

THIS WEEK:

- **Motions for New Trial; General Grounds**
- **Void Sentences; OCGA § 16-11-131 (b)**
- **Jury Instructions; Plain Error**
- **Statute of Limitations; Tolling Provisions**
- **Witness Intimidation; Cross-Examination**
- **Recidivist Sentencing; Rule of Lenity**
- **Faretta Hearings; Reasonable Diligence in Obtaining Counsel**
- **Search & Seizure; Curtilage**

Motions for New Trial; General Grounds

Schmeelk v. State, A20A2018 (2/8/21)

Appellant was convicted of family-violence aggravated assault and reckless conduct. He contended that the trial court erred by failing to consider his amended motion for new trial on the “general grounds.” Specifically, he contended that nothing in the court’s order reflected that it evaluated the credibility of the witnesses and weighed the evidence in deciding whether to exercise its discretion to grant a new trial in its role as the “thirteenth juror.” The Court agreed.

The Court noted that the trial court’s order stated that appellant “argue[d] that there was insufficient evidence of his intent to cause injury and that the verdict went against the weight of the evidence.... The Court finds that there was sufficient evidence before the jury to find intent to commit the acts charged. Accordingly, it is hereby ORDERED that Defendant’s Amended Motion for New Trial is DENIED.”

The Court stated that in the absence of affirmative evidence to the contrary, it presumes that the trial court properly exercised its discretion pursuant to OCGA §§ 5-5-20 and 5-5-21. However, when the record reflects that the trial court reviewed the motion for new trial only for legal sufficiency of the evidence, the trial court has failed to exercise such discretion. And here, the Court found, aside from mentioning that appellant made this argument, the order made no reference to the general grounds, gave no indication that the trial court had considered or reweighed the evidence presented at trial, and did not suggest that the trial court had exercised its discretion pursuant to OCGA §§ 5-5-20 and 5-5-21. Accordingly, the Court vacated the trial court’s order denying appellant’s amended motion for new trial and remanded the case so that the trial court may exercise its discretion as the “thirteenth juror” and, in so doing, reweigh the evidence presented at trial.

Void Sentences; OCGA § 16-11-131 (b)

State v. Langley, A20A1806 (2/8/21)

In 1987, Langley was convicted of murder. Following his release from prison, he was convicted of possession of a firearm by a convicted felon in violation of OCGA § 16-11-131 (b). The court sentence him to ten years, to serve six months in prison with the remainder on probation. The State appealed, contending that the sentence was void. The Court agreed and reversed.

The Court found that OCGA § 16-11-131 (b) provides, in relevant part, that “if the felony for which the person is on probation or has been previously convicted is a forcible felony, then upon conviction of receiving, possessing, or transporting a firearm, such person *shall be imprisoned for a period of five years.*” (Emphasis supplied.). The term “forcible felony” includes Langley’s prior conviction for murder. OCGA § 16-11-131 (e). Nevertheless, appellant argued, the trial court has general discretion under § 17-10-1 (a) (1) (A) to impose a probated sentence. Thus, the Court stated, it must decide whether the specific provision of OCGA § 16-11-131 (b) abrogates the trial court’s general discretion under § 17-10-1 (a) (1) (A).

The Court found that the legislature’s intent is short: the plain language of OCGA § 16-11-131 (b) requires the trial court to impose a term of imprisonment “for a period of five years,” and its use of the term “shall” mandates that the defendant serve all of that term in prison. And given the unambiguous intent and plain language of OCGA § 16-11-131 (b), the specific statute prevails over OCGA § 17-10-1. Thus, the trial court’s imposition of a probated sentence directly contravened the legislature’s intent as set forth in the plain language of the statute. Consequently, the trial court lacked the discretion to impose the sentence that it did because the sentence was void. Accordingly, the Court vacated the sentence and remanded the case for resentencing.

Jury Instructions; Plain Error

Croft v. State, A18A1198 (2/9/21)

In *Croft v. State*, 348 Ga. App. 21 (2018), the Court reversed appellant’s conviction for aggravated sexual battery after concluding that the trial court committed plain error by instructing the jury that it could presume, for the purposes of that offense, that a child under the age of 16 is incapable of consenting to sexual contact as a matter of law. The State subsequently petitioned the Georgia Supreme Court for certiorari review. While the State’s petition was pending, that court decided *Williams v. State*, 308 Ga. 228 (2020), which held that a presumption-of- consent instruction may not always amount to reversible error. The Georgia Supreme Court subsequently granted the State’s petition for certiorari, vacated the Court of Appeals’ judgment, and remanded the case for reconsideration in light of *Williams*.

