

## THIS WEEK:

- Constitutional Right to a Speedy Trial; Prejudice
- Right to be Present; Juror Bias
- *Faretta* Hearings; Ineffective Assistance of Counsel
- Invocation of Right to Remain Silent; Void Sentencing
- Motions for Mistrial; Rule 403

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## Constitutional Right to a Speedy Trial; Prejudice

*Redding v. State*, S22A0124 (5/17/22)

Appellant was convicted murder and aggravated assault. The Supreme Court remanded the case for the trial court to make factual findings and legal conclusions regarding appellant's claim that his constitutional right to a speedy trial was violated. See *Redding v. State*, 309 Ga. 124, 129-130 (2) (844 SE2d 725) (2020). The trial court then held a hearing and issued an order denying appellant's constitutional speedy trial claim. Appellant appealed again.

The Court noted that the trial court acknowledged that *Barker* frames the analysis of a constitutional speedy-trial claim and that the presumptive-prejudice threshold was crossed, and the court considered the relevant factors. But, the trial court began its analysis by stating that a defendant cannot prevail on his speedy-trial claim where no prejudice has been shown. However, the Court stated, this is not the law. Instead, a defendant need not show demonstrable prejudice on a speedy trial claim in every case in order to prevail.

Additionally, when addressing the prejudice factor, the trial court found that when appellant was arrested, he was "also arrested and incarcerated during the entire period on a violation of probation case" and "the hold for violation of probation prevented him from making bond." The court then ruled that due to this probation hold, appellant "would have been incarcerated ... regardless of the new charge of murder and [oppressive pretrial] incarceration was not a significant factor in assessing prejudice to [appellant]." But, citing *Johnson v. State*, 313 Ga. App. 895, 904 (2012), the Court concluded that the trial court erred in ruling that appellant's probation hold precluded the need to assess prejudice associated with oppressive pretrial incarceration.

Furthermore, in addition to misstating and misapplying the law regarding the prejudice factor, the Court found that the trial court failed to weigh each *Barker* factor and conflated its consideration of some of the factors. Accordingly, the Court vacated the trial court's order denying appellant's constitutional speedy trial motion and remanded the case again for the entry of an order containing appropriate findings of fact and conclusions of law on appellant's speedy trial claim.

## Right to be Present; Juror Bias

*Neal v. State, S22A0261 (5/17/22)*

Appellant was convicted of felony murder and other offenses. He contended that the trial court violated his constitutional right to be present by excluding him from four bench conferences during voir dire at which counsel for the parties discussed with the court whether certain prospective jurors should be struck for cause. The Court disagreed.

The Court found that the record did not show that appellant personally waived his right to be present at the bench conferences during voir dire or that his counsel waived that right at appellant's express direction or in open court while appellant was present. Nevertheless, the Court found, the record showed that appellant was in the courtroom when the bench conferences occurred and that his counsel participated in the conferences without objecting to appellant's absence from them. Thus, the question was whether appellant subsequently acquiesced in his counsel's waiver of his right to be present.

Appellant argued that he could not have acquiesced because he did not know what happened at the bench conferences. However, the Court found, this argument was belied by the record. At the motion for new trial hearing, appellant's trial counsel testified that he would "not be surprised" if he did not tell appellant the results of the four bench conferences during voir dire. On cross-examination, the State asked whether, after the bench conferences, he "went back and talked to [appellant] about the particular issue involving the juror that was being discussed." Appellant's trial counsel answered that he misunderstood the question on direct examination and did not realize that he was being asked specifically about the bench conferences during voir dire. He continued, "[I]f it was voir dire and if an issue arose and if [appellant] did not accompany me to the bench conference[,] I'm confident I advised him of whatever just happened at the bench." Appellant also testified at the motion for new trial hearing and was asked whether, after the bench conferences during voir dire, his trial counsel would come back and tell him "what happened at those conferences." Appellant replied, "Yeah, he would tell me what happened."

Therefore, the Court found, the record fully supported the trial court's findings that appellant was informed by his trial counsel as to the substance of each bench conference and acquiesced to counsel's waiver of his presence by failing to voice any objection — either directly or through counsel — to his absence.

Next, appellant contended that his trial counsel was professionally deficient in failing to move to strike a juror after it was discovered on the second day of trial that she knew some members of the victim's family. However, the Court found, contrary to appellant's assertion, the juror was not asked during voir dire if she knew any members of the victim's family. A juror's non-familial relationship with the victim provides a basis for disqualification only if it is shown that the relationship caused the juror to have a fixed opinion of the defendant's guilt or innocence or a bias for or against the defendant. As a result, merely knowing the victim, much less the victim's relatives, is not a sufficient basis to strike a juror or prospective juror for cause.

And here, the Court found, when the issue came to the trial court's attention, the court questioned the juror on the record but outside the presence of the other jurors, and the juror explained that she did not know the victim, that she knew three members of the victim's family, and that her relationships with the victim's family members would not cause her "any

problem whatsoever in being a juror in this case and being fair and impartial to both sides.” Thus, the Court concluded, in light of the juror's answers, which the court found to be credible, as well as the lack of any evidence in the record that the juror held a fixed opinion of appellant's guilt or innocence, appellant failed to show that his counsel was professionally deficient in failing to move to strike the juror.

