

## THIS WEEK:

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## Plea Hearings; Right to Assistance of Counsel

*State v. Houston, S21A0957 (11/23/21)*

The State appealed after a habeas court granted Houston's petition for relief. The facts, very briefly stated, showed that Houston was charged with DUI and various related charges in three cases arising from three separate incidents occurring in 2014, 2015, and 2017. Houston, who was not indigent and didn't claim to be, originally had retained counsel for two of the three cases. During his evaluation for DUI Court, his counsel withdrew. Trial was set but continued to allow Houston to retain new counsel and complete the evaluation. Houston was granted continuances a couple of times to retain counsel. After Houston completed the DUI Court evaluation and orientation, his cases were transferred to DUI Court, and on June 25, 2019, he appeared pro se at a DUI Court plea calendar. At the start of his plea hearing, Houston told the trial court, "I request that I get counsel because I need to find ... some help in this matter." Houston was apparently concerned with the requirements of DUI Court and the State's jail sentence recommendation. The trial court refused to reset his case and Houston proceeded to plead guilty.

Approximately two months later, Houston, through counsel, filed a habeas petition, alleging that his Sixth Amendment right to counsel had been violated because the trial court denied his request for counsel. The habeas court agreed.

The Court stated that a defendant has a Sixth Amendment right to the assistance of counsel at his plea hearing. For a defendant's express waiver of the Sixth Amendment right to counsel to be valid, the waiver must be knowing, voluntary, and intelligent. The law ordinarily considers a waiver knowing, intelligent, and sufficiently aware if the defendant fully understands the nature of the right and how it would likely apply *in general* in the circumstances — even though the defendant may not know the *specific detailed* consequences of invoking it. Whether a defendant is capable of making a knowing and intelligent decision will depend on a range of case-specific factors, including the defendant's education or sophistication, the complex or easily grasped nature of the charge, and the stage of the proceeding. The determination of whether a defendant is capable of making a knowing waiver of his right to counsel is a factual determination that is accepted on appeal unless it is clearly erroneous.

And here, the Court found, the habeas court did not clearly err in concluding that Houston did not make an express waiver of the right to counsel at his plea hearing that was knowing and voluntary. On the contrary, he specifically requested an attorney to help him at the beginning of his plea hearing. Nowhere in the transcript of the change-of-plea hearing did the trial court inform Houston that he had a right to counsel at that hearing.

Nevertheless, the State argued, the forms signed by Houston supported a conclusion that he was informed of his right to counsel. The Court noted that Houston did sign a set of guilty plea statement forms that, among other things, informed him of his right to counsel and that he was waiving that right by pleading guilty. But given the context in which the question about his understanding that he was giving up the right to counsel by pleading guilty appears on the forms — in a list of certain rights that come with a trial — Houston's completion of the forms at most evidenced his awareness that he was giving up the right to have counsel represent him *at trial*. His completion of the forms did not demonstrate that he knew that he had a right to counsel at the *plea hearing*. Furthermore, given that the forms signed by Houston did not include an advisement that a defendant has a right to a lawyer when pleading guilty, the State's suggestion in its briefing that a public defender likely reviewed that paperwork with Houston was beside the point.

The State also pointed to evidence that Houston could have elected not to enter DUI Court and asked for his cases to be reset before a different judge, arguing that this showed that Houston was not “forced” to enter a guilty plea without the benefit of counsel. But, the Court stated, this misapprehended the basis for the grant of habeas relief — that Houston entered his guilty pleas without being apprised of his right to counsel, not that he was somehow left with no choice but to plead guilty on the day that he did.

Accordingly, the Court held, based on the record, it could not conclude that the habeas court clearly erred in making any of its key factual determinations — that Houston entered a guilty plea without counsel, that Houston was not advised that he had a right to counsel at that proceeding, and that, therefore, Houston did not knowingly waive that right. Consequently, the State failed to show a basis to reverse the grant of habeas relief to Houston.

## **Jury Charges; Voluntary Manslaughter**

*Davis v. State, S21A1198 (11/23/21)*

Appellant was convicted of murder and other offenses in the shooting death of Burks. The evidence, briefly stated, showed that appellant had a daughter with Jones, who at the time of the offenses, was living with her boyfriend, Burks. Appellant went to visit his daughter, who was about three years old at the time, on the porch of the home of Jones and Burks. Burks arrived at the home during appellant's visit with his daughter. In the presence of appellant's daughter and Jones's two other minor children, appellant shot at Burks at least 11 times, striking Burks at least seven times. One of the children, who was seven at the time of trial, testified that Burks was “playing with [the] lips” of appellant's daughter, before appellant punched, then shot, Burks.