The Court noted that to show plain error, appellant must demonstrate that the instructional error was not affirmatively waived, was obvious beyond reasonable dispute, likely affected the outcome of the proceedings, and seriously affected the fairness, integrity, or public reputation of judicial proceedings.

The Court found that the first two prongs were met. The trial court’s instruction – which acted to relieve the State of its burden of proving lack of consent – was erroneous, and there was no indication that appellant affirmatively waived this

point of error. However, the Court stated, the third prong of the plain error test still required it to determine whether the trial court's erroneous instruction likely would have affected the outcome of the proceedings such that a defendant's substantial rights were impacted.

And here, the Court found, from the outset of her testimony, the victim described appellant's repeated attempts to engage her in sexual activity and her consistent protestations. During the incidents – including the act underlying the charge of aggravated sexual battery – she would tell him to stop or tell him no; she described one instance in which she slapped him. She also testified that, on a number of occasions, appellant used physical force against her but that she fought back and argued with him. Thus, the Court found, despite the erroneous instruction concerning the victim's "legal" capacity to consent, there was ample evidence here from which the jury could have concluded that the victim did not, in fact, consent to the sexual contact, including the sexual act specifically underlying the aggravated sexual assault charge. In other words, the jury instruction error did not constitute plain error here, given the circumstances, because even had the jury been instructed that the State had to prove lack of consent, no rational juror could have concluded, based on the trial evidence, that the State had failed to prove that element in this case. Accordingly, the Court affirmed appellant's conviction for the offense of aggravated sexual battery.

Statute of Limitations; Tolling Provisions

State v. Campbell, A20A1747 (2/10/21)

Campbell was indicted in 2016 for a rape occurring in 1993. The indictment alleged that Campbell had been unknown to the State and not identified as a suspect until "an investigative lead was established through a DNA match via a search of the DNA Database CODIS (Combined DNA Index System) in August 2008." Campbell filed a plea in bar asserting that the statute of limitation had not been tolled as alleged in the indictment because "he was a suspect at all relevant times" and "his identity was not unknown" to the State. After an evidentiary hearing, the trial court granted the plea in bar and the State appealed.

The Court noted that in criminal cases, the statute of limitation runs from the time of the criminal act to the time of indictment. Thus, the State must file an indictment charging the accused with the offense within the applicable statute of limitation period for that crime unless the statute has been tolled. Here, the State argued that the indictment was not time-barred because the statute of limitation period was tolled by the "person unknown" exception set forth in OCGA § 17-3-2 (2). This provision has been interpreted to mean that a statute of limitation is tolled with respect to an unknown person until the State possesses sufficient evidence to authorize the lawful arrest of that person for the crime charged. The amount of actual knowledge required to lawfully arrest an individual is the familiar probable cause standard. The test of probable cause requires merely a probability — less than a certainty but more than a mere suspicion or possibility. Thus, when a defendant makes a prima facie case that the statute of limitation has expired, the State has the burden of proving that it lacked probable cause to arrest the defendant for a time sufficient to deem the indictment or other charging document timely under the person unknown exception.

Here, the State sought to meet its burden by claiming that Campbell had been unknown to the state and not identified as a suspect until a purported DNA match was discovered in August 2008. However, the trial court found that more than 15 years before the return of the indictment, no later than August 2001, the State had actual knowledge of the following

facts providing probable cause to arrest Campbell: that an investigating officer identified Campbell as a suspect from a sketch of a suspected rapist; that the victim believed the person depicted in the sketch was her assailant; that Campbell fit the physical description and had the same manner of speech as the suspect described by the victim; that Campbell had an attempted rape conviction in a neighboring county with a similar modus operandi to the rape in the instant case; that Campbell was identified in that attempted rape case by the same physical characteristics and speech pattern of the assailant in the current case; that Campbell had been seen by police at his brother's residence near the scene of the rape; and that Campbell was known to have been in the area of the rape while on leave from jail on the weekend of the crime.

The Court held that because the trial court's factual findings were supported by the evidence, they were not clearly erroneous. And these facts supported the conclusion that because the State had probable cause to arrest Campbell long before the statute of limitation had expired, the person unknown exception did not apply. Accordingly, the Court affirmed the grant of Campbell's plea in bar.

