

THIS WEEK:

- Criminal Contempt; Due Process
- Ineffective Assistance of Counsel; Plea Offers
- Constitutional Right to Speedy Trial; *Barker-Doggett* Factors
- Rule of Lenity; Sexual Offenses

Criminal Contempt; Due Process

In re Johnson, A22A0608 (6/30/22)

Appellant is a defense attorney. Briefly stated, the record showed that while presiding over an immunity-from-prosecution hearing in a felony murder case, the judge determined that appellant, the lead defense lawyer, was in contempt of court for failing to heed his demands to be handed a notebook that the judge's assistant had provided to appellant. The judge had intended for his assistant to give the notebook to the prosecutor, not to defense counsel. When the judicial assistant gave appellant the notebook, appellant and the other defense lawyers thought that the notebook contained certain school records that the prosecution had provided the judge the previous day for an in camera inspection. Upon reviewing the contents of the notebook, however, defense counsel discovered that the notebook contained emails between their client and others, which emails had been sent and received by their client while he was being held in jail awaiting trial. This was significant, defense counsel believed, because those emails had not been provided to defense counsel during discovery, yet the prosecution had provided them to the trial judge, ex parte, without defense counsel having any knowledge of their existence. Appellant wanted the notebook to be entered by the clerk into the record; the judge wanted defense counsel to give the notebook to his assistant. When appellant objected, the judge found him in contempt, send him off to jail and stated that he had a funeral to get to and would deal with the contempt upon his return.

Appellant contended that the contempt ruling was made without due process. The Court agreed. The Court stated that although a trial judge has the authority to summarily punish for contemptuous conduct committed in his or her presence, due process requires that such punishment cannot be meted out until the contemnor is given reasonable notice of the charge and an opportunity to be heard. This is because of the heightened potential for abuse posed by the contempt power.

And here, the Court found, the trial judge imposed upon appellant the sanction of jail time, without having first afforded him meaningful opportunity to defend himself against the trial judge's conclusion that his conduct was contemptuous. The Court noted that the hearing transcript captured appellant's

subsequent utterances, “I want to put it on the record ... I want a chain of custody about it ... I want a chain of custody of custody about it[.]” But by that point, the judge had already meted out punishment, and appellant was accordingly being ushered from the courtroom and to a cell by the bailiff(s). The transcript showed that when the bailiff(s) returned to the courtroom and the judge regained possession of the notebook, appellant's co-counsel urged that “[appellant] be released to return to representation.” The judge denied the request, responding that “[w]hat he did was contempt of court” and that appellant “will have to remain in there until such time as he purges himself from his contempt. But right now, I've got a funeral I have to go to.” The order entered hours later recounted the trial judge's contemplation of a contempt hearing for appellant, but by then (and as the same order reflected), appellant had already been incarcerated.

The Court stated that contempt is a drastic remedy which ought not to deprive one of his liberty unless it rests upon a firm and proper basis. Here, because the record showed that requisite due process was not extended to appellant, the contempt ruling (whether oral or written) was not authorized and therefore reversed.

Ineffective Assistance of Counsel; Plea Offers

State v. Dorsey, A22A0589 (7/1/22)

Dorsey was indicted on armed robbery and other offenses. Prior to trial, the State filed notice of its intent to seek recidivist punishment pursuant to OCGA § 17-10-7 (a) and (c). In the weeks before Dorsey's trial, the State extended a plea offer of twenty years to serve seven on a reduced charge of “some form of robbery.” In response, trial counsel e-mailed the prosecutor indicating that Dorsey would “plea to everything in the original plea offer if [the State] would come down on the probation time (from 20 serve 7 to 10 serve 7).” On the day before Dorsey's trial commenced, trial counsel again e-mailed the prosecutor, this time to ask whether Dorsey could accept the State's original plea offer. The prosecutor responded, “No, he rejected that offer and a few subsequent ones.” After a jury trial, he was convicted of and sentenced as a recidivist to serve life in prison without the possibility of parole plus five years probation. Dorsey moved for a new trial arguing, in relevant part, that his trial counsel was constitutionally ineffective by misadvising him regarding the consequences of rejecting the State's favorable plea offer and the effect his status as a recidivist would have on his sentence if he were convicted after a trial. The trial court agreed and granted Dorsey a new trial. The State appealed.