At trial, appellant testified that he shot Burks in self-defense. Appellant claimed that he saw Burks retrieve a gun from his car and put it in his pocket before Burks approached the porch where appellant was visiting with his daughter. According to appellant, he objected when Burks “grabbed” appellant's daughter “on her face.” Appellant claimed that Burks said, “I already told you what I'd do,” started “swinging on” him, and continued to attack him as appellant backed away down the

steps of the porch. Appellant testified that he was weakened by pneumonia and shot Burks to defend himself. Appellant admitted that he did not see Burks “pull his gun” on appellant at any time during the incident.

Appellant argued that the trial court committed plain error in failing to charge on voluntary manslaughter. The Court disagreed.

The Court noted that even slight evidence showing that the victim seriously provoked the defendant requires the trial court to give a requested charge on voluntary manslaughter. Appellant argued that there was evidence that he was seriously provoked, such that a voluntary manslaughter charge should have been given, in that Burks touched the lips of his three-year-old daughter, then started attacking him. But, the Court stated, an error is plain only if it is clear or obvious under current law. An error cannot be plain where there is no controlling authority on point. The Court noted that appellant cited no precedent requiring a voluntary manslaughter instruction under circumstances similar to those presented in this case and the Court stated it found none. The Court further noted that molestation or similarly improper touching of a defendant's minor child might in some cases create the sort of serious provocation that merits a voluntary manslaughter charge, but it was not at all obvious that the apparently brief, non-sexual touching of appellant's daughter by Burks rose to this level of provocation.

Moreover, the Court stated, where there is a question of self-defense, a charge on voluntary manslaughter is warranted only where there is evidence showing that the accused was so excited that he reacted passionately rather than simply in an attempt to defend himself. Neither fear that someone is going to pull a gun nor fighting are the types of provocation which demand a voluntary manslaughter charge. Evidence that Burks was “swinging on” appellant, even coupled with evidence that Burks touched appellant's daughter, did not obviously require a voluntary manslaughter instruction. Therefore, the trial court did not plainly err in failing to give that instruction.

## **Motions for New Trial; Failure to Appear**

*Murray v. State, S21A1098 (11/23/21)*

Appellant was convicted of malice murder and other crimes. Very briefly stated, the record showed that over the course of his motion-for-new-trial proceedings, appellant was appointed three different attorneys, each of whom he rejected. Representing himself at the last hearing on his motion for new trial, appellant purported to be a different person — “Billy Drew Bey” — who was acting as appellant's attorney, prompting the trial court to enter an order either dismissing or denying appellant's amended motion for new trial because “Bey” had not provided any support for the motion and “Murray” had failed to appear for the hearing. Appellant, still representing himself, appealed.

The Court stated that to the extent the first reason indicated that the trial court considered the merits of the numerous claims raised by appellant's amended motion for new trial and denied them all because he did not provide additional evidence beyond the trial record, the court erred. The Court found that some of appellant's claims required additional evidence to be successful because they relied on alleged evidence that exists outside the trial record, such as his claims that the State withheld, or his counsel failed to find, certain exculpatory evidence. However, some of appellant's enumerations did not require additional evidence, such as his merger claim, his claims that the trial court erred by admitting certain evidence, and some of his claims of ineffective assistance of trial counsel. The trial court could have denied or granted these

claims based entirely on the existing record. Thus, denying them all on their merits on the ground that appellant failed to present additional support for them at the hearing was error and undermined any effort to read the order as a ruling on the merits of appellant's claims.

Next, the Court held that to the extent the trial court dismissed appellant's amended motion for new trial without considering its merits because appellant purportedly failed to appear at the hearing, was error as well. Motions for new trial can be, and regularly are, decided without a hearing. If a defendant does not request a hearing or does not appear at a scheduled hearing, he may waive his right to a hearing and the opportunity to expand the record, but that does not waive his right to have the merits of his motion for new trial considered and decided by the trial court based on the existing record. Thus, appellant's absurd assertion that he was not at the hearing was not a valid basis for the trial court to dismiss his amended motion for new trial.

