

## THIS WEEK:

- Grand Jury Proceedings; Police Officers
- Juveniles; Statements
- Right to Public Trial; Ineffective Assistance of Counsel
- OCGA § 16-6-5.1; Sufficiency of the Evidence
- Conspiracy; Sentencing

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### Grand Jury Proceedings; Police Officers

*Burns v. State, S21A0905 (3/8/22)*

Appellant was on duty as a police officer in June 2016 when he allegedly shot and killed an individual. Briefly stated, the procedural facts show that in August 2016, the DA provided appellant with notice under former OCGA §§ 17-7-52 and 45-11-4 of the DA's intent to present evidence to a grand jury of offenses arising out of the June 2016 shooting incident. Appellant exercised his rights to be present with counsel during the grand jury presentation, and to give sworn testimony not subject to cross-examination. On August 31, 2016, the grand jury returned a true bill of indictment against him on all proposed charges.

In July 2018, the DA nol prossed the indictment and then sought to reindict appellant. In August 2018, the DA provided appellant with a copy of the new indictment and notice of the DA's intent to proceed with a grand jury hearing on September 5, 2018, pursuant to the 2016 versions of OCGA §§ 17-7-52 and 45-11-4. After the grand jury indicted appellant, he filed a "Plea in Abatement/Motion to Quash Indictment," arguing that, because the shooting incident occurred before the July 1, 2016, effective date of the amendments to OCGA §§ 17-7-52 and 45-11-4, the State was required to follow the prior version of the statutes. After a hearing, the trial court denied his motion. The Supreme Court then granted appellant's application for interlocutory appeal.

Citing *Deal v. Coleman*, 294 Ga. 170 (2013), appellant argued that the trial court erred by failing to properly analyze the issue of retroactivity. Specifically, he contended that former OCGA §§ 17-7-52 and 45-11-4 created substantive, private rights, rather than substantive, public rights, as found by the trial court. The Court disagreed. The Court noted that the framing of this case as one about the retroactive application of the 2016 amendments was largely misguided. In its order, the trial court assumed that the statutes at issue provided substantive rights for peace officers and then delved into an analysis regarding whether the rights were public or private under *Deal*. However, the Court stated, this assumption was incorrect, as the crux of this case is whether the statutes at issue provide substantive rights or whether they govern only procedure of the courts.

And here, the Court found, the 2016 statutory amendments are not substantive in nature as they create no new obligations and grant no substantive rights that did not exist before. Instead, the 2016 amendments merely changed the procedures

for providing notice of a grand jury hearing to an accused police officer and the procedures under which an accused officer may be present during and provide evidence by sworn testimony at that hearing. While these may be important and valuable rights, they are procedural, not substantive, in nature. Therefore, the Court concluded, because the 2016 amendments to OCGA §§ 17-7-52 and 45-11-4 are procedural, and because the amended statutes were in effect at the time of appellant's grand jury proceeding, they governed that proceeding.

Nevertheless, appellant argued, the trial court's order allowed an unconstitutional ex post facto application of the 2016 amendments. The Court again disagreed, because the 2016 amendments are procedural in nature, and the prohibition on ex post facto laws applies only to substantive, not procedural, rights.

## Juveniles; Statements

*Daniels v. State, S21A1268 (3/8/22)*

Appellant was convicted of felony murder in connection with the shooting death of Kenneth Moore; the aggravated assaults of Jai Williams, Jamal Williams, and James Williams; the theft of vehicles belonging to Jamal Williams, Marcus Jones, and Alvin Walker; and other offenses. The evidence, very briefly stated, showed that during the early morning of December 17, 2017, appellant stole a truck belonging to Jones at Jones's residence. The next day, appellant and another person kicked in the back door of Moore's house and stole numerous items. Moore returned home during the break-in and appellant shot him. On December 24, appellant stole Walker's vehicle from Walker's residence. On Christmas Day, 2017, appellant and two others stole Jamal Williams's vehicle as it sat idling at his parents' home. Williams, his father, and brother then gave chase in the father's vehicle. Appellant and the Williamses got into a shoot-out at Belvedere Park and Jamal Williams was shot by appellant. The vehicle was recovered by the Williamses and returned to the parents' house. Appellant was arrested at his home on Jan. 11, 2018, taken to the police station and questioned by multiple officers (although not at the same time) for five to six hours on a wide range and number of incidents. Appellant was 14 years old at the time of the crimes and when he was interviewed by the police.