First, the Court addressed whether Dorsey's trial counsel rendered deficient performance. The Court stated that if a plea bargain has been offered, a defendant has the right to effective assistance of counsel in considering whether to accept it. Specifically, a defendant is entitled to be fully informed of certain consequences of his decision to accept or reject a plea offer, including the right to the informed legal advice of counsel regarding the possible sentences that could be imposed following a conviction at trial. An attorney's failure to inform his or her client that he or she would be ineligible for parole as a

recidivist for the entirety of a lengthy prison sentence is constitutionally deficient performance. The recidivist statute is, and has been, a prominent feature of our criminal justice system — anyone who is subject to it should be informed accurately about its consequences.

Here, the Court found that the record supported the trial court's finding of deficient performance. Relying on trial counsel's statements at sentencing and his testimony at the motion for new trial hearing, the trial court concluded that counsel was deficient by failing to take into account both of the recidivist-sentencing statutes at play in this case and by subsequently misadvising Dorsey that the trial court was not required impose a life sentence when, in fact, the court had no discretion to do otherwise given Dorsey's status as a recidivist.

Having determined that the trial court properly concluded that trial counsel's performance was deficient, the Court addressed the prejudice prong of the *Strickland* analysis. To establish prejudice in the context of a rejected plea offer, a defendant must show the outcome of the plea process would have been different with competent advice. This three-part inquiry requires that a defendant demonstrate (1) that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), (2) that the court would have accepted its terms, and (3) that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

The Court, addressing the three factors in reverse order, found that there was no question that the State's offer of twenty years to serve seven with no recidivist treatment was less severe than the life sentence without the possibility of parole that Dorsey received. As to the trial court's acceptance of the plea, the court found that it would have been willing to accept a plea agreement had one been reached, and the Court stated that it could not second guess the trial court's findings regarding its own consideration of the plea offer.

As to whether Dorsey would have accepted the plea offer, the Court noted that the court found that Dorsey presented credible evidence that he would have accepted the plea deal but for his counsel's deficient performance. In support of this finding, the trial court highlighted trial counsel's testimony that Dorsey stated he would have accepted the plea offer had he known that he faced a mandatory sentence of life imprisonment without the possibility of parole, as well as counsel's e-mail to the prosecutor the night before the trial began inquiring whether the State's original offer remained open. The Court found that these findings provided objective evidence of Dorsey's intention to accept the State's offer. Moreover, as the trial court correctly noted, the "significant difference" between the punishment offered by the State as compared to the mandatory sentence of life without parole that Dorsey faced upon conviction served as additional evidence that could support an inference regarding the reasonable probability that Dorsey would have accepted the plea offer but for his counsel's erroneous advice.

Finally, the Court looked at whether the trial court was correct to grant Dorsey a new trial because of his trial counsel's ineffective assistance. And here, the Court found, it could not affirm the relief implemented by the trial court — namely, a new trial — because this remedy does not redress the constitutional injury at issue. Sixth Amendment remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests. Thus, a remedy must neutralize the taint of a constitutional violation. And where trial counsel's ineffective assistance results in the rejection of a plea offer and subsequent imposition of a greater sentence upon conviction after a trial, the remedy would not be the grant of a new trial. The Court noted that in a typical case involving charges that would have been admitted as part of the plea bargain that are the same as the charges the defendant was convicted of after trial, resentencing is an appropriate remedy. But, the Court found, this was not a “typical case” because the plea offer involved lesser included charges and Dorsey's armed robbery conviction mandates the imposition of recidivist penalties. As a result, resentencing alone, or even a new trial, will not remedy the violation of Dorsey's right to effective counsel. Furthermore, the Court noted that the parties failed to brief the remedy issue on appeal. Therefore, the Court affirmed the trial court's conclusion that Dorsey was denied the effective assistance of counsel, vacated the part of the court's judgment setting aside Dorsey's convictions and granting him a new trial, and remanded the case for further proceedings.

