

THIS WEEK:

- **Motions for New Trial; Re-trials**
- **Sentencing; Recidivists**
- **Public Defenders; Attorney-Client Relationships**
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- **Plea Deals; Judicial Commentary**
- **Deliberating Juries; Lone Holdouts**
- **Sequential Jury Charges; *Edge***
- **Authentication; Closing Arguments**
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- **Constitutional Right to Speedy Trial; *Barker-Doggett* Balancing Test**

Motions for New Trial; Re-trials

Riley v. State, A20A1446 (9/9/20)

Appellant was charged with rape and giving a false name to a law enforcement officer. Following a four-day trial, the jury convicted him of both counts. However, at the conclusion of his initial trial, the trial court realized it had committed error when it permitted an employee of the district attorney's office to sit on the jury. The trial court initially stated that it intended to declare a mistrial, but later clarified that it could not grant a mistrial after the jury had rendered its verdict and, instead, sua sponte granted a new trial under OCGA § 5-5-40. The trial court then stated that the new trial would begin the following Monday, to which trial counsel responded, "Fine." Appellant was convicted of both counts at this second trial.

Appellant argued that the trial court committed plain error when it declared a de facto mistrial after the jury's verdict in the first trial, and that he was prejudiced as a result, especially due to the unavailability of the transcripts prior to his second trial. He contended that the Court was not bound by the trial court's nomenclature, and could look at the substance of the trial court's order to determine that the trial court granted a de facto mistrial. He further contended that it was error to schedule the second trial to begin the following Monday, as opposed to placing it on the docket under OCGA § 5-5-48, and that this quick rescheduling confirmed that the trial court granted a mistrial instead of a new trial. Finally, he argued that allowing the trial court's ruling to stand would essentially nullify the rule against a post-verdict mistrial. The Court disagreed.

The Court stated that it is well-settled that a trial court cannot grant a mistrial after the jury renders its verdict. But, OCGA § 5-5-40 (h) authorizes the trial court to sua sponte grant a new trial within 30 days from entry of the judgment. And here, although the trial court initially stated that it would grant a mistrial due to the error of seating an improper juror, it ultimately recognized that it could not grant a mistrial post-verdict. And contrary to appellant's argument, there was no

confusion about the trial court's actions. The nomenclature and the substance of the trial court's order are the same; the trial court exercised its authority under OCGA § 5-5-40 (h) to sua sponte grant a new trial.

The Court also found that when the trial court announced its ruling, and scheduled the second trial to begin the following week, trial counsel responded that it was "fine." Thus, having acquiesced to the decision, appellant waived his right to appellate review.

Furthermore, the Court found, to the extent that appellant argued it was error to order a new trial without the benefit of the transcripts from the first trial, and that he was entitled to free transcripts to prepare for the second trial, he could not show any harm or prejudice. A trial court may rule on a motion for new trial without the benefit of the transcripts. Moreover, a review of the transcript from the second trial shows that counsel was able to question witnesses about prior testimony to bring out any inconsistencies even without the benefit of the transcript from the first trial.

Finally, as to appellant's contention that the trial court erred in placing the new trial on the docket the following week, the Court also found no error. Under OCGA § 5-5-48, "[w]hen a new trial has been granted by the court, the case shall be placed on the docket for trial as though no trial had been had[.]" And, under OCGA § 17-8-1 (a), "[t]he cases on the criminal docket shall be called in the order in which they stand on the docket unless the accused is in jail or, otherwise, *in the sound discretion of the court.*" (Emphasis supplied). As such, the trial court was authorized, in its discretion, to set the new trial for the following week and OCGA § 5-5-48 does not prohibit the trial court from setting the trial more quickly.

Sentencing; Recidivists

State v. Stanford, A20A0879 (9/9/20)

Stanford entered a non-negotiated guilty plea to one count of first-degree burglary. The State sought recidivist sentencing under OCGA § 17-10-7 (a) and (c) given Stanford's eight prior felony convictions, which included five prior burglary convictions and three non-burglary convictions. The trial court sentenced him as a recidivist to 25 years' imprisonment, with 5 years to serve and the balance suspended. The State moved for reconsideration, arguing that the trial court properly sentenced Stanford to a term of 25 years but erred by suspending a portion of it. The State argued that Stanford must serve all 25 years of his sentence in prison without the possibility of parole. When the trial court did not alter Stanford's sentence, the State appealed.

