

THIS WEEK:

- **Motion to Withdraw Plea; Timing**
- **Appellate Court Jurisdiction; Right of Direct Appeal**
- **Identification; Photo Lineups**
- **Gang Activity; Intrinsic Evidence**
- **Ineffective Assistance of Appellate Counsel; Conflicts of Interest**
- **Closing Arguments; Burden of Proof**
- **Search & Seizure; Collective Knowledge of Police**

Motion to Withdraw Plea; Timing

Jordan v. State, S20A1477 (2/1/21)

Appellant pled guilty to felony murder. He contended that the trial court erred in denying his motion to withdraw his plea of guilty. The Court agreed.

The facts, briefly stated, showed that four days into his malice murder trial, appellant and the State agreed to a plea deal in which appellant would plead guilty to felony murder and the State would nolle prosequi his other charges. The court accepted the plea but stated it would schedule the sentencing to a later time. Before sentencing, appellant moved to withdraw his plea of guilty. The trial court denied the motion, finding that appellant had no right to withdraw his plea in a "capital case" and that appellant waived his right to withdraw his plea during the plea colloquy.

Appellant argued that the trial court erred in concluding that his murder charge meant that he did not have the right to withdraw his guilty plea. The Court noted that OCGA § 17-7-93 (b) gives a defendant the right to withdraw his guilty plea "[a]t any time before judgment is pronounced," and it has interpreted this language as permitting withdrawal as a matter of right at any time before the trial court orally pronounces a defendant's sentence. Once a sentence is pronounced, that absolute right terminates; after that point, a trial court has the discretion to allow withdrawal, but only when necessary to correct a manifest injustice.

However, the Court stated, in *Fair v. State*, 245 Ga. 868, 878 (8) (1980), it created an exception to the right to withdraw a guilty plea before sentencing in cases in which the State seeks the death penalty. This is because in cases where the death penalty is sought, with the exception of cases involving aircraft hijacking and treason, the judgment does not rest upon the plea but rather upon the plea and the proof of an aggravating circumstance, and additional proceedings following the plea are required to determine the existence of an aggravating circumstance to authorize the death penalty. But here, there was no dispute that the State did not seek the death penalty. Following appellant's guilty plea, the trial court was required only to enter a sentence, not to conduct another proceeding to determine the existence of an aggravating circumstance. As a

result, the *Fair* exception to OCGA § 17-7-93 (b) did not apply and thus, appellant had a right to withdraw his plea at the time he filed his motion to withdraw.

Appellant also contended that the trial court erred in finding that he knowingly waived his right to withdraw his guilty plea. The Court noted that in *Blackwell v. State*, 299 Ga. 122, 124 (2016), it held that the right to withdraw under OCGA § 17-7-93 (b) can be waived if the waiver is knowingly, voluntarily, and intelligently made. But here, the Court found, although the transcript of the plea colloquy showed that appellant was advised of his trial rights and told that he would be waiving those rights by pleading guilty, at no point in that colloquy did the trial court refer specifically to the statutory right to withdraw under OCGA § 17-7-93 (b). The trial court's statements that appellant would not be able to ask for another trial were not sufficient to advise appellant of his right to withdraw his guilty plea prior to sentencing. The trial court confirmed that appellant understood that "if I wind up sentencing you to life without parole, you can't then turn around and ask for a jury trial." But this phrasing did not refer to the right to withdraw a plea before sentencing; instead, it referred to appellant's ability to ask for a jury trial after sentencing. The trial court also confirmed that appellant understood that, by pleading guilty, he would be "ending this jury trial, and it will not finish, and there will not be another one." But, unlike in *Blackwell*, the trial court's statement that there would not be another trial did not plainly inform appellant that he would not be permitted to withdraw his guilty plea if it were accepted by the trial court.

In so holding, the Court stated that it was "sympathetic to the trial court's concern that [appellant]'s guilty plea and subsequent motion to withdraw were calculated to manipulate the justice system. They may well have been. But the text of OCGA § 17-7-93 (b) does not include an exception for intentional manipulation, and we will not create one. In such cases, it is incumbent on the trial court and prosecutor to ensure that a record is made that will show a knowing and voluntary waiver." Accordingly, the Court concluded, because the record did not show such a waiver, it reversed the denial of appellant's motion to withdraw his guilty plea.