In so holding, the Court stated that appellant's flagrant disrespect for the trial court and judicial process — as demonstrated by many of his actions, including his repeated refusal to accept the lawyers appointed for him (even after he specifically requested them), his filing of dozens of pro se motions while represented, his creation of an imaginary character to serve as his lawyer, and his refusal to identify himself correctly to the trial court — was undoubtedly frustrating for the court, which was striving to ensure that he received the benefit of properly conducted motion-for-new-trial proceedings. Appellant's behavior was inappropriate and served only to waste the trial court's time and delay resolution of his case. Nevertheless, the Court stated, it must vacate the trial court's order and remand the case for the court to consider the merits of appellant's amended motion for new trial.

## Motions to Suppress; Video Conferencing

*State v. Assing, A21A0763 (9/30/21)*

Assing was charge with three counts of DUI and other traffic offenses. She filed a motion to suppress which the court conducted over video conferencing. The record showed that at the hearing, Assing argued that the initial officer lacked probable cause to detain her. The prosecutor declined to call the initial officer to the hearing, but instead said he would call the arresting state trooper as a witness. However, the prosecutor told the court that the trooper had trouble connecting to the video and after the hearing resumed, the parties presented their arguments regarding whether testimony from the initial officer was necessary. After argument and another brief pause, the trial court concluded that the initial officer's testimony was in fact necessary to meet the State's burden to show reasonable grounds for detaining Assing temporarily. Because that officer was not present, the trial court indicated that it would grant the motion. The State asked for clarification and noted that the arresting state trooper arrived at the scene ten minutes after Assing's collision, but the court confirmed its ruling and concluded the hearing. The State appealed.

The State contended that the trial court erred by not allowing the trooper to testify. But the trial court made a specific finding that the trooper "did not appear for the hearing," and the Court stated it could not reject this finding as clearly erroneous. In fact, the Court noted, the State did not claim that the trooper was present. Rather, it argued that the trial court should have allowed it to ask for a continuance to address the trooper's difficulty connecting to the hearing. The State, however, never requested a continuance or informed the court that the trooper's technological issues had not been resolved. And after the trial court orally announced its ruling, the hearing continued, with both the prosecutor and defense

counsel discussing the ruling with the trial court. Even though the State knew at that point that the court planned to grant Assing's motion, it did not request the opportunity to present evidence from the trooper, assert that technological difficulties continued to impede his presence, or make any effort to proffer the evidence that, in its view, was sufficient to withstand Assing's motion to suppress.

The Court stated that as the appellant, the State carried the burden of showing error affirmatively by the record, and when that burden is not met, the judgment is assumed to be correct and will be affirmed. The Court recognized that technological difficulties could arise as Georgia courts shift to conducting hearings via video conference due to Covid 19. But when such circumstances occur, a party must inform the trial court and request additional time to resolve the issue. Although the trooper initially had difficulty joining the video conference, the Court found that the record was silent as to what took place as the hearing progressed. It did not disclose whether the trooper joined, whether his technical problems continued, or whether he simply decided not to participate. And despite presenting further argument after the trial court announced its ruling, the State did not apprise the court of the trooper's situation, request the opportunity to offer evidence or seek a continuance. As a result, the record was devoid of evidence in support of the temporary detention. Under these circumstances, the Court concluded that the trial court did not err in finding that the State failed to meet its burden.

### **Crawford; Rule 403**

*Allen v. State, A21A0709 (10/4/21)*

Appellant was convicted of three counts of violation of the Georgia Street Gang Terrorism and Prevention Act. The evidence, very briefly stated, showed that Tate, a rival gang member, went on Facebook live and said that appellant's gang, Sex-Money-Murder, a subset of the Bloods, should stop hiding. The next day, appellant and other members of his gang, got into a shootout with Tate.

Appellant contended that the trial court erred in admitting over his objection an audio recording of the Facebook video by Tate because it violated the Confrontation Clause and constituted inadmissible hearsay. The Court stated that the Confrontation Clause applies only to out-of-court statements that are testimonial in nature. A statement is testimonial if its primary purpose was to establish evidence that could be used in a future prosecution. After a determination is made that a statement is nontestimonial in nature, normal rules regarding the admission of hearsay apply. And here, the Court found, the statements made in the Facebook live recording clearly were not intended for use in a future prosecution and thus were not testimonial and thus, appellant's constitutional right of confrontation was not implicated.

Appellant next argued that the evidence was inadmissible hearsay. The Court stated that for a statement to constitute hearsay, it must be "offered in evidence to prove the truth of the matter asserted." OCGA § 24-8-801(c). But, here, the statements contained in the recording were not offered to prove the truth of the matter asserted. Rather, the recording was offered to show its effect on appellant and his motive for participating in the shootout. Accordingly, appellant's claim that this evidence was inadmissible hearsay was also without merit.