The State contended that a harmonious reading of the relevant portions of OCGA § 17-10-7 and OCGA § 16-7-1, in particular OCGA § 16-7-1 (d), precluded the trial court from exercising any discretion to suspend Stanford's sentence. Though the Court found the State's argument compelling, the Court noted that the interplay between these statutes had already been addressed by our Supreme Court in *Goldberg v. State*, 282 Ga. 542, 547 (2007) which held that "when OCGA § 16-7-1 (b) [(2010) and OCGA § 17-10-7 (a) are harmonized, the former specific recidivist statute applies when the defendant is a habitual burglar having only prior convictions for burglary, whereas *the latter general recidivist statute applies when the defendant is a habitual felon with prior convictions for other crimes.*" (Emphasis supplied.)

Thus, the Court found, *Goldberg* plainly and broadly announced that when a defendant is being prosecuted for burglary and is a habitual felon, as Stanford is, the recidivist provisions in OCGA § 17-10-7 apply rather than the specific recidivist

provisions in the burglary statute. Therefore, in accordance with the holding in *Goldberg* and the plain language of OCGA § 17-10-7 (a), the trial court properly sentenced Stanford to 25 years, the maximum sentence set forth in OCGA § 16-7-1 (b) for a person who is being prosecuted for a third or subsequent burglary. Further, the express terms of OCGA § 17-10-7 (a) allow a trial court to use its discretion to “suspend the maximum sentence prescribed for the offense.” Again, because Stanford is a habitual felon and not merely a habitual burglar, the trial court was not constrained by the language in the recidivist provisions of the burglary statute that bars the suspension of sentences. Accordingly, the Court concluded, the trial court was authorized to suspend a portion of Stanford's 25 year sentence.

Public Defenders; Attorney-Client Relationships

Wright v. State, A20A1353 (9/9/20)

Appellant was convicted of one count of burglary in the first degree and criminal trespass. She argued that the trial court abused its discretion by not appointing her another attorney after she showed there was a lack of communication and a conflict with her trial attorney. The Court disagreed.

The record showed that the trial court addressed appellant's concerns about her court-appointed attorney at two pre-trial hearings, the first on October 8, 2018, and the second on October 22, 2018. At the first hearing, appointed counsel stated that he had represented appellant in another case and that bench warrants had been issued for her “a couple of times[.]” He further stated that he had “attempted over the last two years to meet with [appellant] and speak with her about the case. She has changed phone numbers three times. My phone number is the same. I am very easy to find. I have yet to be able to sit down and actually talk to her about this case.” But, she was presently incarcerated in a neighboring county and he visited her there the day before.

Appellant told the judge at the hearing that she had texted and called her attorney and he never responded. She requested another attorney because “he [was] not representing [her]” and trial counsel had failed to help her “at all.” When the trial court asked appellant if she had evidence that she wrote trial counsel or had communicated with him by phone, appellant responded, “I don't.” Further, appellant admitted that she had spoken to trial counsel when he called her at her grandmother's home.

At the second pre-trial hearing, appointed counsel stated that he was not going to file a motion to suppress the search warrant and that he told appellant it was “not [his] job to file frivolous motions before the [trial c]ourt.” The Court noted that in its order denying appellant's motion for new trial, the trial court found that at the pre-trial hearings, appellant had not been “able to provide any information to show that she communicated with her appointed legal counsel and [that] he failed to respond to her.”

The Court stated that a breakdown in communication between a defendant and his counsel must be extreme before it mandates that the trial court remove appointed counsel. Thus, tension in the attorney-client relationship, disagreements over trial strategy, and a general loss of confidence or trust in counsel are insufficient, without more, to demonstrate the type of complete breakdown in communication necessary to mandate the removal of counsel from the case. And here, sitting as the fact finder, the trial court could disbelieve appellant's explanation and rely on the statements proffered by trial counsel regarding their communications and interactions. Also, appellant did not provide any evidence of her written

or telephonic attempts to reach trial counsel. Consequently, the Court concluded, the trial court did not abuse its discretion in denying her request for new court-appointed counsel.