Constitutional Right to Speedy Trial; *Barker-Doggett* Factors

State v. Adams, A22A0931 (7/20/22)

Adams was arrested for DUI on March 18, 2018, and subsequently released on bond. During an October 2018 municipal court hearing, the State moved to bind the case over to state court. Adams objected and requested a bench trial in municipal court, citing concerns over excessive delays when cases are bound over to state court, and highlighting that his case already had experienced a “really long delay” due to a “computer issue.” On October 26, 2018, the municipal court granted the State's motion and bound the case over to state court. The State filed an accusation on May 13, 2019. In the interim, Adams had moved, but there was no pending case in which his address could be updated with the state court clerk until after the accusation was filed. When Adams did not appear for his arraignment in August 2019, a bench warrant was issued for his arrest. He subsequently was arrested in early February 2020, at which time he was required to post bond a second time in the amount of \$400. Adams filed his plea in bar and motion to dismiss on February 18, 2020. The state court granted the motion on constitutional speedy trial grounds and dismissed the charges against Adams on December 16, 2021. The State appealed.

As to the threshold inquiry, the Court found that 45 months passed between Adams's initial arrest on March 18, 2018, and the dismissal of the charges against him on December 16, 2021. Since a one-year delay is typically presumed to be prejudicial, the Court found that the trial court properly found that the

delay in this case — a total of nearly four years — was presumptively prejudicial and triggered full analysis of the four *Barker-Doggett* factors.

First, the Court agreed with the trial court that a pretrial delay of 45 months (33 months beyond the initial 12-month presumptively prejudicial delay period) was significant — particularly considering the non-complex charges at issue — and thus, properly weighed against the State.

Second, the Court agreed with the trial court that the delay of just under 16 months attributable to the statewide judicial emergency is not weighed against either party. However, the Court noted, the total delay in this case (as of the date of the dismissal order) encompassed 45 months. In its order, the state court accounted for only 33 months: the 17 months from Adams's arrest to his scheduled arraignment and the 16 months attributable to the judicial emergency. The court's order thus failed to account for (a) the seven months between Adams's scheduled arraignment and the beginning of the judicial emergency; and (b) the slightly more than five months between the end of the judicial emergency and the entry of the state court's order. In that vein, as noted by the State, the state court similarly failed to address whether either of those delays should be weighed against either party. And as also noted by the State, the state court neither identified the weight to be assigned to those delays nor made any factual findings in support thereof. Absent the required findings on these issues, the Court stated it must vacate the state court's order and remand the case for the state court to complete the necessary analysis. Nevertheless, because the state court addressed the remaining steps of the *Barker-Doggett* framework — which necessarily must be a part of the analysis on remand — the Court addressed them.

Third, as to the assertion of the right, the Court noted that the Adams first voiced concerns regarding a timely resolution of the charges against him when he sought a bench trial in the municipal court and objected to the State's motion to bind the case over to state court. The State, however, contended that the trial court should have measured the delay between Adams's initial arrest in March 2018 and the February 2020 filing of his plea in bar and motion to dismiss in determining the timeliness of his assertion of his right to a speedy trial. However, the Court found no abuse of discretion by the state court in this regard on the particular factual and procedural scenario presented here. As the state court noted, Adams made early efforts to protect his right to a speedy trial by seeking a bench trial in the municipal court but was thwarted by the State's motion to bind the case over to state court. And the record supported the state court's finding that Adams ultimately filed his plea in bar and motion to dismiss within a week of when he first learned of the existence of the state court proceedings. Nevertheless, the Court noted that given Adams's change of address between the magistrate court's October 2018 grant of the State's motion to bind the case over to the state court and the May 2019 accusation filed in state court, neither Adams nor his attorney received timely notice of the pending state court proceedings. Consequently, the trial court found that Adams first learned of the state court proceedings when he was arrested in early February 2020, and he filed his plea in bar and motion to dismiss in the state court within a week of that arrest. However, the Court determined, while these

findings also were supported by the record, they again were incomplete. In particular, the state court did not address whether — and, if so, to what extent — Adams's failure to update his address with the state court after his accusation was filed should factor into the timeliness of his assertion of his speedy trial rights. To the extent that additional evidence may be required in this respect, the state court should give the parties the opportunity to present such evidence on remand. And to the extent that the state court may wish to take judicial notice of its clerk's office's practices and procedures related to a party's ability to update his address, it should clearly state so in any order it enters on remand. And, while the State maintained that Adams's failure to seek a timely ruling on his plea in bar and motion to dismiss after it was filed weighed against him, the state court made no findings one way or another on that issue either and this too must be addressed on remand