Appellate Court Jurisdiction; Right of Direct Appeal

Jefferson v. State, S20G0528 (2/1/21)

Appellant was convicted of kidnapping, two counts of armed robbery, and other offenses. The trial court granted appellant's motion for new trial in part, finding that the evidence was insufficient to support his convictions for armed robbery. The trial court denied the motion as to the remaining convictions. Appellant then timely filed a direct appeal, which the Court of Appeals dismissed because the trial court's order was not a final judgment and therefore, the order could be appealed only through the interlocutory appeal process. The Court then granted certiorari to address this appellate jurisdiction question.

The Court noted that although the trial court "granted" appellant's motion as to the armed robbery convictions, the State is legally barred from retrying appellant on those counts given the court's rationale for its decision. This is so because once a reviewing court reverses a conviction solely for insufficiency of the evidence to sustain the jury's verdict of guilty, double jeopardy bars retrial. The Court stated that only in rare circumstances, not present here, might a retrial be possible following a judicial determination that the evidence presented in support of the crimes charged was insufficient. If, for example, the trial court had decided that the evidence was legally insufficient only because of a change in the substantive law after trial, then perhaps a retrial might be possible. The Court noted that it has yet to decide such a case, but the Court of Appeals

and other courts have determined that double jeopardy concerns do not preclude the State from retrying a defendant when the evidence presented at trial is rendered insufficient only by a post-trial change in law. In any event, no such holding was made in this case and the State did not suggest that this narrow exception would apply in this case. Thus, the trial court's conclusion that the evidence was insufficient to support a conviction on either of the armed robbery counts of the indictment rendered its decision with respect to those counts final, as Appellant may not be retried on those counts.

Accordingly, the Court concluded, the trial court's order was directly appealable and consequently, the order of the Court of Appeals dismissing the appeal was vacated and the case remanded back to it.

Identification; Photo Lineups

Kirkland v. State, S21A0113 (2/1/21)

Appellant was convicted of malice murder and related offenses. The relevant evidence showed that during an armed robbery of a nightclub by appellant and another person, the victim was shot and killed. The crimes occurred in the nightclub's parking lot. McGee, a nightclub employee, escaped the gunshots fired by appellant and his accomplice by jumping over a nearby wall, injuring his leg in the process. Less than two weeks after the incident, a detective conducted an interview with McGee. One of the lineups contained a photograph of appellant and non-suspect "fillers." On that day, McGee was unable to make any identifications. At the end of the interview, McGee told the detective that he could not concentrate properly on the photographs because of the "heavy medications" he was taking for the injuries to his leg he sustained while fleeing the shooters. Six days later, McGee returned to the police station, and the detective once again presented the same lineups to him, though the order of the potential suspects in each set had been shuffled. At that time, McGee indicated that he was no longer suffering from medication side-effects. During this viewing of the photo lineups, McGee identified a photo of appellant as one of the shooters with what McGee described to be "100 percent certainty."

Appellant argued that the procedure was unduly suggestive because the detective knew appellant's identity as the suspect when he conducted the photo lineups. Specifically, he contended that a photo lineup *must* be presented by someone who does not know the suspect's identity. But, the Court stated, there is no authority supporting appellant's argument. To the contrary, statutory law contemplates photo lineups being administered by police officers who know the identity of a suspect, see OCGA § 17-20-2 (b) (2) (B). And, even in those situations, failure to follow the procedures contained within the statute does not require automatic exclusion. See OCGA § 17-20-3 Therefore, the Court found, this argument failed.

Next, appellant argued, the procedure was unduly suggestive because the detective presented the lineup containing his photograph to McGee twice, without selecting a completely different photograph of appellant for the second interview and without presenting that photograph in a lineup with all new filler photos of non-suspects. But, the Court noted, this argument also was bereft of authority to support his position. Instead, appellant provided nothing to support his speculation that conducting the second lineup in this manner was impermissibly suggestive. Here, the Court found, there was no evidence presented that the procedure employed by the detective was equivalent to McGee being told by police the identity of the suspect. A trial court is authorized to find that there was no impermissible suggestiveness where the witness identified the defendant in two lineups and the defendant's photograph was the only one to appear in both. Therefore, appellant's second ground for contending that the photo lineup was unduly suggestive and should have been suppressed also failed.