Sovereign Citizens; Merger

Haynes v. State, A20A1347 (9/10/20)

Appellant was convicted of five counts of armed robbery, two counts of aggravated assault, and giving a false name. The record showed that when appointed trial counsel would not assert his sovereign-citizen defense, appellant informed the court that he wanted to represent himself, which the court granted after a lengthy *Faretta* hearing. When appellant repeatedly made statements based on his sovereign-citizen defense, interrupted the court, and, eventually stated that he was leaving the courtroom, the trial court ordered him to be removed from the courtroom for disrupting the proceedings. After he had been removed from the courtroom, the trial court ordered appointed counsel, who had been acting as standby counsel, to represent appellant during the trial.

Appellant argued that when the trial court removed him from the courtroom, his constitutional right to be present during all critical proceedings was violated. Specifically, he contended that his behavior was not sufficiently disruptive to warrant his exclusion, particularly since he did not affirmatively inform the court that he would continue his disruptive behavior. However, after quoting lengthy parts of the transcript, the Court held that the trial court did not err by removing appellant given his behavior, including his repetitive arguing, his refusal to answer the judge's questions, and his repeatedly interrupting the judge while she was speaking. Further, when the trial court asked appellant if he would like to stay in the courtroom without disrupting the proceedings or to leave the courtroom, he only responded that he did not "consent" to the proceedings. And ultimately, appellant instructed the trial court that "you can continue without me," and that he was "leaving the courtroom."

Nevertheless, appellant argued, the trial court erred in reinstating his lawyer without his consent. But, the Court stated, a trial judge may terminate self-representation by a defendant who deliberately engages in serious and obstructionist misconduct. And, a court may - even over objection by the accused - appoint a "standby counsel" to aid the accused if and when the accused requests help, and to be available to represent the accused in the event that termination of the defendant's self-representation is necessary. Thus, the Court held, under the circumstances of this case, the trial court did not err in asking previously appointed counsel to represent appellant in his absence.

Finally, appellant argued that some of his convictions merge. The Court agreed. The Court noted that Count 1 of the indictment charged appellant with using a handgun to take a restaurant's currency in the presence of an employee of the restaurant, and Count 2 charged appellant with using a handgun to take that employee's currency. Count 3 charged appellant with, the next day, using a handgun to take a restaurant's currency in the presence of an employee, and Count 4 charged appellant with using a handgun to take that employee's cellular telephone. Appellant was found guilty on all four counts and was sentenced to a concurrent life sentence on each count.

The Court held that Counts 1 and 2 alleged only one robbery and Counts 3 and 4 alleged only one robbery because robbery is a crime against possession, and is not affected by concepts of ownership. Similarly, one may only rob a person, and not a corporate entity, or an object such as a cash drawer. Therefore, since there was only one victim in Counts 1 and

2 and only one victim in Counts 3 and 4, who were by each transaction robbed of their possession of both their own property and the restaurants' money there was only one robbery in each instance.

So the Court agreed with appellant that only one armed robbery was committed in Counts 1 and 2 and one armed robbery was committed in Counts 3 and 4. The Court also observed that its holding comports with the unit-of-prosecution analysis applicable when a defendant is charged with multiple counts of the same crime, given the implication that the relevant unit of prosecution is the robbery of a person, regardless of how many items are taken.

Plea Deals; Judicial Commentary

Crews v. State, A20A1426 (9/10/20)

Appellant was convicted of aggravated assault (OCGA § 16-5-21) for his part in a group stabbing attack of an inmate. The evidence showed that the attack on the victim was made by members of the Gangster Disciples after the victim renounced his membership in the gang. After trial, he received a 20-year sentence as a recidivist, pursuant to the then-effective version of OCGA § 17-10-7 (a) and (c).

The record showed that appellant rejected two prior plea offers from the State, one in which he would have spent 10 years in confinement beyond the sentence he was currently serving, and another in which he would have spent five years in confinement beyond his current sentence, and five on probation. Immediately before trial, the State made a third offer. If appellant pled guilty, the State would waive recidivist sentencing, would not require his cooperation in implicating others, and would recommend that he serve his new sentence concurrently with the sentence he was presently serving, meaning he could have been eligible for release in just under five years.

Appellant argued that he was entitled to a new trial because a comment made by the judge influenced his decision to decline the State's offer of a plea bargain. Specifically, appellant contended that the trial court, in its discussion with the State regarding recidivist sentencing under OCGA § 17-10-7 (a) and (c) stated that appellant could not receive the maximum 20 year with no parole sentence. The Court disagreed.