Appellant argued that his statements to the police should have been excluded because the officers who arrested and interviewed him did not comply with OCGA § 15-11-502 (a) (3), which provides, in relevant part that "[a] person taking an alleged delinquent child into custody, with all reasonable speed and without first taking such child elsewhere, shall . . . [b]ring such child immediately before the juvenile court or promptly contact a juvenile court intake officer." OCGA § 15-11-502 (b) provides an exception to this requirement. Subsection (b) provides that, notwithstanding the general rule of subsection (a), "a law enforcement officer may detain an alleged delinquent child for a reasonable period of time sufficient to conduct interrogations and perform routine law enforcement procedures including but not limited to fingerprinting, photographing, and the preparation of any necessary records." Specifically, he contended that his detention for questioning violated these provisions of the Juvenile Code because he was not brought before a juvenile court until the next day.

The Court determined that because his arguments were not made until after trial, its review was limited to whether there was plain error. The Court noted that although the application of the exception set forth in OCGA § 15-11-502 (b) appeared to be a matter of first impression for this Court, subsection (b) plainly authorized the police to detain and interrogate appellant for a reasonable period of time after his arrest. And the Court stated, it could not say that a period of

roughly five and a half to six hours was an obviously unreasonable time for interrogation in this case, particularly given the range and number of incidents about which appellant was questioned by the police.

Appellant also argued that he was first brought before the juvenile court at 1:30 p.m. on January 12, the day after his interviews with the police. However, the Court noted, he did not point to anything in the record to support that assertion, nor did he even assert what happened during the intervening hours, such as whether a juvenile court intake officer was contacted. Thus, he failed to show that any such delay was obviously unreasonable, such that it was an obvious error under OCGA § 15-11-502 (b).

Next, appellant argued that he did not knowingly and voluntarily waive his constitutional rights before making the incriminating statements and that they should have been excluded by the trial court under the test set forth in *Riley v. State*, 237 Ga. 124 (1976). *Riley* provided that in evaluating whether a juvenile defendant knowingly and voluntarily waived his *Miranda* rights during an interrogation, the courts are to consider the following nine factors: (1) age of the accused; (2) education of the accused; (3) knowledge of the accused as to both the substance of the charge and the nature of his rights to consult with an attorney and remain silent; (4) whether the accused is held incommunicado or allowed to consult with relatives, friends, or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) methods used in interrogation; (7) length of interrogations; (8) whether or not the accused refused to voluntarily give statements on prior occasions; and (9) whether the accused has repudiated an extra judicial statement at a later date. Appellant argued that the trial court misapplied the *Riley* factors in reaching its conclusion that his statements were admissible.

After reviewing, in detail, the facts applicable to each of the *Riley* factors, the Court found that although some factors weighed against the trial court's ultimate determination that appellant's statements were admissible under *Riley*, it could not say that the trial court erred. Appellant, who the record showed was nearly 15 years old and could read and write, was clearly advised of his rights twice and appeared to understand them. And although his interviews were fairly lengthy, there was nothing in the record to suggest that he was coerced, intimidated, threatened, or held incommunicado by the police. He was permitted to speak with his mother and was given food and drink at the police station. He never asked to speak with a lawyer or anyone else. Under these circumstances, it could not be said that the trial court erred in concluding that, under the totality of the circumstances, appellant made a knowing and voluntary waiver of his *Miranda* rights under the *Riley* factors.

## Right to Public Trial; Ineffective Assistance of Counsel

*Alexander v. State*, S21G0112 (3/15/22)

Appellant was convicted of multiple sexual offenses against his two stepdaughters, both of whom were under the age of 16 at the time of trial. Briefly stated, the record showed that at the State's request and with the consent (or at least without objection) of appellant's counsel, the courtroom was cleared during the testimony of the two victims and a child advocate who interviewed the younger victim. The only exception to this was that the victims' uncle, upon the request of the victims and the State, was allowed to remain in the courtroom. Appellant's parents were among the group of spectators that were asked to leave.

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# CaseLaw UPDATE

WEEK ENDING APRIL 1, 2022

Issue 13-22

Following trial, appellate counsel filed a motion for new trial, alleging that trial counsel rendered ineffective assistance by failing to object to the partial closure of the courtroom. Relying on *Reid v. State*, 286 Ga. 484, 488 (3) (b) (2010), the trial court rejected appellant's claim. The Court of Appeals affirmed, also relying on *Reid*. See *Alexander v. State*, 356 Ga. App. 392, 394-395 (2) (a) (2020). The Court granted appellant's petition for a writ of certiorari.

