper passing, reckless driving, driving with a suspended license, and possessing less than an ounce of marijuana. Appellant filed a plea in bar alleging procedural double jeopardy because the prosecution should have been brought in one proceeding. After a hearing, the court denied the motion.

Appellant contended that the trial court erred in denying his plea in bar. The Court noted that the Georgia Criminal Code provides for a procedural protection, in addition to traditional constitutional protections, against being "worn down" by multiple prosecutions for offenses arising from the same criminal conduct. Under OCGA § 16-1-7 (b), if several crimes 1) arising from the same conduct are 2) known to the proper prosecuting officer at the time of commencing the prosecution and are 3) within the jurisdiction of a single court, they must be prosecuted in a single prosecution. A second prosecution is barred under OCGA § 16-1-8 (b) (1) if it is for crimes which should have been brought in the first prosecution under OCGA § 16-1-7 (b). In order for this procedural aspect of double jeopardy to prohibit a prosecution, all three prongs must be satisfied. A defendant who asserts a plea in bar pursuant to OCGA §§ 16-1-7 and 16-1-8 bears the burden of

affirmatively showing that the prosecuting attorney who handled the first prosecution had actual knowledge of the facts supporting the charge allegedly subject to a plea in bar.

Thus, the Court stated, the vital question pertains to the city prosecuting officer's knowledge of all the charges on the date when the defendant's guilty plea was accepted to fewer than all the crimes arising from his conduct.

Here, appellant called the prosecuting attorney for the city to testify about the guilty plea he took from him in the first criminal proceeding. The attorney, who was in private practice and served as an associate solicitor as part of his firm's representation of the city, testified that he lacked specific memory of the case and could not recall whether he had actual knowledge of facts or charges beyond what was in the citations he resolved with appellant's guilty plea. During the examination, the attorney speculated about whether, in his normal process, he would have encountered a police report that would have indicated other charges, but he ultimately testified that he could not say whether he had actual knowledge of any offenses beyond the citations he prosecuted. Based on the attorney's testimony, the superior court made an explicit finding that appellant did not meet his burden to show that the city attorney had actual knowledge of all the facts supporting the superior court charges, and consequently, the Court discerned no clear error. It was for the superior court to weigh the attorney's testimony and resolve any inconsistencies in it. Accordingly, the Court concluded, appellant's challenge demonstrated no basis for reversal.

Procedural Double Jeopardy; Revocation of First Offender Status

Thomas v. State, A20A1536 (9/18/20)

In 2016, appellant pleaded guilty under the First Offender Act to two counts of aggravated assault, one count of violation of the Georgia Street Gang Terrorism and Prevention Act ("GSGTPA") and obstruction. In 2019, the State filed a petition for adjudication of guilt in the 2016 case on the grounds that appellant violated the terms and conditions of probation by committing multiple new offenses, had contact with a known gang member and a person on probation, failed to report to his probation officer, and failed to participate in his substance abuse group, all of which were prohibited by the 2016 sentence. Following a hearing, the trial court granted the petition, concluding that appellant, by a preponderance of the evidence committed: statutory rape between August 10, 2018 and August 11, 2018; violations of the GSGTPA between January 3, 2019, and January 8, 2019; theft by taking between January 7, 2019, and January 8, 2019; entering an automobile, armed robbery, possession of a firearm during the commission of a felony, and three counts of aggravated assault on or about January 8, 2019; and unlawful acts of violence in a penal institution. The court also found that appellant had contact with gang members, failed to report for drug screens, and failed to participate in his substance abuse group. The court adjudicated appellant guilty and resentenced him to 36 years, to serve 35 years.

Appellant was subsequently charged in three separate indictments for the crimes which formed the basis for his first offender revocation. Appellant filed pleas in bar to each of the indictments and the court denied all three.

Appellant contended that the trial court erred by denying his pleas in bar because the State's use of the three 2019 cases to adjudicate him guilty and impose a sentence in the 2016 case bars his prosecution in the present cases on double jeopardy grounds. Citing *Zellner v. State*, 353 Ga. App. 527 (2020) (cert. applied for, Case No. S20C0882), the Court disagreed.

First, the Court stated that the constitutional prohibition against double jeopardy was designed to protect an individual from being subjected to the hazards of trial and possible conviction more than once for an alleged offense. Here, as in *Zellner*, the crimes alleged in the three instant cases, which are alleged to have occurred in 2019, are based on entirely separate events than that in 2016. Thus, appellant was not in jeopardy of being convicted more than once for the same offense.

Second, the use of the 2019 crimes as a basis for his guilt adjudication in the 2016 case is permitted by the First Offender Act, which provides that the court may enter an adjudication of guilt and proceed to sentence the defendant when the defendant violates the terms of his or her first offender probation. And here, appellant was accused, in part, of violating his first offender probation in the 2016 case by violating certain criminal statutes.