After quoting the colloquy between the State and the court, the Court found that although the trial court did not inform appellant that he would receive a mandatory 20-year sentence if convicted, it clearly stated that a 20-year sentence was possible. In other words, the trial court at no point indicated that it *could not* sentence appellant to 20 years in prison. Rather, the trial court clearly indicated that it *could* sentence him to 20 years in prison. Thus, because appellant knew that he could receive a 20-year sentence, he was sufficiently apprised of the risks of going to trial.

Deliberating Juries; Lone Holdouts

Delgado v. State, A20A1096 (9/10/20)

Appellant was convicted of trafficking in methamphetamine. Briefly stated, the record showed that the trial was brief - the jurors heard approximately four hours of opening statements and testimony from four witnesses in one afternoon. The next morning, the jurors heard closing arguments and received their charge before beginning their deliberations at 12:57

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p.m. Approximately three and a half hours later, the jury submitted a note stating that the jury was deadlocked at 8-4. Over defense counsel's motion for a mistrial, the court gave them an *Allen* charge.

The jury resumed deliberating the following morning. After two hours, a second note was sent out stating that it was 11-1 and the lone holdout is not likely to "ever chang[e] his stance." Over another defense motion for a mistrial, the judge ordered the jury to continue deliberating and sent a copy of the *Allen* charge into the jury room. Before lunch, a third note was sent. It stated that the lone holdout was "sitting back refusing to discuss or budge on his stance. He gives no backing to his opinions." The note opined that the deliberations were "going nowhere." The judge then questioned the foreman, the holdout juror and the ten other jurors. The foreman acknowledged that the juror participated at the beginning of deliberations but was now refusing to deliberate further. The foreman stated that the holdout juror had not changed his opinion since the beginning of deliberations, an opinion which was apparently based on the holdout juror's disbelief of a witness. On the other hand, when asked if he consulted with and considered the views of the other jurors, the holdout juror replied that he had discussions and arrived at his opinion, which was different from the other jurors, and he did not think it made sense to try to sway them. In his opinion, he had complied with the mandates set forth in the *Allen* charge to continue deliberations, but he believed the jurors were just going through the motions. After hearing arguments from counsel, the court found that the holdout juror had "failed and refused to discharge his duties as a juror" and over another defense motion for mistrial, replaced him with an alternate juror. Three hours later, the jury rendered a guilty verdict.

Appellant contended that the trial court erred in denying his motions for mistrial and dismissing the lone holdout juror. The Court agreed.

The Court noted that in the context of removing jurors, the possibility of harmful error is heightened when a jury has begun deliberations or when a jury is deadlocked, both of which were present in appellant's case. Also, a particular danger of harmful error is posed by the removal of a lone holdout juror, because such a juror may well have concluded that a reasonable doubt exists as to the defendant's guilt and therefore has not refused to deliberate but has simply refused to engage in additional deliberation after reaching his conclusion.

Thus, while recognizing the trial court's efforts to undertake a thorough inquiry, the Court concluded that the trial court abused its discretion in dismissing the lone holdout juror from appellant's jury. Relying on *Mason v. State*, 244 Ga. App. 247, 248 (1) (2000), the Court found that as in *Mason*, the testimony of the jurors from appellant's trial showed that the holdout juror had participated in deliberations for several hours before making up his mind. Indeed, the record showed that the holdout juror deliberated for approximately five hours before disengaging from the deliberations, an amount of time which surpassed the evidence portion of appellant's trial. Significantly, appellant's holdout juror's differing opinion was based on his belief as to the credibility of a witness, which is undoubtedly an appropriate basis for a juror to reach an opinion on the guilt or innocence of the accused.

Thus, the Court found that appellant's holdout juror, like the juror in *Mason*, did not fail to fulfill his obligations as a juror, but rather had reached a decision, which was based on his review of the testimony and the witnesses' credibility, after meaningfully deliberating and trying to reach a verdict. The holdout juror testified that he had attempted to deliberate with the other jurors, but believed that they were unwilling to accept his differing opinion and the deliberations were no longer productive. This testimony was supported by several other jurors. That the holdout juror refused to change his opinion after continued deliberations does not provide good cause for dismissal. Accordingly, because the trial court did

not have sufficient legal cause to remove the holdout juror, the Court concluded that the trial court erred in dismissing the juror as opposed to declaring a mistrial. Accordingly, appellant's conviction was reversed and the case remanded for a new trial.