As to the fourth factor, Adams argued he was prejudiced because he had been scheduled to start a new job either the day of or the day after his February 2020 arrest. Because of the arrest, he missed his first day of work, for which he was “written up.” According to Adams, missing the first day of his job was the “catalyst” for his termination approximately one month later, and he suffered embarrassment because of the episode. The Court stated that on the peculiar facts of this case, the extent to which Adams's re-arrest in February 2020 properly may be viewed as prejudicial under the *Barker-Doggett* analysis depends, at least in part, on the extent to which the blame for that arrest lies with Adams, the State, or both. And that determination depends, at least in part, on the extent to which the blame for Adams's failure to update his address with the state court after his accusation was filed lies with Adams, the State, or both, taking into account all of the circumstances, including the nearly seven-month delay between the municipal court's grant of the State's motion to bind the case over to state court and the State's filing of the accusation in the state court. Consequently, absent findings on each of these issues, the state court's prejudice analysis is premature. And, the Court stated, the trial court also should address on remand the State's claims that no prejudice is attributable to the time between Adams's initial March 2018 arrest and his subsequent February 2020 arrest and that the delays in this case have not impaired Adams's ability to prepare a defense.

Finally, the Court found that given the trial court's failures to properly calculate and account for all times encompassed by the total delay and to determine and clearly identify the relative weight to be attributed to each of the individual factors that led to delays in this case, the court necessarily did not properly balance all the relevant factors. This step of the analysis thus provided nothing for the Court to review — as a result of which it did not address the State's arguments regarding the proper weighing and balancing of each relevant factor at this time — and the state court should address this part of the balancing test anew on remand.

Rule of Lenity; Sexual Offenses

Mecomber v. State, A22A0953 (7/21/22)

Appellant was indicted on ten counts of child sexual exploitation, with each count alleging that, in violation of OCGA § 16-12-100 (b), he knowingly possessed and controlled a specified digital photograph depicting a minor engaged in sexually explicit conduct. Appellant pled guilty to the charges, and the trial court merged all counts into Count 1 at sentencing. It then imposed a 20-year felony sentence. Appellant argued that the rule of lenity required misdemeanor punishment under OCGA § 16-12-100 (c). The Court disagreed.

The Court noted that the rule of lenity is rooted in the vagueness doctrine, which requires fair warning as to what conduct is proscribed. It ensures that if and when an ambiguity exists in one or more statutes, such that the law exacts varying degrees of punishment for the same offense, the ambiguity will be resolved in favor of a defendant, who will then receive the lesser punishment. The key inquiry is whether the identical conduct would support a conviction under either of two crimes with differing penalties.

Appellant argued that the felony possession and control of digital images in violation of OCGA § 16-12-100 (b) (8) is equivalent to the misdemeanor "processing and producing" visual matter under OCGA § 16-12-100 (c), triggering the rule of lenity. But, the Court found, the offenses proscribed by these two provisions are distinct. Unlike OCGA § 16-12-100 (b) (8), knowing possession or control is not the primary concern of OCGA § 16-12-100 (c). A subsection (c) violation results when a person responsible for processing or producing visual or printed material fails to report to law enforcement that the material contains child-related sexually explicit content. The failure to report, rather than knowing possession or control of such material, gives rise to a misdemeanor charge.

And here, appellant was not indicted for failure to report sexually explicit material involving a child. He was charged with — and pled guilty to — knowing possession and control of the material. The charged conduct falls within the felony provision of OCGA § 16-12-100 (b) (8), not the misdemeanor language of OCGA § 16-12-100 (c). The rule of lenity, therefore, did not apply.