Next, appellant argued that the trial court erred in admitting "highly prejudicial evidence which had little to no probative value." Specifically, appellant took issue with the admission of photographs posted to his Facebook profile showing his

gang affiliation as well as testimony from the investigator admitted as an expert in criminal street gangs, and testimony from a former prison guard.

The Court noted that the trial court admitted the photographs over appellant's Rule 403 objection that their probative value was substantially outweighed by the danger of unfair prejudice. Appellant objected to the expert's testimony stating it was "bad character evidence" and that the defense already had conceded he was in a criminal street gang. The trial court overruled the objection. During the testimony of the former prison guard, Appellant voiced an objection under Rule 403, arguing that "we've already admitted gang member association. ... The prejudicial effect so far outweighs the probative value ... [s]ince we've admitted the fact[.]" The court allowed the guard's testimony over the objection.

Appellant argued that evidence of his gang membership violated Rule 403 because his trial counsel admitted during opening argument that appellant was a member of "Sex-Money-Murder," a criminal street gang. But, the Court stated, counsel's statements during his opening were not evidence, and the State still had to prove that appellant was a member of a "criminal street gang" known as "Sex-Money-Murder," as well as a connection between that gang and the crimes at issue. Thus, the Court concluded, the trial court did not abuse its discretion under Rule 403 when it admitted the evidence of gang activity.

## Speedy Trial Demands; Unsworn Juries

*State v. Bowman, A20A1873 (10/5/21)*

Following a trial by jury, Bowman was convicted on one count of child molestation and one count of incest, and he was ultimately sentenced to serve fifty years with the first fifteen years in confinement. Nearly five years later, Bowman's then-appellate counsel filed an amended motion for new trial, alleging that the petit jury was unsworn; and — with consent of the State — the motion was granted. Shortly thereafter, Bowman filed a motion for discharge and acquittal on the grounds that his statutory and constitutional rights to a speedy trial—which he properly asserted prior to trial — were violated by the nullified verdict. The trial court granted Bowman's motion, and the State appealed.

The State argued that the trial court erred by concluding that Bowman's statutory right to a speedy trial was violated by its failure to swear the petit jury. The Court noted that it was undisputed that Bowman filed a statutory speedy trial demand in compliance with OCGA § 17-7-170 (a). What was disputed was whether Bowman was "tried" or put on "trial" for purposes of OCGA §§ 17-7-170 (b) and (c). The Court noted that OCGA § 17-7-170 (c) provides that a statutory speedy trial demand expires "at the conclusion of the trial or upon the defendant entering a plea of guilty or nolo contendere." In this regard, Bowman argued that because the jury was not sworn as required by OCGA § 15-12-139 when he was tried in 2014, he was not "tried" or on "trial" for purposes of OCGA §§ 17-7-170 (b) or (c).

The Court agreed that binding precedent holds that the complete failure to swear a petit jury prior to deliberations demands a new trial. Indeed, the *complete* failure to swear-in a jury results in a conviction that is a nullity, because jeopardy does not attach in a jury trial until the jury is impaneled *and sworn*.

But, the Court stated, just because an unsworn jury renders a conviction a nullity such that it requires a retrial, this does not mean the first trial is rendered a nullity such that a defendant is entitled to a discharge and acquittal under OCGA §

17-7-170 (b). OCGA § 17-7-170 was enacted to implement the constitutional provision for a speedy trial, and it does not provide any substantive right but, rather, establishes a procedure for securing the existing constitutional right. Unlike the protection afforded by the Double Jeopardy Clause, the Speedy Trial Clause does not, either on its face or according to the decisions of the Court, encompass a “right not to be tried” which must be upheld prior to trial if it is to be enjoyed at all. It is the delay before trial, not the trial itself, which offends against the constitutional guarantee of a speedy trial.

And here, the Court noted, the trial court failed to swear the petit jury and that failure went entirely unnoticed by everyone involved—including the trial court. So, as far as all involved were concerned, Bowman was in fact tried (or had a trial) and then convicted of the crimes for which he was indicted, resulting in his post-trial incarceration. And while the trial court's failure to swear the petit jury rendered Bowman's conviction a nullity, there was no statutory or precedential basis for concluding that he was not tried within the meaning of OCGA §§ 17-7-170 (b) or (c). To the contrary, the Court stated, the ordinary signification of “trial” supports its determination that he was tried within the meaning of those statutes.