Sequential Jury Charges; *Edge*

Aeger v. State, A20A1544 (9/11/20)

Appellant was indicted for malice murder, felony murder, and aggravated assault. A jury found her guilty of voluntary manslaughter as a lesser included offense of malice murder, and not guilty of the remaining charges. Appellant contend that the trial court committed plain error by instructing the jury that it was required to consider voluntary manslaughter only after acquitting her of malice murder and felony murder. She argued that the instructions were given “in a confusing, sequential and/or hierarchical manner and thereby impaired the jury’s consideration of each offense,” and that the instructions were made worse by a “confusing verdict form.”

The Court stated that a trial court may instruct a jury to consider a greater offense before it considers a lesser offense. A trial court may not, however, instruct the jury that it must reach a unanimous verdict on the greater offense before considering the lesser offense. Pursuant to *Edge v. State*, 261 Ga. 865, 867 (1992), a sequential charge requiring the jury to consider voluntary manslaughter only if it has considered and found the defendant not guilty of malice murder and felony murder is not appropriate where there is evidence that would authorize a charge on voluntary manslaughter.

Here, the Court noted, the trial court did not specifically instruct the jury that it must reach a *unanimous* verdict on the murder charges before considering the voluntary manslaughter offense; so there was no clear error in that regard. But, the Court found, even if some portion of the instruction was improper, the standard for plain error was not met in this case because there is no exact formula that trial courts must follow in this context so long as the charge as a whole ensures that the jury will consider whether evidence of provocation and passion might authorize a verdict of voluntary manslaughter. Here, the court's jury charge as a whole ensured that the jury would consider whether the evidence might authorize a verdict of voluntary manslaughter. Specifically, the court included instructions defining murder and directed the jury: “After consideration of all the evidence, *before you will be authorized to return a verdict of guilty of malice murder, you must first determine whether mitigating circumstances if any would cause the offense to reduce to voluntary manslaughter.*” (Emphasis supplied.) The court then gave the statutory definition of voluntary manslaughter. See OCGA § 16-5-2 (a). Next, after defining felony murder and aggravated assault, the court reiterated: “After the consideration of all of the evidence, before you would be authorized to determine the verdict of malice murder or felony murder, *you must first determine whether mitigating circumstances, if any, would cause the offense to be reduced to voluntary manslaughter.*” (Emphasis supplied.) The court again defined voluntary manslaughter, adding that the State had the burden of proving beyond a reasonable doubt that the offense of murder was not so mitigated, explaining the principles of provocation and passion in the context of voluntary manslaughter. And, in response to a second note from the jury, the court repeated the instructions it had given twice earlier in which it directed the jury to first determine whether the circumstances of the case would cause the offense to be reduced to voluntary manslaughter. Further, the verdict form provided that the jury could find appellant guilty of malice murder, felony murder or voluntary manslaughter

Thus, the Court found, the trial court instructed the jury several times that before it would be authorized to determine the verdict of murder, it must first determine whether mitigating circumstances would cause the offense of murder to be reduced to voluntary manslaughter and, each time, the court included in its definition of voluntary manslaughter the appropriate passion and provocation language. The court also instructed the jury that the State had the burden of proving that the killing was done without mitigating circumstances. Therefore, per the court's instructions, the jury could not find appellant guilty of murder without considering evidence of provocation or passion which might authorize a verdict of voluntary manslaughter.

Accordingly, the Court concluded, the instruction did not likely affect the outcome of the proceedings and did not seriously affect the fairness, integrity or public reputation of judicial proceedings. Consequently, the Court found no plain error.

Authentication; Closing Arguments

Woodruff v. State, A20A1083 (9/11/20)

Appellant was convicted of family violence aggravated assault. At trial, the victim testified that she did not remember what she told the officers about appellant strangling her when she was pregnant with appellant's child. Instead she testified that she was the aggressor and appellant caused her no harm.

Appellant argued that the trial court erred in admitting emails sent between appellant and the victim while appellant was incarcerated in jail. Specifically, he argued that the communications were not authenticated because the victim denied sending or receiving the emails. The Court disagreed.