## **Faretta Hearings; Ineffective Assistance of Counsel**

*Neloms v. State, S22A0457 (5/17/22)*

Appellant was convicted of malice murder and other offenses. He contended that the trial court erred when it failed to hold a *Faretta* hearing to determine whether he was knowingly and intelligently waiving his right to counsel. The Court disagreed.

The Court stated that both the federal and state constitutions guarantee a criminal defendant both the right to counsel and the right to self-representation. The pre-trial unequivocal declaration of a defendant that he wishes to represent himself must be followed by a hearing at which it is determined that the defendant knowingly and intelligently waives the traditional benefits associated with the right to counsel. Requests to proceed pro se during trial, however, are treated differently. A defendant cannot frivolously change his mind in midstream by asserting his right to self-representation in the middle of his trial.

Here, the Court found, appellant's indication that he sought to represent himself was not made prior to trial, nor was it unequivocal. Appellant made his request on the third day of trial, after several witnesses had already testified. Further, when appellant spoke personally to the court about his request, he indicated that he was seeking new counsel to assist him; he did not indicate that he wanted to represent himself. And upon revisiting the matter, appellant told the trial court that he would continue with his current counsel. Thus, the Court concluded, appellant's request was not an unequivocal one made prior to trial, so a *Faretta* hearing was not required.

Appellant next argued that his trial counsel rendered ineffective assistance by failing to raise a hearsay objection to an investigator's testimony. The record showed that the murder of the victim was witnessed by Thompson. When Thompson was called as a witness for the State, he began to repeatedly invoke his right against self-incrimination under the Fifth Amendment in response to the prosecutor's questions. The court excused the jury and conducted a conference in chambers with counsel, where the prosecutor suggested that the court instruct Thompson to answer the questions to the best of his ability without incriminating himself. Appellant's trial counsel noted that Thompson had no previous written or recorded statement that could corroborate or impeach his testimony. However, the prosecutor responded that it could call Glenn as an additional witness; Glenn was an investigator with the District Attorney's office and was present when the prosecutor met with Thompson before trial. Upon returning to the courtroom, the prosecutor continued to question Thompson, who largely testified, “I can't remember.” Thompson was then cross-examined by the defense. Thereafter, the prosecutor called Glenn, who testified to what Thompson stated in the meeting with the prosecutor.

The Court found that Thompson's alleged lack of memory was sufficient foundation to allow Glenn to testify as to the content of Thompson's statements during the meeting. Further, Thompson was present at trial, was asked about the statements he made during the meeting with the prosecutor and Glenn was subject to cross-examination.

Thus, the Court concluded, Glenn's testimony was properly admissible as prior inconsistent statements, and an objection on this ground would have been meritless. Trial counsel therefore could not be deemed ineffective for failing to make a meritless objection on this ground.

## **Invocation of Right to Remain Silent; Void Sentencing**

*Goodman v. State, S22A0306 (5/17/22)*

Appellant was convicted of felony murder and other crimes in connection with the death of Solomon and the aggravated assaults of four other people. The evidence showed that Solomon was killed during an exchange of gunfire which erupted when a carload of people drove by a group of other people sitting outside socializing.

Appellant contended that he twice invoked his right to remain silent during a detective's interrogation, and thus the incriminating statements he made during a subsequent interrogation by different detective should have been suppressed. The Court stated that an exercise of the federal constitutional right to remain silent in the face of police questioning must be scrupulously honored. But the right must be invoked unambiguously. A person under interrogation must articulate a desire to cut off questioning with sufficient clarity that a reasonable police officer in the circumstances would understand the statement to be an assertion of the right to remain silent. Such clarity is absent when a suspect makes an ambiguous statement in the midst of his plain acquiescence to continued questioning.

And here, the Court found, appellant did not unambiguously invoke his right to remain silent. After each time that appellant told the first detective he did not want to talk — and before any further questions from the detective — he said that he wanted the police to investigate Solomon's death. In other words, the Court found, appellant did not merely acquiesce in continued conversation; he prompted it. Therefore, appellant did not invoke his right to remain silent, and the trial court did not err in admitting his later statement to the second detective.

Next, the Court noted that appellant was indicted for tampering with evidence with the intent of obstructing his own prosecution for felony murder, in violation of OCGA § 16-10-94. Appellant was convicted of this charge and sentenced to ten years. The Court stated it will exercise its discretion sua sponte to vacate a sentence for the benefit of defendants if it notices that the sentence is void. And here, the Court found, appellant's sentence on the tampering charge was void because our case law has interpreted OCGA § 16-10-94 (c) as authorizing a sentence of between one and ten years only if the tampering involves the prosecution of "another person." Tampering with evidence for the purpose of obstructing one's own prosecution may be sentenced only as a misdemeanor. Accordingly, the Court vacated appellant's sentence as to this count and remanded for resentencing regarding it.