Finally, appellant contended that the photo-lineup procedure was unduly suggestive because there was evidence that McGee had been shown a photo of appellant by a neighborhood friend prior to his first interview with the detective. But, the Court found, this argument failed in two ways. First, the outside action taken by appellant's neighborhood friend had no bearing on the identification procedure employed by the detective and provided no evidence that the procedure, itself, was unduly suggestive. Second, McGee testified that he could not recall whose photograph his friend had shown him when he ultimately made an identification of appellant in the second photo lineup (and he made no identification at all in the first lineup). McGee further indicated that the only other time he remembered seeing the shooter's face was on the night of the shooting. McGee also stated that he did not believe that the person his friend had shown him was the same person he identified from the lineup, though there may have been similarities.

Accordingly, the Court concluded, the trial court did not abuse its discretion by admitting McGee's identification of appellant.

Gang Activity; Intrinsic Evidence

Middlebrooks v. State, S21A0381 (2/1/21)

Appellant was convicted of malice murder and other crimes in connection with the shooting of Barber and the aggravated assault of Chappell. The evidence, briefly stated, showed that appellant, Barber and Jones were members of a gang, with appellant being "over" Barber and Jones. Barber agreed to trade a rifle to Jones in exchange for two pistols. However, after the exchange, Barber was dissatisfied and wanted to undo the trade, to which Jones apparently agreed. At the designated meeting spot, Barber showed up with Chappell and Jones showed up with appellant. Appellant shot Barber and Chappell.

Prior to trial, appellant filed motions to exclude any evidence regarding his gang participation or activity as improper character evidence under OCGA § 24-4-404 (b) as irrelevant and highly prejudicial. The trial court denied the motion, finding that the evidence was intrinsic to the crimes charged.

Appellant argued that the gang evidence was not relevant because the State did not charge him with a violation of Georgia Street Gang Terrorism and Prevention Act, there was no evidence of ongoing gang activity, the State did not adequately prove that he was a gang member, and the evidence was unnecessary to prove motive. The Court disagreed.

Here, the Court found, the State presented evidence from which the jury could conclude that appellant and Barber were active gang members in the same gang and that appellant was motivated to shoot Barber because of a perceived disrespect. The challenged gang evidence thus plainly pertained to the chain of events in the case and was linked in time and circumstance with the charged crimes, making the information necessary to complete the story for the jury. And, the Court stated, even in the absence of a gang-related charge, evidence of gang activity or affiliation may still be admissible to show motive.

Nevertheless, appellant argued, the evidence of his gang involvement was more prejudicial than probative and was also inaccurate. The Court stated that although evidence of gang membership can be highly prejudicial, all inculpatory evidence is inherently prejudicial; it is only when unfair prejudice substantially outweighs probative value that the rule permits

exclusion. And here, the Court found, the trial court did not abuse its discretion in determining that the probative value of the gang evidence in establishing the context and motive for the charged offenses was not substantially outweighed by the danger of unfair prejudice. Additionally, any alleged inaccuracies or objections raised on appeal by appellant with respect to the credibility of the gang evidence went not to the evidence's admissibility but rather its weight, which is for the jury to resolve.

Ineffective Assistance of Appellate Counsel; Conflicts of Interest

Hall v. Jackson, S20A1574, S20X1575 (2/1/21)

Jackson was convicted of 28 counts of armed robbery and other crimes. The record, very briefly stated, showed that at trial, Jackson was represented by counsel from the county public defender's office (hereinafter "trial counsel"). After trial, he was represented by a different lawyer from the same office (hereinafter "appellate counsel") who was a subordinate of appellant's trial counsel. Appellate counsel wanted to raise claims of ineffective assistance in Jackson's motion for new trial and discussed the matter with his boss, trial counsel. Trial counsel was offended and so, appellate counsel did not raise those issues, instead raising other issues which the trial court eventually heard and denied. The Court of Appeals affirmed. Thereafter, with private counsel, Jackson filed a habeas petition alleging that his appellate counsel had a conflict of interest causing him to forego raising his potentially meritorious ineffective assistance of trial counsel claims. The habeas court agreed and ordered that Jackson be given a new trial. The Warden appealed.