Finally, the Court found meritless appellant's argument that his prosecution for the instant crimes was barred by OCGA § 16-1-8 (b) (1), which provides in relevant part that "[a] prosecution is barred if the accused was formerly prosecuted for a different crime … if such former prosecution … [r]esulted in … a conviction . . . and the subsequent prosecution … is for … crime[s] which involve[] the same conduct[.]" Here, the 2019 crimes involve different conduct than the crimes for which he was convicted in the 2016 case. And, he was not convicted of the instant crimes in the 2016 case; instead, his first offender status was revoked and he was adjudicated guilty and convicted of the crimes alleged in the 2016 indictment.

Impeachment by Contradiction; Relevancy

Moore v. State, A20A1348 (9/21/20)

Appellant was convicted of aggravated assault (family violence) and battery (family violence). The victim was appellant's wife. Appellant contended that the trial court abused its discretion by prohibiting a witness from testifying at his trial. The Court disagreed.

The transcript showed that during the trial, appellant's counsel proffered that he received a phone call from one of the victim's friends who stated that it was common knowledge that the victim was having an affair. Trial counsel wished to call her as a witness to impeach the victim's testimony that she was not having an affair. The trial court heard the friend's testimony outside of the presence of the jury in order to determine its admissibility. The friend testified that it was common knowledge that the victim was having an affair, and that she knew about the affair because on one particular occasion, she had observed "lingering touches" between the victim and the person with whom she was allegedly having an affair. The friend asked the victim how long "that [had] been going on" and the victim replied "a while." This conversation took place approximately seven years prior to the assault. The trial court excluded the friend's testimony after finding that "[w]hether or not [the victim] had or did not have any affair … has nothing to do with this case" and concluding that the testimony was too remote and speculative.

The Court stated that the admission of evidence lies within the sound discretion of the trial court. "A witness may be impeached by disproving the facts testified to by the witness." OCGA § 24-6-621. The use of extrinsic evidence to impeach a witness by contradiction, however, is not unlimited. 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 found, the trial court did not abuse its discretion when

it excluded the extrinsic evidence of the alleged affair because it was speculative and had no bearing on whether appellant assaulted the victim.

Search & Seizure; Curtilage

State v. Davis, A20A1204 (9/22/20)

Davis was indicted for two counts each of armed robbery, aggravated assault, and possession of a firearm during the commission of a felony. Briefly stated, the evidence showed that Davis was arrested after two individuals were robbed at gunpoint by thieves who drove up next to them in a white pickup truck. Police followed the tracking information from a victim's stolen cell phone to Davis' neighborhood, where they located him in a white pickup truck parked in his driveway. Police ultimately seized a cell phone case, earbuds, and a handgun. Davis moved to suppress the evidence against him, which the trial court granted on the bases that the police did not have reasonable suspicion to enter Davis' property, Davis had a reasonable expectation of privacy in his truck in his driveway at the time police searched his truck, and no exigent circumstances existed to justify the warrantless search. The State appealed.

The State argued that the trial court erred in finding that Davis had a reasonable expectation of privacy in his truck in his driveway. The State conceded that the officer's interaction with Davis was not a voluntary first-tier encounter, given that the officer immediately forcibly removed Davis from his car and detained him. But, the State justified the police officers' intrusion onto Davis' driveway on the ground that officers had a particularized and objective suspicion that Davis committed a crime in light of the fact that his truck matched the description given by the victims and was in the vicinity of the stolen cell phone pings.

However, the Court stated, it need not decide whether police had the requisite reasonable suspicion to initiate a second-tier encounter with Davis because he had a reasonable expectation of privacy in his driveway, which is part of the curtilage of his home. Thus, even if the officers had the heightened standard of probable cause to investigate a crime, the Fourth Amendment prohibited them from entering Davis' home or its curtilage without a warrant absent consent or a showing of exigent circumstances.

Nevertheless, the State argued, the prohibition against such entry into the curtilage of a home is subject to the exception that any visitor, including a police officer, may enter the curtilage of a house when that visitor takes the same route as would any guest, deliveryman, postal employee, or other caller. But, the Court noted, this exception has been recognized in cases involving first-tier encounters where police seek to "knock and talk" with the resident of a home. The State failed to cite any cases which permitted an officer to traverse the driveway of a home for the purpose of initiating a second-tier encounter and detention. And, when police engage in behavior which is beyond what any private citizen may do, the basis for this exception evaporates.

