

THIS WEEK:

- *Terry* Stops; Reasonable Articulable Suspicion
- Search & Seizure; Statements
- Constitutional Right to a Speedy Trial; Judicial Emergency
- Cross-Examination; Pending Charges Against Witnesses

Terry Stops; Reasonable Articulable Suspicion

Johnson v. State, A21A1306 (2/8/22)

Appellant was convicted of aggravated assault, felony obstruction of a police officer, which the trial court merged with the aggravated assault, and misdemeanor obstruction. The evidence, very briefly stated, showed that in a 911 call, the caller gave his first and last name, as well as his phone number and stated that he was calling because, "I just seen a guy on the corner of Lafayette Drive and Caldonia Street and I went to Mapco and they had a picture up of a guy that was wanted for grand theft auto and I swear it's the dude. . . . He's on foot. . . . It's a dead-on match." When asked to describe him, the caller stated that he was a white guy, "wearing a ball cap, I believe it's blue, got on some khaki shorts, and a dark colored t-shirt." A uniformed deputy located a guy, later identified as appellant, who was in the area, wearing similar clothes to that identified by the concerned citizen, and walking alone. When the deputy stopped his marked patrol car, appellant was about 20 yards away and walking toward him. The deputy told appellant that he received a call about a suspicious person in the area, but appellant ignored him and continued walking. The deputy, while walking beside appellant, asked to see identification. Appellant kept walking. The deputy asked him again to stop and show identification. Appellant took off running. The deputy gave chase and eventually caught appellant when appellant tripped. In the struggle that ensued, appellant pulled a knife and stabbed or cut the deputy. The deputy then shot appellant twice.

Appellant contended that the evidence was insufficient to support his misdemeanor obstruction conviction. Specifically, appellant argued that the deputy was not in the lawful performance of his duties because the command to stop was not supported by reasonable articulable suspicion. The Court agreed.

The Court stated that generally, a concerned citizen tip is considered reliable when identifying information is provided because the citizen informant may be subject to penalty for providing false information. Here however, the Court found, assuming arguendo that the information provided by the concerned citizen was true and reliable, the information conveyed must also amount to a reasonable articulable suspicion. In this case, the deputy acted upon a dispatch relaying information from a 911 call about the location of a man who the citizen reported was a "dead-on match" for a man wanted for "grand theft auto." Quoting *United States v. Hensley*, 469 U.S. 221, 232-233 (II) (B) (105 SCt 675, 83 LE2d 604) (1985), the Court stated that "[i]f a flyer or bulletin has been issued on the basis of articulable facts supporting a reasonable suspicion that the wanted person has committed an offense, then reliance on that flyer or bulletin justifies a stop to check identification, to pose questions to the person, or to detain the person briefly while attempting to obtain further

information. If the flyer has been issued in the absence of a reasonable suspicion, then a stop in the objective reliance upon it violates the Fourth Amendment. . . . It is the objective reading of the flyer or bulletin that determines whether other police officers can defensibly act in reliance on it." (Citations omitted)

And here, the Court found, the State presented no evidence of the wanted flyer, much less evidence showing a reasonable, articulable suspicion to believe that appellant had committed a crime involving "grand theft auto." Therefore, the Court determined, the deputy was not acting within the lawful discharge of his duties when he commanded appellant to stop, and consequently, insufficient evidence supported appellant's misdemeanor obstruction conviction.

Appellant then argued that his aggravated assault conviction should also be reversed. The Court disagreed. Appellant's "common-law right to resist an unlawful arrest or detention" extends only to a proportionate use of force necessary to resist the force used to arrest or detain a person. Based on the particular facts and circumstances of this case, the Court concluded that a rational trier of fact could find that appellant's use of a knife to resist arrest was a disproportionate use of force.