Witness Intimidation; Cross-Examination

Broadwater v. State, A20A1635 (2/12/21)

Appellant was convicted of armed robbery, kidnapping, and possession of a firearm during the commission of a crime. Appellant contended that the trial court committed plain error in allowing a State's witness to testify about threatening messages she received from his family member. Specifically, the witness testified that she had received text messages and Facebook messages from appellant's uncle threatening her not to testify against appellant and that appellant's uncle had driven past her house on several occasions.

The Court stated that evidence of a defendant's attempt to influence or intimidate a witness can serve as circumstantial evidence of guilt. Evidence of an attempt made by a third person to influence a witness not to testify or to testify falsely is relevant and may be introduced into evidence in a criminal prosecution on the issue of the defendant's guilt where it is established that the attempt was made with the authorization of the accused. However, evidence of a threat or attempt to influence a witness made by a third party must be linked to the defendant in order to be relevant to any material issues.

And here, the Court found, although the threats were made by appellant's uncle, the State presented no evidence that appellant made any threats against the witness or that he directed another person to send the threatening messages. Nor did the State present any circumstantial evidence for an inference to be made that the threats were made at appellant's instigation. Thus, in the absence of evidence permitting an inference to be drawn that the threats were instigated or authorized by appellant, the witness's testimony regarding threats she received was inadmissible. Nevertheless, the Court concluded, there was no plain error because given the overwhelming evidence of guilt, appellant failed to show that the testimony likely affected the outcome of his trial.

Appellant also contended that the trial court committed plain error in allowing the prosecutor to question him as to why the State's witnesses would lie against him. The Court stated that our courts have long held that it is improper to ask a testifying witness whether another witness is lying. The Eleventh Circuit has held that it is often necessary to focus a witness on the differences and similarities between his testimony and that of another witness. This is permissible provided he is not asked to testify as to the veracity of the other witness.

But, the Court found, pretermitted whether the prosecutor's questions to appellant were error, he failed to make the necessary affirmative showing that he was entitled to reversal of his convictions. Specifically, in light of the overwhelming evidence of appellant's guilt, he could not show any harm from the prosecutor's alleged error of questioning him regarding the veracity of the State's witnesses.

Finally, appellant argued, the cumulative effect of the errors warranted a new trial. The Court disagreed. Having considered the cumulative effect of the witness's testimony and the prosecutor's cross-examination, the Court concluded that the cumulative prejudicial effect of any such errors did not require a new trial.

Recidivist Sentencing; Rule of Lenity

Sambou v. State, A20A1764 (2/16/21)

Appellant was convicted of one count of identity fraud and one count of forgery in the first degree. The evidence, very briefly stated, showed that the victim, Moustapha Ndiaye, sought appellant's help in obtaining a taxi license. The victim provided appellant with his driver's license, social-security card, and records of his driving history for appellant to make the required copies of those documents for the taxi license application process. Appellant then made a driver's license using the victim's name and information, but with appellant's picture. Appellant thereafter was pulled over by a law enforcement officer and gave the officer the fraudulent driver's license to establish his identity.

Appellant contended that the trial court erred in sentencing him as a recidivist under OCGA § 17-10-7 (a) based on a prior conviction in New York. The Court noted that this statute imposes maximum sentences for any person convicted of a felony who was previously convicted under the laws of any other state of a crime which if committed within this state would be a felony. Appellant contended that the trial court erred in sentencing him as a recidivist because the State failed to show that he was represented by counsel when he pleaded guilty to the offense in New York. The Court agreed that in recidivist sentencing, the State bears the burden of showing both the existence of the prior guilty pleas and that the defendant was represented by counsel when he entered the pleas. But a defendant can waive a claim that such a prior conviction is invalid because the defendant was denied the assistance of counsel in connection with the conviction. And here, appellant raised no objection to the introduction of his prior felony conviction, and his trial counsel acknowledged the existence of that conviction during the sentencing hearing. As a result, he waived this specific argument for appeal.