Relying on OCGA § 24-9-901 (a), the Court found that the State properly authenticated the e-mails such that there was sufficient evidence to allow a reasonable jury to find that the victim had sent and received the e-mails in question. The State provided a certificate of authenticity from the jail, the victim acknowledged that she had been communicating with appellant, and the e-mails contained information related to the details of the case. Thus, the Court concluded, under all of these circumstances, it was very unlikely that anyone other than appellant and the victim had written the e-mails. Accordingly, the trial court did not abuse its discretion in admitting the e-mail records.

Appellant also challenged the closing arguments made by the State. First, appellant contended that the State violated his due process rights by commenting on the "cycle of violence" during closing argument. Specifically, he contended that testimony regarding the cycle of violence and its effect on his child, who had not been born at the time of the charged crime, was not in evidence. However, the Court found, given the testimony and evidence presented a trial, which included an e-mail from the victim to appellant detailing the effect of violence on their child, the prosecutor's statements here were a reasonable extrapolation of the evidence.

Next, appellant argued that his trial counsel rendered ineffective assistance by failing to object to the prosecutor's statements that appellant had requested a lesser-included charge of simple battery. The Court stated that generally, a prosecutor should refrain from mentioning that the defendant requested the lesser-included charge. However, at the motion for new trial hearing, defense counsel testified while he was unaware that the prosecutor's statements were objectionable, he made a strategic decision not to object because it was beneficial to appellant for the jury to keep hearing the term simple battery.

During closing argument at trial, defense counsel mentioned that there would be a lesser-included charge of simple battery, but argued that the evidence did not support that charge either. Accordingly, the Court found, appellant failed to demonstrate deficient performance.

Finally, appellant argued that his trial counsel provided ineffective assistance by failing to object to the prosecutor's statements regarding the State's decision to prosecute the case. During closing argument, the prosecutor stated: "The State of Georgia took that decision, whether or not to prosecute a case, out of the victim's hands, right? They passed a law and now it's up to the State of Georgia to move forward."

The Court noted that under OCGA § 17-4-20.1 (a), "[w]henver a law enforcement officer responds to an incident in which an act of family violence ... has been committed, the officer shall not base the decision of whether to arrest and charge a person on the specific consent of the victim or on a request by the victim solely or on consideration of the relationship of the parties." Furthermore, the prosecutor's statements during closing argument were a response to the victim's testimony at trial. Thus, the statements fell within the "wide latitude" afforded to prosecutors during closing argument. And the prosecutor's argument was not a misstatement of law. Accordingly, because the prosecutor's argument was permissible, trial counsel's failure to object to it could not serve as the basis for an ineffective assistance claim.

Juror Misconduct; Improper Communications

Cooke v. State, A20A1428 (9/15/20)

Appellant was convicted of armed robbery, attempted armed robbery, and other related crimes. He argued that the trial court erred in denying his motion for new trial because a juror admitted to improper communications during deliberations, which aided her in reaching a verdict. The Court disagreed.

The Court stated that when irregular juror conduct is shown, there is a presumption of prejudice to the defendant, and the prosecution carries the burden of establishing beyond a reasonable doubt that no harm occurred. However, in order for juror misconduct to upset a jury verdict, it must have been so prejudicial that the verdict is deemed inherently lacking in due process. Furthermore, when the substance of the communication is established without contradiction, the facts themselves may establish the lack of prejudice or harm to the defendant.

Here, the Court found, in its preliminary instructions, the trial court admonished the potential jurors not to conduct research outside the confines of the court and not to discuss the case with anyone prior to deliberating. The trial court restated this instruction during the trial proceedings. However, a juror admitted that, during the trial but before deliberations, she phoned her ex-boyfriend, a Florida police officer, and asked him general questions regarding ballistics evidence. She further testified that he provided her with "a rough, roundabout answer," but that it did not influence her decision. She further testified she did not share this information with the other jurors, and the other jurors confirmed that this information was not shared with them.

The Court noted that there was no contradiction in the communications made by the juror. But, the communications, although in violation of the trial court's instruction not to discuss the case, did not involve deliberation before the close of evidence, nor did the juror attempt to persuade other jurors on any issue in the case. Therefore, the Court concluded, the

juror's actions, while improper, were not so prejudicial as to have contributed to the conviction, and were harmless beyond a reasonable doubt.