Search & Seizure; Statements

State v. Jennings, A21A1355, A21A1396 (2/8/22)

Jennings was indicted for first-degree vehicular homicide, hit and run, failure to report an accident, and failure to maintain lane. After the trial court granted in part and denied in part, Jennings's motion to suppress, the State appealed and Jennings cross-appealed. The evidence, briefly stated, showed that a victim was killed in a hit-and-run one night in 2017. Based on their investigation and from a passenger-side mirror found lying on the pavement beside the victim, the police determined there were 17 vehicles in the area that the mirror could have come from, and one such vehicle was a Ford Escape. An investigator went to the residence where the vehicle was registered. It was in a very rural area. The driveway was a good distance from the road and not visible from the road. The house itself was not visible to one beginning to approach up the driveway.

The investigator intended to do a "knock and talk." As the investigator drove up a slight hill to the house, he spotted the back end of a black Ford Escape parked ahead and "sticking out" in an area on the left side of the house. And upon closer approach to this area, by parking his car beyond the front of the house and behind the Ford Escape (so that it would be unable to leave), he noticed the passenger-side mirror was missing. The investigator later referred to the vehicle's location on the driveway as a "parking area" just past the front of the house, "after you pass the front door." Jennings's husband greeted the investigator and told him that Jennings had hit a deer. The investigator asked that Jennings be called and told to come home. When Jennings arrived home, she told the investigator that she thought she hit a deer. Jennings was arrested and the vehicle seized. Two days later, the police secured a warrant for the vehicle.

The State argued that the trial court erred in suppressing the vehicle and other evidence. First, the State contended that the investigator's initial entry onto the curtilage of Jennings's property did not require exigent circumstances because it was not to do a search of the property, but was instead done to conduct a "knock and talk." The Court stated that warrantless searches of the curtilage are "per se unreasonable under the Fourth Amendment—subject only to a few specifically established and well-delineated exceptions." One such exception is a "knock and talk" procedure, in which law enforcement approaches a home or residence to investigate a crime or make inquiries of the occupants. And here, the Court

agreed with the trial court, which found the investigator proceeded beyond the area necessary to conduct a knock and talk by driving further up the driveway and parking directly behind the vehicle. As a result, the Court concluded, the officer began a search of the property without a warrant, consent, or exigent circumstances.

Further, the Court also agreed with the trial court's conclusion that even if the investigator had been in a lawful position from which to view the vehicle after passing the front of the house (and thus the front door), there were no exigent circumstances or consent by which the officer could search the remainder of the curtilage or seize the vehicle without first obtaining a warrant. Indeed, not only must an officer be lawfully located in a place from which the object can be plainly seen, he or she must also have a lawful right of access to the object itself. This is true even when items of contraband are visible within an officer's plain view. And an officer gains lawful access to an item in plain view by obtaining a search warrant, obtaining consent to search, or the existence of exigent circumstances. And here, the officers did not do so.

In her cross-appeal, Jennings argued the trial court erred by failing to exclude her statements on the basis that they were made while she was in custody without having been read her *Miranda* rights. The Court disagreed. The Court found that the evidence showed that Jennings made her statements while outside on her own property, without threats by law enforcement, while she was not handcuffed, and while she was not otherwise restrained. Thus, the trial court did not err in determining that she was not in custody for purposes of *Miranda*.

Constitutional Right to a Speedy Trial; Judicial Emergency

Labbee v. State, A22A0246 (2/10/22)

The Court granted appellant an interlocutory appeal from the trial court's denial of his plea in bar asserted on constitutional speedy trial grounds. Very briefly stated, the record showed that appellant was arrested in March 2015 and indicted on one count of aggravated child molestation and four counts of child molestation based on his alleged sexual abuse of three children. The cases were continued for various reasons from 2016 to 2020. The case was on the February 20, 2020 calendar, but continued because the prosecutor intended to nolle prosequi the case. However, after meeting with the victims, the State decided to continue its prosecution. Then, the Judicial Emergency was declared. On September 28, 2020, while jury trials remained suspended, appellant filed his plea in bar. Following a video conference hearing, the trial court denied the plea and gave appellant a certificate of immediate review.