Nevertheless, appellant argued, the trial court erred in sentencing him as a recidivist because the State failed to establish that his prior New York conviction was a crime, which, if committed in Georgia, would be considered a felony. The proper analysis for a reviewing court is to identify the out-of-state crime used to enhance the defendant's sentence under OCGA § 17-10-7 (a), consider whether the crime is divisible, and then parse the crime's elements using the "formal categorical" or "modified categorical" approach. After establishing the elements of the out-of-state predicate conviction, it should determine whether those elements would describe a felony under Georgia law. More specifically, when the out-of-state or federal offense sets out a single (or "indivisible") set of elements to define a single crime, the sentencing court lines up that crime's elements alongside those of the state offense and sees if they match. This comparison of statutory elements is what the federal courts refer to as the "formal categorical" approach. In contrast, the "modified categorical" approach is applicable when a sentencing court is confronted with a prior conviction for violating a statute that sets forth multiple

crimes and is, thus, “divisible.” For this narrow range of cases, sentencing courts would need to look beyond the statutory elements of the crime to the charging paper and jury instructions used in a case.

Here, the Court found, the statutory language of the New York felony offense of offering a false instrument for filing in the first degree was not divisible, meaning that the Court must apply the “formal categorical approach to determine if it matches a felony offense under Georgia law. And a comparison of the elements showed that the Georgia felony that the New York offense of offering a false instrument for filing most closely resembles is OCGA § 16-10-20. Both offenses punish using a writing or document that one knows contains false information for purposes connected to a government-related entity’s interest in such document. Accordingly, the trial court did not err in sentencing appellant as a recidivist under OCGA § 17-10-7 (a).

Appellant also contended that the trial court erred in failing to apply the rule of lenity by sentencing him for the felony of identity fraud rather than the misdemeanor of giving a false name to a law enforcement officer. But, the Court found, the two statutes are not coextensive. Identity fraud requires the intentional fraudulent use of, or possession with intent to use, some sort of identifying information of another person without that person’s consent. But giving a false name is both broader and narrower than the offense of identity fraud. Specifically, it is broader in that it covers any “giving” of a false name, which includes both oral and written forms of a false name. But it is narrower in that the name must be given to a law enforcement officer in the lawful discharge of his official duties. Importantly, while these offenses may share common elements, each offense has elements that are not included in the other. And here, the State charged appellant with identity fraud by alleging that he “without authorization and consent, did willfully and fraudulently, use identifying information of Moustapha Ndiaye, to wit: said accused used victim’s name during a traffic stop” The State was required, then, to prove that appellant fraudulently used Ndiaye’s identifying information without his consent, neither of which would have been required to prove giving a false name to a law enforcement officer. Accordingly, the Court held, the trial court did not err by declining to apply the rule of lenity.

Faretta Hearings; Reasonable Diligence in Obtaining Counsel

Porter v. State, A20A1889 (2/19/21)

Appellant was convicted of two counts of identity fraud following a bench trial in which he appeared pro se. Appellant contended that the trial court violated his right to counsel without an unequivocal waiver of his right to counsel and by failing to conduct a *Faretta* hearing on the record. The Court agreed.

The Court stated that under *Faretta*, the trial court must apprise the defendant of the dangers and disadvantages inherent in representing himself so that the record will establish that he made a knowing, voluntary and intelligent waiver of his right to counsel. But here, there were no transcripts of any pre-trial proceedings. At the motion for new trial, the court stated that appellant was adamant that if he could not receive a court-appointed attorney, he wanted to represent himself. The Court stated that taken as true, the trial court’s statements are consistent with a defendant’s unequivocal waiver of his right to counsel and his request to represent himself. But, as a result, the trial court should have conducted a hearing on the record to further advise appellant on his right to counsel and on the dangers of proceeding pro se. However, not only was there no evidence of a *Faretta* hearing, there was no indication from the trial court’s post-trial statements that it ever

advised appellant, in any form, of the dangers of self-representation. Consequently, the Court held, in view of the presumption against a waiver of the right to counsel, appellant's convictions must be reversed.

Furthermore, the Court found, even in the absence of an express waiver of the right to counsel, the trial court failed to properly evaluate whether appellant acted with reasonable diligence in obtaining counsel and whether the absence of counsel was attributable to reasons beyond his control. The record, briefly stated, showed that appellant was tried ten months after indictment. Four months after indictment, appellant applied for a public defender, but was turned down. Appellant initially stated that he would hire counsel, but after hearing and continuances, he apparently determined that he would represent himself at trial.