The Court stated that to carry his burden of proving that his appellate counsel provided ineffective assistance because he had a conflict of interest, Jackson must show that an actual conflict of interest significantly and adversely affected his representation of Jackson. Jackson need not show actual prejudice, that is, a reasonable probability that the outcome of his motion for new trial or direct appeal would have been more favorable to him if appellate counsel had not labored under a conflict of interest. Instead, prejudice is presumed if Jackson demonstrates that the conflict of interest existed and that it significantly affected appellate counsel's performance.

The Court noted that the Warden did not dispute that both appellate and trial counsel believed that these ineffective assistance issues were potentially meritorious claims that should have been raised. The Warden also did not dispute that appellate counsel could not pursue the claims because he worked in the same office as (and as a subordinate to) trial counsel. The Warden instead argued that a defendant like Jackson, who was represented during his trial, motion for new trial proceeding, and direct appeal by lawyers from the same public defender's office, may raise for the first time in a habeas petition claims that his trial counsel provided ineffective assistance, because his appellate lawyer could not properly assert such claims against another lawyer from the same office. But, the Court stated, the cases upon which the Warden relied did not address the issue of conflict of interest and were inapposite.

Moreover, the Court noted, the Warden did not argue, and the evidence presented at the habeas hearing did not show, that appellate counsel made a strategic decision not to raise the ineffective assistance of trial counsel claims. Rather, the evidence fully supported the habeas court's conclusion that appellate counsel failed to raise the claims because his conflict of interest prevented him from doing so.

Therefore, the Court found, Jackson met his burden of proving that appellate counsel's inability to raise what appellate counsel believed to be valid ineffective assistance of trial counsel claims in the amended motion for new trial significantly and adversely affected appellate counsel's representation of Jackson. Accordingly, Jackson was not required to prove that if appellate counsel had raised those claims, they would have had a reasonable probability of success. Therefore, the Court affirmed the portion of the habeas court's judgment granting relief to Jackson on the ground that appellate counsel provided ineffective assistance because he had an actual conflict of interest.

Nevertheless, the Warden contended, the habeas court erred by setting aside Jackson's convictions and granting him a new trial, rather than a new direct appeal. The Court agreed. The appropriate remedy is to grant Jackson a second appeal, which will allow him to start the post-conviction process anew with the assistance of conflict-free counsel.

Accordingly, while the Court affirmed the grant of habeas relief, it vacated the part of the habeas court's judgment setting aside Jackson's convictions, and remanded the case with the direction that the habeas court enter an order requiring the grant of another appeal and setting aside the trial court's order denying Jackson's motion for new trial and the decision of the Court of Appeals affirming his convictions so that he may pursue post-conviction remedies in the trial court with the assistance of conflict-free counsel.

Closing Arguments; Burden of Proof

Williams v. State, A20A2092 (1/21/21)

Appellant was convicted of two counts of fleeing or attempting to elude a police officer, and one count each of reckless driving, obstruction of an officer, driving without a license, speeding, operating an unregistered vehicle, failure to maintain lane, driving without proof of insurance, failure to stop at a stop sign, and a turn signal violation. Prior to closing arguments, appellant moved to restrict the State from mentioning during closing "[a]ny language . . . arguing about how the evidence is un rebutted in this case [because] that's burden shifting on to the Defense." The trial court denied appellant's motion.

Appellant contended that "the trial court erred when it allowed the State to argue that because [he] did not rebut the State's evidence, he was not entitled to the presumption of innocence." But, the Court stated, an argument that the defendant has not rebutted or explained the State's evidence does not amount to an improper burden-shifting argument. Thus, since appellant's motion in limine sought to limit the State from arguing that he had failed to rebut the State's evidence, the trial court did not abuse its discretion in denying his motion.