The Court found that because appellant was arrested in 2015 and still not tried in 2021, the delay was presumptively prejudicial. Therefore, the four-factor test under *Barker-Doggett* was triggered. First, in looking at the length of the delay, the Court found that the trial court did not abuse its discretion by declining to weigh this factor heavily against the State.

As to the reason for the delay, the Court found that the trial court acted within its discretion in weighing some of the delay benignly against the State because there was no evidence of intentional delay. The Court also found that the trial court did not abuse its discretion in finding some of the delay to be weighed moderately against the State. In this regard, some of the delay was caused by the prosecutor's requests for continuances based on his decision (later reversed upon further interviews with the victim and consultation with another prosecutor) to seek entry of a nolle prosequi order. Also, the Court agreed with the trial court that some of the delay was caused equally by both parties. In so finding, the Court disagreed with appellant's argument that the delay caused by the first continuance in September 2016, which was consented

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to by both parties, should have been attributed solely to the State because it was the result of the State's failure to timely serve him with a large volume of discovery, including 15 DVDs and approximately 200 pages of documents. Instead, the Court found that as the trial court accurately pointed out in its order, appellant's demand for discovery requested that the State produce discovery to him at least 10 days before trial, and the State produced the discovery at issue 47 days before the anticipated trial date and "only 27 days after [appellant] opted into discovery."

Next, the Court looked at the delay caused by the pandemic. The Court agreed with appellant's general assertion that the "State" includes judges and that the duty is on the State to bring the defendant to trial. But, the Court stated, the pandemic is a catastrophic and unique event beyond either party's control and cited as support other federal and sister state court decisions dealing with the pandemic. Furthermore, the Court added, sometimes a portion of the pretrial delay should not be weighed against the State because the delay is justified and appropriate. And here, the Court found, the Chief Justice of the Georgia Supreme Court entered the judicial emergency order and its extensions in response to the pandemic in Georgia and the need for social distancing. And, notably, appellant did not point to any evidence that the Chief Justice could have taken less drastic measures and avoided suspending jury trials as a result of the pandemic; did not point to any evidence that the statewide prohibition on jury trials could have been lifted sooner by the Chief Justice in a manner consistent with public health guidelines; and did not point to any evidence that jury trials could have resumed more quickly in the particular county in which appellant is to be tried. Under these circumstances, the Court found, even if the State can be said to have caused the pandemic-related delay by suspending jury trials, the delay was justified and appropriate.

Nevertheless, the Court disagreed with the trial court's ultimate weighing of the second factor. The Court noted that after properly analyzing the various reasons for the delay, the trial court concluded that 39.6 percent of the reason for the delay weighed equally/neutral against the State and appellant; 41.2 percent weighed solely against the State; and 19.2 percent weighed solely against appellant. The trial court then concluded that "[t]he second factor weighs against both the [S]tate and [appellant] and [appellant] is assigned sole and shared responsibility totaling at least 59% of the total delay." But, the Court stated, when both parties bear equal responsibility for a portion of the delay or the reason for the delay is otherwise neutral, that specific portion of the delay should not be weighed for or against either side. Thus, under the trial court's allocation of responsibility for the delay, 39.6 percent of the delay should not have been weighed for or against either party. When the State bears sole responsibility for some portion of the delay and the defendant bears sole responsibility for other portions, the second factor should be weighed against the party responsible for the greater portion of the delay. Accordingly, because under the trial court's analysis the State was solely responsible for a greater percentage of the delay than appellant (41.2 percent versus 19.2 percent), the Court concluded that the reason for the delay should have been weighed against the State, and the trial court erred in concluding otherwise.