The Court stated that where a non-indigent defendant has not invoked his right to represent himself at trial, but has also failed to hire an attorney to represent him, the determination of whether he validly waived his right to counsel does not turn upon whether he knowingly and intelligently chose to proceed pro se. Instead, a finding of waiver depends on whether the non-indigent defendant exercised reasonable diligence in securing representation. Thus, when presented with a non-indigent defendant who has appeared for trial without retained counsel, the trial judge has a duty to delay the proceedings long enough to ascertain whether the defendant has acted with reasonable diligence in obtaining an attorney's services and whether the absence of an attorney is attributable to reasons beyond the defendant's control. In other words, it is incumbent upon the trial court in such circumstances to determine three issues on the record: (1) whether a defendant is eligible to have appointed counsel represent him, and, if not, (2) whether the defendant exercised reasonable diligence in attempting to retain trial counsel and (3) whether the absence of trial counsel was attributable to reasons beyond the defendant's control.

And here, after reviewing the record, the Court determined that the trial court failed to address two of the three inquiries. Specifically, the trial court failed to properly evaluate whether appellant acted with reasonable diligence in obtaining counsel and whether the absence of counsel was attributable to reasons beyond appellant's control. Accordingly, the Court reversed the trial court's order denying appellant's motion for new trial. But, because the Court found that the evidence was sufficient to support appellant's convictions, the State may retry him.

Search & Seizure; Curtilage

Lewis v. State, A20A1704 (2/22/21)

Appellant was convicted of VGCSA and possessing tools for the commission of a crime. The evidence, briefly stated, showed that an officer, who was familiar with appellant and appellant's neighborhood, was driving by appellant's house when he spotted appellant sitting on the side porch of his home with money in hand and making motions as if weighing something on a scale. The officer believed appellant was weighing and portioning drugs; so, he stopped his vehicle and got out and watched appellant from the street before calling for backup. When the backup officer arrived, the officer called out to appellant, who responded "oh shit" and stuffed what he had been weighing under the stairwell. Appellant's home had a chain link fence around it and appellant refused the officer's request to enter his property. However, because the home next to appellant's home was abandoned property, the officer walked up the side of that yard until he was but a few feet from where appellant had been sitting. And on the side steps of appellant's house, the officer could see a scale with

marijuana residue and residue of a white powdery substance, which he believed to be cocaine. The officers then entered appellant's property and seized the drugs because the drugs were in plain view.

Appellant contended that the trial court erred in denying his motion to suppress. Specifically, he argued that the trial court erred by finding that the officers lawfully seized the contraband from his property without a warrant under exigent circumstances. The Court agreed and reversed his convictions.

The Court noted that the record showed that during appellant's encounter with law enforcement, a crowd of onlookers gathered in the vicinity, and occupants from within appellant's home began interacting with police. All the while, the scales with drug residue remained in open view on the side steps of appellant's house. In light of this evidence, the trial court concluded that exigent circumstances supported the officers' decision to retrieve the contraband from appellant's property without a warrant because there was a "genuine risk of evidence destruction."

But, the Court found, the officer testified that when his supervisor arrived, he was told to seize the contraband simply because it was in plain view from the neighboring abandoned property. And when the officer was asked specifically why he did not get a warrant to retrieve the contraband, he responded simply, "Plain view." He further testified that appellant was arrested after the contraband was seized. Moreover, the officer also testified regarding discussions about calling an ADA to get a search warrant for inside appellant's house, but one was never obtained because officers decided to leave that task up to another department. But because officers considered obtaining a warrant for the inside of the house, the home's occupants were at one point detained outside to safeguard any evidence that might be inside.

Consequently, the Court found, the record did not support the trial court's finding that the officers were entitled to retrieve evidence from the curtilage of appellant's property under exigent circumstances. To the contrary, the testimony by the officer established that the officers walked onto the property and retrieved the contraband from the curtilage of the home simply because it was in "plain view," not because they believed it was in danger of imminent destruction. Indeed, the officers' ability to successfully secure the house in anticipation of obtaining a warrant to search inside evinced the lack of exigent circumstances. And there was no evidence to suggest that the curtilage of the house could not be secured while a warrant was obtained. Accordingly, the Court held, the trial court's conclusion was not supported by the evidence, and appellant's motion to suppress should have been granted. Thus, the trial court erred in denying appellant's motion to suppress, and the Court reversed his convictions because they were all supported by the evidence recovered in the unlawful seizure.