## **Motions for Mistrial; Rule 403**

*Perkins v. State, S22A0158 (5/17/22)*

Appellant was convicted of malice murder and other crimes in connection with the shooting death of Menefee. The evidence, very briefly stated, showed that appellant and three co-defendants, Chandler, Franklin, and Mitchell, committed a home invasion armed robbery of the apartment of Menefee's girlfriend. Menefee was shot to death after giving the

defendants money. Appellant contended that the trial court erred when it denied his motion for mistrial after an investigating detective impermissibly made a reference to a gang and when the trial court gave a curative instruction that repeated the word “gang” four times. The Court disagreed.

The Court stated that the decision to grant a mistrial is within the discretion of the trial court and will not be disturbed on appeal unless there is a showing that a mistrial is essential to the preservation of the right to a fair trial. The Court held that the trial court acted within its discretion to conclude that a mistrial was not necessary to preserve appellant's right to a fair trial. The prosecutor had instructed the detective not to make any reference to gangs; the detective mentioned the word “gang” only once and did not mention appellant's name in connection with that reference; and before the trial court allowed the detective's testimony to continue, it instructed the jury to disregard the reference to a “gang.”

Moreover, the Court found, the trial court's curative instruction to the jury included a strong and clear admonition that “these defendants are not being prosecuted as members of a gang or any gang activity whatsoever” and that “[y]ou may not consider any evidence that the defendants are members of a gang or involved in gang activities from any evidence in this trial henceforth, including but not limited to the part that this witness's testimony said that I have labeled nonresponsive.” The trial court concluded by instructing the jury, “[y]ou should in fact disabuse your minds of it completely.”

Appellant also contended that the trial court abused its discretion in admitting five photographs—State's Exhibits 87, 129, 167, 168 and 169—which the detective referenced in her testimony. It was undisputed that these exhibits were photographs taken at memorials or vigils that were held for Menefee several days after his death. The photographs appellant objected to depicted the following: Exhibit 87 showed Chandler wearing pants labeled with “RIP” in red ink; Exhibit 129 showed appellant holding a red candle while wearing a red undergarment that is visible and a red or maroon jacket and holding a rifle; Exhibit 167 showed Chandler wearing his “RIP” pants, Franklin wearing a red hat, making hand gestures, and smoking, and another man making a similar hand gesture and wearing red shoes and a hat with “SMM” on it; Exhibit 168 showed Franklin making hand gestures; and Exhibit 169 showed Franklin in Menefee's girlfriend's apartment smoking, holding a red candle, and wearing red gloves. Appellant argued that the photographs were “highly prejudicial” and violated Rule 403 because the clothing worn by the men depicted in the photographs suggested a gang affiliation and the men could have been viewed as “making signs that could be construed as gang[-]affiliated.”

The Court noted that at trial, and again in evaluating appellant's motion for new trial, the trial court considered appellant's arguments and the State's response that the colors and gestures were incidental and that testimony would not be, and was not, elicited about their meaning. In denying appellant's motion for new trial, the trial court concluded that the five photographs “were relevant to show multiple facts at issue at trial and . . . that their probative value was not substantially outweighed by a danger of unfair prejudice.” It also found that all “the pictures were intrinsic evidence and thus Rule 404 (b) did not apply to it.”

The Court found no abuse of discretion in the trial court's conclusion under Rule 403 that the probative value of the photographs was not substantially outweighed by the danger of unfair prejudice. First, the only photograph that depicted appellant was Exhibit 129, which showed him in possession of a rifle slung over his shoulder by a strap while holding a red candle. That image corroborated multiple witnesses who testified that they saw appellant at or around the time of the crimes carrying a gun that they characterized as an “assault rifle,” “AK,” “chopper,” or “big gun” with a “strap around the

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# CaseLaw UPDATE

WEEK ENDING JUNE 17, 2022

Issue 24-22

shoulder”—evidence that was indisputably probative of the State's case. Under these circumstances, the trial court did not abuse its discretion by concluding that the probative value of the photograph's depiction of appellant holding a rifle was not substantially outweighed by the danger of unfair prejudice.

The Court found that the other four photographs depicted only appellant's co-defendants. But even assuming, without deciding, that the trial court abused its discretion in admitting these photographs, any such error was harmless. Here, as with Exhibit 129, the Court stated that it could not say that a reasonable juror would discern solely from pants with “RIP” on them, a hat with “SMM” on it, hand gestures, or red items—aspects of the four photographs appellant pointed to on appeal—as suggesting that he and his co-defendants were affiliated with a gang. Indeed, the State made no argument at trial that the photographs depicted gang affiliation or activity. Furthermore, appellant did not present any evidence showing that the photographs depicted gang affiliation or activity. Moreover, as with Exhibit 29, the four other photographs were admitted into evidence shortly after the trial court instructed the jury not to “consider any evidence that the defendants are members of a gang or involved in gang activities from any evidence in this trial,” which diminished any potential prejudicial effect of the photographs, and the State also presented strong independent evidence of appellant's guilt apart from the photographs. Thus, the Court concluded, it was highly probable that admission of the four photographs did not contribute to the verdicts against appellant.