As to the third factor, the assertion of the right, the trial court found that appellant did not assert his constitutional right to a speedy trial until he filed his plea in bar on September 28, 2020, which was approximately 5 years, 6 months after his arrest. Given the length of the delay, the Court found that the trial court acted within its discretion in weighing the third factor heavily against appellant. In so finding, the Court rejected appellant's contention that he asserted his constitutional right to a speedy trial in his June 2016 motion entitled "Defendant's Waiver of Formal Arraignment, Entry of 'Not Guilty' Plea and Demand for Jury Trial." The Court noted that the title and text of appellant's June 2016 motion expressly demanded a trial by jury but made no explicit reference to a speedy trial. Thus, the trial court properly found that appellant

did not sufficiently invoke his constitutional speedy trial right for purposes of the third *Barker-Doggett* factor until he filed his plea in bar on September 28, 2020.

As to prejudice, the fourth *Barker-Doggett* factor, the trial court concluded that it would presume prejudice from the length of the pretrial delay. The trial court also considered the three specific forms of prejudice, finding that there was no evidence of oppressive pretrial incarceration, no evidence that appellant had suffered undue anxiety or concern caused by the pretrial delay, and no evidence that appellant's defense had suffered any actual impairment resulting from the delay in the proceedings. After reviewing the record, the Court found that the trial court did not abuse its discretion as to this factor.

In balancing the four factors, the Court found that the trial court correctly analyzed the first, third, and fourth *Barker-Doggett* factors. As to the second *Barker-Doggett* factor, the trial court properly analyzed the various reasons for the delay, but ultimately erred in failing to weigh that factor against the State. However, even if the trial court significantly misapplies the law or clearly errs in a material factual finding, the trial court's exercise of discretion can be affirmed if the appellate court can conclude that, had the trial court used the correct facts and legal analysis, it would have had no discretion to reach a different judgment. And here, the Court found, if the trial court had properly weighed the second factor against the State (albeit not heavily, given that there was no deliberate effort by the State to delay the case), the trial court still would have been compelled to deny appellant's plea in bar, given his long delay in asserting his constitutional right to a speedy trial and his failure to demonstrate any actual prejudice. Therefore, the Court affirmed the trial court's exercise of its discretion in denying appellant's plea in bar on constitutional speedy trial grounds.

Cross-Examination; Pending Charges Against Witnesses

Poole v. State, A21A1200 (2/11/22)

Appellant was convicted of aggravated assault and possession of a firearm by a convicted felon. The evidence showed that appellant shot a man in the head after the man intervened in a fight between appellant and appellant's girlfriend outside of a restaurant. A witness who had been at the restaurant with appellant and appellant's girlfriend identified appellant as the shooter. When the officers went to the apartment of the boyfriend of the witness, they found her, her boyfriend, drugs and guns.

Appellant contended that the trial court erred by limiting his cross-examination of the witness regarding criminal charges pending against her at the time of trial. The Court disagreed.

The Court stated that a criminal defendant has wide latitude to cross-examine and impeach a witness concerning pending criminal charges to show the witness's motivation in testifying, such as bias, partiality, or an agreement between the government and the witness. The extent of such cross-examination is within the sound discretion of the trial court. It may exercise a reasonable judgment in determining when the subject is exhausted. The trial court abuses its discretion and commits error when it cuts off all inquiry on a subject on which the defense is entitled to reasonable cross-examination. However, trial courts retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on such cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness's safety, or interrogation that is repetitive or only marginally relevant.

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Here, the Court stated, appellant contended that when his trial counsel was attempting to question the witness about charges pending against her, “hoping at the very least to show her potential bias in testifying for the State while the State was prosecuting charges against her,” the trial court “cut off all inquiry” on the witness’s pending charges. However, the Court found, the trial court did not cut off all inquiry on the subject. In fact, the witness twice testified, during both direct and cross-examination, that she was charged with “intent to distribute” and “possession” of a “controlled substance,” namely, methamphetamine, and she also testified that she was not offered any deal from the State for her testimony. In addition, the trial court allowed appellant to question the witness about guns and drugs found in her boyfriend’s apartment, the nature of the charges pending against her, and whether she had been truthful to law enforcement about the presence of marijuana in the apartment. Therefore, the Court concluded, the trial court’s limitation on further cross-examination regarding the witness’s pending charges was not error, but an appropriate exercise of the court’s discretion.