Unfortunately, until Bowman filed his amended motion for new trial nearly five years later, the reversible error committed in his trial went undiscovered. To be sure, the Court stated, the failure to swear a petit jury is no small matter, which is why Bowman's motion for new trial was correctly granted by the trial court. But until the error was noticed by the trial court, Bowman, or the State, there was no way to rectify the situation. And as lamentable as the post-conviction delay in discovering this error may be, it does not implicate or trigger the protections of OCGA § 17-7-170 (b). Bowman was “tried” or placed on “trial” within the plain meaning of OCGA §§ 17-7-170 (b) and (c), and the fact that his conviction was subsequently (and rightly) declared a nullity is of no consequence in determining whether his speedy trial demand was satisfied. Thus, the Court concluded, although the failure of the trial court to swear the petit jury unquestionably rendered Bowman's conviction a nullity (meaning that he may be retried for all the charges he faced, including those for which he was acquitted, without running afoul of the Double Jeopardy Clause), this nullity did not entitle him to a discharge and acquittal under OCGA § 17-7-170 (b). There is simply no legal basis supporting Bowman's attempt to extend the nullification of a conviction due to a violation of OCGA § 15-12-139 to the underlying trial itself for purposes of OCGA §§ 17-7-170 (b) and (c).

In sum, the Court stated, a trial and conviction are not synonymous, nor are they to be conflated.

Nevertheless, Bowman argued, his constitutional right to a speedy trial was violated under *Barker v. Wingo*. But, the Court noted, his only argument was that his right to a speedy trial was violated because the period between his arrest and the grant of his motion for discharge and acquittal was more than 78 months. But the Court stated, it concluded the initial trial was a trial for “speedy trial” purposes, notwithstanding the reversible error committed. Thus, under these circumstances, the proper calculation for delay is the time between the trial court's ruling upon Bowman's amended motion for new trial and the grant of his motion for discharge and acquittal. And because the trial court erred in its analysis of this question, it improperly calculated the delay, which, at less than one year, was not presumptively prejudicial, thus triggering the four-factor analysis of *Barker v. Wingo*. Accordingly, the Court concluded, Bowman's constitutional argument failed at the threshold and the trial court's judgment was reversed.

## Conceding Guilt; *McCoy*

*Pass v. State, A21A0756 (10/7/21)*

Appellant was tried on charges of possession of cocaine with intent to distribute, possession of less than one ounce of marijuana, obstruction of an officer, giving false information to a law enforcement officer, driving without a license, and failure to stop at a stop sign. He was convicted of only obstruction, giving a false name, and driving without a license.

Relying on *McCoy v. Louisiana*, \_\_\_ U. S. \_\_\_ (138 SCt 1500, 200 LE2d 821) (2018), appellant contended that his trial counsel's strategic decision to concede his guilt on the charges of obstructing an officer, giving a false name to a law enforcement officer, and driving without a license constituted a structural error requiring a new trial. Specifically, he argued that trial counsel's testimony at the hearing on the motion for new trial, that appellant was generally opposed to the idea of conceding guilt, showed that trial counsel usurped appellant's fundamental decision to decide the objective of his defense -- i.e., to maintain his innocence and pursue an acquittal on all charges. And appellant further contended that under *McCoy*, his attorney's conduct resulted in a structural error, requiring that he be granted a new trial. The Court disagreed.

The Court stated that nothing in *McCoy* requires counsel to obtain the express consent of a defendant before conceding guilt. Instead, *McCoy* makes clear that structural error occurs only where counsel concedes his client's guilt to one or more charges despite the client's "intransigent and unambiguous objection" to this strategy. *McCoy*, 138 SCt at 1507 (I). And here, the Court found, appellant, who neither appeared nor testified at the new trial hearing, presented no evidence that he voiced such an objection. The only evidence on this issue was the testimony of trial counsel, who acknowledged that although appellant was not happy with the strategy, he never forbade her to use it. And appellant did not prevent counsel from relying on this strategy even after she made it clear to him that, despite his reservations, she planned to employ it. Nor did appellant voice any objections to the trial court, even when it inquired as to whether appellant agreed to the proposed stipulation that he was driving without a license. Given these circumstances, the Court concluded that trial counsel's strategic decision to concede guilt on some of the misdemeanors with which appellant was charged did not constitute structural error requiring a new trial.