Constitutional Right to Speedy Trial; *Barker-Doggett* Balancing Test

Kishel v. State, A20A1380 (9/15/20)

Appellant was convicted of child molestation. He contended that the trial court erred in denying his motion to dismiss based on a violation of his constitutional right to a speedy trial. The Court disagreed.

The record showed that appellant pled guilty in New Jersey to aggravated sexual assault of his minor stepdaughter. Thereafter the victim revealed to her mother and others that appellant had also molested her in 2008 while they were staying at a hotel in Georgia. On March 18, 2014, appellant was indicted on charges of aggravated child molestation and child molestation arising this incident. On May 28, 2014, the trial court issued an order placing the case on the court's administrative dead docket, noting that appellant had not appeared at the scheduled plea and arraignment held the previous day. Appellant, while incarcerated in New Jersey, wrote three letters to the superior court clerk's office, requesting documents and information about his case. In September 2016, appellant was extradited from New Jersey, where he had been incarcerated for his guilty plea conviction. The trial court removed the case from its dead docket and scheduled a trial during the week of December 13, 2016. Appellant then moved for a continuance, which the trial court granted, and the trial was continued until January 31, 2017. The day before trial, on January 30, 2017, appellant file a motion to dismiss the indictment on the ground that his right to a speedy trial under both the federal and state constitutions had been violated. After an evidentiary hearing and arguments of counsel, the trial court denied the motion.

The Court stated that the right to a speedy trial attaches at the time of arrest or formal accusation or indictment, whichever occurs first, and the courts measure the delay from the time the right attaches. Such time then runs until the date on which the defendant's trial begins. Here, the relevant time period does not include any pre-indictment delay and instead consists of the 34 months that elapsed between the indictment on March 18, 2014, and the start of the trial on January 31, 2017. Thus, the trial court correctly found that this pretrial delay of 34 months was presumptively prejudicial and when a delay raises a presumption of prejudice, a court must consider the four factors of the *Barker-Doggett* balancing test.

As to the first factor, the length of the delay, the Court noted that the trial court weighed the delay against the State, but only lightly. However, the Court agreed with appellant that the 34-month delay was uncommonly long and that the trial court should have weighed it more heavily against the State.

As to the second factor, the trial court found that the primary reasons for the delay were an overcrowded docket and the time-consuming process of transferring a prisoner between two jurisdictions, and weighed this factor relatively benignly against the State. The Court found these findings to be clearly erroneous. There was no evidence regarding an overcrowded docket and the only evidence concerning the transfer of appellant from New Jersey to Georgia indicated that the process took approximately two months. Instead, contrary to the trial court's findings, the record revealed that the primary reason for the delay was the court's placement of the case on its dead docket after appellant did not appear for the plea and arraignment in May 2014. Thus, the Court found, it was apparent that the State was more to blame than appellant in bringing the case to trial. However, there was no evidence that the delay was deliberate and intended to hinder the defense.

Rather, given the lack of evidence as to why the court placed the case on its dead docket, the Court found that the delay was attributable to the State's negligence and consequently, weighted as a relatively benign factor against the State.

As to the third factor, the Court found that appellant, who had already moved for and been granted a continuance of the case, did not assert his right to a speedy trial until the eve of trial when he filed his motion to dismiss. Therefore, the Court found, the trial court did not err in finding this eve-of-trial request untimely, and it properly weighed this factor against appellant.

As to the last factor, prejudice, the Court noted that appellant made no claims or showings regarding oppressive pretrial incarceration or anxiety and concern. Rather, he contended that his defense was prejudiced because he was unable to locate other adults who stayed in neighboring hotel rooms to testify that they heard no unusual noises and that appellant's hotel room door had been open in order to socialize. In order to establish prejudice however, appellant had to present specific evidence showing that the unavailable witness could supply material evidence for the defense. But, appellant failed to present any such specific evidence or show how the purported testimony would have been material since the victim made no claim of unusual noises or that she was molested while the door was open. Instead, appellant made only conclusory statements about unidentified witnesses. Consequently, the Court found, appellant failed to show that he was prejudiced by the delay.

Finally, the Court found while two of the *Barker-Doggett* factors weigh against the State, the lack of prejudice and appellant's eve-of-trial assertion of his speedy trial right weighed heavily against him. Thus, the Court concluded, under these circumstances, the trial court did not abuse its discretion in denying the motion to dismiss.