Appellant also argued that the trial court erred by allowing the State to improperly argue that the burden of proof had shifted to him. Specifically, the prosecutor stated the following during the State's closing argument: "When the defendant walked into this courtroom and before the evidence was presented, he was presumed innocent. But at this point now that all the evidence is in, all of the evidence you heard from our officer, all the evidence that the State had to present on this case is in, it is un rebutted at this point. We have all the evidence. He no longer has that presumption of innocence."

The Court found that the prosecutor's statements on the presumption of innocence misstated the law. Thus, the trial court should have so instructed the jury. However, the Court found, the particular facts of this case showed no grounds for

reversal. During the jury charge, the trial court instructed the jury that the law was to come from the court and charged the jury on the burden of proof and presumption of innocence, stating that appellant was presumed innocent until proven guilty. The jury was presumed to follow the trial court's instructions, and appellant presented nothing to overcome this presumption. Consequently, the Court concluded, considering the trial court's subsequent instructions, and the evidence against appellant, any error was harmless beyond a reasonable doubt.

Search & Seizure; Collective Knowledge of Police

Romaine v. State, A20A2002 (1/21/21)

Appellant was convicted of one count of armed robbery, two counts of aggravated assault, and one count of possession of a firearm during the commission of a felony. The evidence, briefly stated, showed that a young man dressed in gray sweatpants, a gray jacket, and a black face-covering entered a GameStop store. Using a black semiautomatic firearm, he robbed the store. During the robbery, the clerk gave the assailant a cash bundle with a tracker in it, and when the robber fled the store, the tracker was activated. Information about the robbery was broadcast to local police, including the tracker's GPS location, which was emitted in real time. Police also issued a "be on the lookout alert" for the robber, which included the suspect's age and race and that he was wearing gray sweatpants and a gray sweatshirt. Shortly after the robbery, the tracker's movements slowed at the corner of a particular intersection, and several officers converged there. On one corner there are several businesses, including a gas station, a restaurant, and a hotel. One of the officers broadcast over the radio that he observed an individual who fit the suspect's description walking behind the restaurant toward the hotel. Officer Sales heard the broadcast and drove to the rear of the hotel to stop the possible suspect. Officer Sales saw no pedestrians, but he did see a Toyota backing out of a parking space. No other vehicles were in motion. Officer Sales stopped the Toyota and made contact with appellant, who was driving. Appellant was wearing gray sweatpants and matched the general description of the suspect, and Officer Sales detained him. Appellant gave his consent to search the car, and during the subsequent search, police found a gray sweatshirt, a black mask, a black semiautomatic pistol, cash, a bill that had something – possibly a tracker - cutout of it, and a GameStop bag.

Appellant contended that the trial court erred in denying his motion to suppress. Specifically, he contended that because Officer Sales did not personally observe him on foot or see him engage in any illegal activity prior to the traffic stop, he lacked reasonable suspicion to make the stop. The Court disagreed.

For a traffic stop to be valid, an officer must identify specific and articulable facts that provide a reasonable suspicion that the individual being stopped is engaged in criminal activity. Reasonable suspicion may exist based on the collective knowledge of the police when there is reliable communication between the officer supplying the information and the officer acting on that information instead of the arresting officer's knowledge alone. So long as an officer has reasonable suspicion, a brief investigatory stop is permitted even if the officer does not personally observe the defendant commit a traffic violation or other criminal act prior to the stop.

And here, the Court found, the GPS tracker taken during the robbery led police to a particular corner where three businesses were located. Police had a general description of the robber, as well as a description of his clothing, and an officer saw a person matching that description walking from the restaurant toward the hotel and broadcast this information over the radio. Based on this broadcast, Officer Sales drove around to the hotel parking lot where he saw one vehicle

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attempting the leave. Thus, the collective knowledge of the officers established that the suspect was in the vicinity, a person matching the suspect's description was headed toward the hotel, and a single vehicle was attempting to leave the hotel parking lot. This totality of circumstances gave police specific and articulable facts to believe that the driver of the vehicle may have been the suspect, thus providing reasonable suspicion for the traffic stop. Accordingly, the Court concluded that the trial court did not err in denying appellant's motion to suppress.