Thus, the Court found, the police were not legally present on Davis' driveway at the time he was detained. The officers were not authorized to enter the curtilage of Davis' home for the purpose of initiating a second-tier encounter absent an exception to the warrant requirement. Accordingly, because all of the evidence against Davis was obtained as a result of an unlawful search and seizure, the trial court did not err in suppressing it.

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Indictments; Merger of Offenses

Townsend v. State, A20A1478 (9/24/20)

Appellant was convicted of three counts of theft by taking and one count of forgery in the first degree. Briefly stated, the evidence showed that the victims wanted to invest in a minor league professional basketball team. Appellant told them he could make that happen. The victims gave appellant $40,000.00 toward their ownership interest in January 2008. In February 2008, the victims gave appellant $60,000.00 more and in June 2008, the victims gave appellant an additional $100,000.00. Eventually, the victims realized that appellant was defrauding them and appellant was arrested.

Appellant contended that the three theft by taking counts merged into one count because they involve the same crime committed on different dates, but the date was not made a material element. The Court stated that it was constrained to agree.

The Court noted that in Counts 1, 2, and 3 of the indictment, appellant was charged with taking an amount over $500 from the victims on three different dates. Specifically, the indictment alleged that, on separate dates, appellant: "… did unlawfully take a sum of United States currency, the property of [the victims], with a value exceeding $500.00, with the intention of depriving said owner of said property, *this count not included in any other count of this indictment*[.]"(Emphasis supplied.)

The State contended that this language is sufficient to make the date material and to protect appellant from double jeopardy concerns. However, citing its recent decision in *Thomas v. State*, 352 Ga. App. 640, 642 (1) (a) (2019), the Court held that the allegations in the indictment failed to particularize the dates, such as by specifying the amount of money taken on each occasion, and therefore, the date was not a material element in the indictment.

The Court also noted that it has never opined what language is required to make the date material in the absence of express language stating that it is. But, the Court concluded, simply stating that the offenses in each count are "not included in the other counts" does not specifically allege that the date is material. Consequently, appellant was correct that his convictions for theft by taking must merge. And, as the sentences imposed on each count were to run consecutively, the Court vacated the sentences and remanded with instructions to merge the three theft offenses and resentence appellant for only one theft conviction, in addition to the forgery conviction.

Due Process; Constitutional Right to a Speedy Appeal

Hardeman v. State, A20A1434 (9/29/20)

Appellant was convicted of one count of rape, two counts of child molestation, and two counts of simple battery. The record, briefly stated, showed that appellant was convicted by a jury on October 14, 2003. On November 6, 2003, appellant wrote a pro se letter to the trial court seeking an appeal. Around the same time, appellant sent a letter to the clerk of court, requesting to appeal his conviction and for a trial transcript. On November 24, 2003, the county's contract public defender at the time filed a boilerplate motion for new trial even though he never met with appellant. Appellant's trial counsel died in 2008. Appellant was released in 2013. In 2019, appellant received a rule nisi on the 2003 motion for new

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trial. Appellant then hired appellate counsel to file a particularized motion for new trial and to represent him during the motion for new trial hearing. After the hearing, the court denied the motion.

Appellant argued that his due process rights were violated by a lengthy post-trial delay. The Court stated that substantial delays in the criminal appellate process implicate due process rights. In evaluating whether appellate delay violated a defendant's due process rights, courts use the four-factor test set forth in *Barker v. Wingo*, 407 U. S. 514 (92 SCt 2182, 33 LE2d 101) (1972) for evaluating claims of violations of the right to a speedy trial. Those factors are: (1) the length of the delay; (2) the reason for the delay; (3) whether or not the defendant asserted his right to an appeal; and (4) whether or not the defendant was prejudiced because of the delay.

Although the Court agreed that the first three *Barker* factors weighed in favor of appellant, the Court found he did not prove the necessary element of prejudice. Appellant argued that he was prejudiced by the post-trial delay because, by the time the trial court conducted a motion for new trial hearing, his trial counsel had died and was therefore unavailable to answer questions about his ineffective assistance claim. However, the Court noted, appellant's original 2003 motion for new trial did not raise ineffective assistance of counsel. Rather, appellant waited until 2019, after his trial counsel's death, in order to file an amended motion for new trial raising the claim. Thus, relying on *Mattox v. State*, 308 Ga. 302 (3) (2020), the Court found that appellant did not show that there was a reasonable probability that his motion for new trial would have been decided differently if the trial court had considered it in a timely manner. Furthermore, the Court found that appellant neither raised a meritorious claim of ineffective assistance on appeal nor shown how his trial counsel's testimony at the motion for new trial hearing would have resulted in a different result on appeal. Accordingly, the Court concluded, because appellant did not show that his appeal was prejudiced by the excessive post-trial delay in this case, the trial court's ruling was not in error.