Appellant contended that the partial closure deprived him of his public-trial right under the Sixth Amendment. Specifically, the trial court failed to follow *Presley v. Georgia*, 558 U.S. 209, 214 (130 SCt 721, 175 LE2d 675) (2010) by not conducting any inquiry or making any findings regarding the interests to be advanced by the closure, whether the closure was broader than necessary to advance those interests, and whether there were alternatives to closure. Moreover, he argued, had his trial counsel objected to the partial closure and had the objection been overruled, he would have been entitled to have his convictions reversed on direct appeal without the need to show actual harm because a courtroom closure during witness testimony in violation of a defendant's right to a public trial under the Sixth Amendment is a "structural" error.

However, the Court stated, where, as here, no objection to an alleged error is raised at trial and the error is raised only through a claim of ineffective assistance of counsel, *Strickland v. Washington* ordinarily requires the defendant to show not only that his counsel performed deficiently by not objecting, but also that the deficiency caused prejudice, meaning a reasonable probability that, but for the deficiency, the outcome of the trial would have been different. Applying *Strickland*, the Court held in *Reid* that even when a courtroom closure would necessitate reversal had an objection been preserved, in order to satisfy the prejudice prong of the *Strickland* test, the defendant is required to demonstrate a reasonable probability that the outcome of the trial would have been different had his counsel objected to the closure.

Nevertheless, appellant argued, *Reid* was decided before the U. S. Supreme Court's decision in *Weaver v. Massachusetts*, \_\_\_ U.S. \_\_\_ (137 SCt 1899, 198 LE2d 420) (2017). In *Weaver*, appellant argued, the Supreme Court decided that when it comes to courtroom closures, claims of ineffective assistance must ultimately concentrate on the fundamental fairness of the proceeding, rather than the higher standard of *Strickland* prejudice. Thus, appellant contended, the Court should overrule *Reid* and adopt the "fundamental fairness" test employed by the *Weaver*. The Court disagreed.

The Court found that *Weaver* did not actually establish any new test for evaluating claims of ineffective assistance of counsel, and there are sound reasons to continue applying *Reid*'s holding to such claims. Thus, the Court stated, it would continue to adhere to *Reid* and declined appellant's invitation to overrule it.

Applying *Reid*, the Court found that appellant failed to carry his burden of showing a reasonable probability that the outcome of his trial would have been different but for his counsel's failure to object to the closure of the courtroom during the witnesses' trial testimony. The Court noted that in his testimony at the hearing on his motion for new trial, appellant suggested that, had his parents remained in the courtroom, the victims might have testified differently. But, the Court stated, such speculation is insufficient to establish prejudice in a claim of ineffective assistance of counsel. Therefore, because appellant did not make the requisite showing of prejudice, there was no error in the Court of Appeals' determination that appellant's claim of ineffective assistance of counsel must be rejected under *Reid*. Accordingly, the judgment of the Court of Appeals was affirmed.

## **OCGA § 16-6-5.1; Sufficiency of the Evidence**

*Huggins v. State, A21A1694 (2/1/22)*

Appellant was convicted of sexual assault of a student and sexual battery. The evidence showed that appellant was a driving instructor at Lanier Technical College and the 16-year-old victim was a full-time high school student but was enrolled at Lanier Tech for on-the-road driving lessons. Appellant argued that Lanier Tech is not a "school" under OCGA § 16-6-5.1 (2016), and thus the evidence at trial was insufficient to sustain his conviction for sexual assault of a student. The Court disagreed.

The Court noted that applying the definition of "school" under OCGA § 16-6-5.1 was an issue of first impression. Nevertheless, even under a strict construction of the statute, Lanier Tech and its corresponding driver's education course met the definition of school under the 2016 version of OCGA § 16-6-5.1. Although the victim attended a separate high school and was not enrolled at the college, the definition of school included "educational program[s]," which encompassed the driver's education course. The college's driver's education course was established pursuant to Joshua's Law, and one of the purposes set out by the General Assembly in passing the law was that "the state should assist in getting more young people into . . . driver education and training programs." See Ga. L. 2005, p. 1461 § 2. And, in approving the curricula for driver's education courses, the State ensures that the courses "educate young drivers about safe driving practices and the traffic laws of this state and . . . train young drivers in the safe operation of motor vehicles." OCGA § 40-5-10 (a). Finally, OCGA § 16-6-5.1's definition of school included that the institution or program provide education to children "at any level, pre-kindergarten through twelfth grade, or the equivalent thereof if grade divisions are not used." OCGA § 16-6-5.1 (a) (5) (2016). The Court found that the college's driver's education course satisfied this requirement because the course was limited to drivers between the ages of 15 and 18. Accordingly, the Court concluded, the trial court did not err in finding that Lanier Tech and its corresponding driver's education course met the definition of school under OCGA § 16-6-5.1 (2016).

Next, appellant argued that he was not a "teacher" under OCGA § 16-6-5.1 (2016). The Court again disagreed. Unlike the defendants in *State v. Morrow*, 300 Ga. 403 (2016) (paraprofessional) and *State v. Rich*, 348 Ga. App. 467 (2019) (substitute teacher), appellant did the sort of things that teachers typically do. He instructed students in the classroom and on the road, was expected to know the subject material, graded tests, evaluated his students' driving performance, had discretion when instructing the students, trained other instructors, and was a certified driving instructor. Accordingly, the Court concluded, the trial court did not err in finding that appellant was a teacher under the 2016 version of OCGA § 16-6-5.1.

Nevertheless, appellant contended, he had no supervisory or disciplinary authority over the victim and was "simply the passenger in the vehicle with her[.]" However, the Court found, as the phrase is used in OCGA § 16-6-5.1 (b) (1), "supervisory or disciplinary authority" means "the power to direct and to enforce compliance." Here, appellant's job description included managing student behavior; he was in the car with the victim in a specialized driving instruction vehicle; and he instructed the victim on driving and corrected her behavior while on the road. Thus, the Court found, appellant had supervisory authority over the victim. during the driving lesson.

## Conspiracy; Sentencing

*Tucker v. State, A21A1760 A22A002 (2/4/22)*

Appellants, Jarvis and Jason Tucker, were convicted of four counts each of false imprisonment and kidnapping, three counts of aggravated assault, two counts of armed robbery, and one count each of conspiracy to commit armed robbery, conspiracy to commit burglary, burglary, first-degree cruelty to children, and possession of a firearm or knife during the commission of a felony. Very briefly, the evidence showed that early one morning in 2011, N. A. was exiting his car in his home driveway when a masked man carrying a walkie-talkie put a shotgun to his head. Almost immediately, two other masked, armed men joined them. They then took him inside and robbed him. When N.A.'s wife, K. A. emerged from her upstairs bedroom, she was accosted and brought downstairs. One intruder then woke up the couple's teenage son and brought him and the couple's three-year-old daughter downstairs. The victims were placed in the laundry room, while the intruders ransacked the home, before leaving the residence.

During the investigation, one of appellant's co-defendants agreed to work with the police. In 2016, with the help of the cooperating co-defendant, appellants met with an undercover agent and agreed to commit a similar home invasion. Eventually, appellants were arrested.

Jason contended that the trial court committed plain error by failing to instruct the jury that one cannot conspire with a government agent or informant. He contended that, absent such an instruction, the jury may have improperly convicted him of conspiracy (in Counts 1 and 2) based on his communications with government actors. The Court noted that Jason did not identify any binding precedent supporting this claim but rather cited only federal appellate court decisions. An error is plain if it is clear or obvious under current law. An error cannot be plain where there is no controlling authority on point. And while decisions of the federal courts of appeal are persuasive, they are not binding on Georgia appellate courts. Consequently, the Court concluded, Jason did not meet his burden of showing plain error in this regard.

Jarvis argued that the trial court erred in denying his motion for a directed verdict on Count 4 — possession of a firearm during the commission of a felony. He contended that this conviction cannot stand because the underlying felony — conspiracy to commit an armed robbery — is not a “crime against or involving the person of another,” as required by the applicable statutory scheme. The Court noted that the parties did not cite, and research did not reveal, any binding precedent addressing this issue. Nevertheless, the Court concluded that a conspiracy to commit an armed robbery necessarily involves the person of another in two ways, insofar as it requires at least one co-conspirator and at least one victim. And Jason's argument that conspiracy “is a crime of agreement, not a crime against a person” misses the mark on both points — in a conspiracy to commit an armed robbery, the very nature of the agreement itself requires both a co-conspirator and a victim. That the victim here was fictional matters not for the Court's analysis. Because the agreement is the essence of a conspiracy, what matters is that the agreement itself entailed a victim. Thus, just as impossibility is not a defense to criminal attempt — another inchoate crime — impossibility here does not change the fact that Jason was found guilty of agreeing with another person to commit the armed robbery of another person. Therefore, the Court held, conspiracy to commit an armed robbery may form the basis for a conviction of possession of a firearm during the commission of a felony.

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Appellants argued, and the State agreed, that the trial court erred by failing to merge his two conspiracy convictions. The Court found that they were convicted of two counts of conspiracy arising out of their plan to commit the fictitious 2016 home invasion: conspiracy to commit armed robbery (Count 1) and conspiracy to commit burglary (Count 2). Because both convictions arose out of the same agreement, appellants could be convicted of, and sentenced for only one count of conspiracy. Moreover, the trial court's error was not harmless because the total sentence imposed for the conspiracy convictions — twenty years (ten for each count) — exceeded the maximum for a single conspiracy conviction. Consequently, appellants were subject to a maximum sentence of ten years for conspiracy, and their twenty-year total sentences for the two conspiracy convictions required the Court to vacate the conspiracy conviction under Count 2 and remand the case to the trial court for resentencing.

Next, appellants argued that the trial court erred by failing to merge their convictions for the aggravated assaults with a firearm of N. A. and K. A. (Counts 13 and 14) into their convictions for the armed robberies of those victims (Counts 6 and 7). The State conceded that the convictions naming K. A. as a victim (Counts 7 and 14) should merge but maintained that the convictions naming N. A. as a victim (Counts 6 and 13) should stand. The Court agreed with the State.

Here, the aggravated assault and armed robbery of N. A. were two distinct episodes. The aggravated assault was completed when a co-defendant held a shotgun to N. A.'s head outside of his home and escorted him into the home. The armed robbery subsequently occurred when another co-defendant guarded N. A. with a revolver against a wall inside the home while another intruder removed his wallet and jewelry, and two other intruders ransacked the victims' home. Consequently, the convictions for the aggravated assault and armed robbery of N. A. (Counts 6 and 13) did not merge. However, the Court found, the aggravated assault and armed robbery of K. A. were both part of the same continuous transaction that began when one intruder pointed a gun at her, ordered her downstairs, and demanded money, jewelry, and the location of a safe. The trial court therefore should have merged the convictions for Counts 7 and 14. Consequently, the Court vacated the conviction for aggravated assault under Count 14 and instructed the trial court to resentence accordingly on remand.

Finally, although not addressed by any of the parties, the Court found that the trial court committed two sentencing errors that also required the Court to vacate some of appellants' sentences and remand for resentencing. First, Count 12 of the indictment charged appellants with the false imprisonment of N. A. and K. A.'s daughter S. A., who was three years old at the time. A defendant convicted of false imprisonment of a victim under the age of 14 and not the defendant's child is subject to a split sentence, which must include at least one year in prison, to be followed by at least one year of probation. OCGA §§ 16-5-41 (b), (c); 17-10-6.2 (a) (2), (b). A sentence that does not comply with the OCGA § 17-10-6.2 split-sentence requirement is void. The Court noted that it is required to correct a void sentence, regardless of whether either party has raised the error on appeal.

Thus, the Court found, under OCGA § 17-10-6.2, the trial court was required to impose a total sentence for appellants' convictions that included at least one year of probation. See OCGA §§ 16-5-41 (c); 17-10-6.2 (a) (2), (b). Consequently, their ten-year prison sentences for Count 12, which included no probation, was void. Therefore, the Court vacated those sentences and instruct the trial court to resentence appellant in accordance with OCGA § 17-10-6.2 on remand.

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Second, the indictment charged appellants with kidnapping S. A. and a defendant convicted of kidnapping a child under the age of 14 also is subject to a split sentence, which must include a mandatory minimum 25-year prison term, to be followed by life on probation. OCGA §§ 16-5-40 (d) (2), (e); 17-10-6.1 (b) (2) (A). A deviation below the minimum requirements of OCGA § 17-10-6.1 (b) results in a void sentence. Consequently, appellants' 20-year prison sentence for Count 19 also was void and the Court similarly vacated those sentences for resentencing on remand.