

## THIS WEEK:

- **Double Jeopardy; Successive Prosecutions**
- ***Brady* Violations; Post-Trial DNA Testing**
- **Photo Lineups; Substantial Likelihood of Misidentification**
- **Collateral Order Doctrine; Motions to Withdraw as Counsel**
- **Statements of Juveniles; *Riley* Factors**

### Double Jeopardy; Successive Prosecutions

*Torres v. State, S22A0659 (9/20/22)*

Appellant was charged with six counts of felony murder (Counts 1-6), criminal attempt to commit armed robbery (Count 7), conspiracy to commit armed robbery (Count 8), armed robbery (Count 9), conspiracy to commit aggravated assault (Count 10), aggravated assault with intent to rob (Count 11), aggravated assault with a deadly weapon (Count 12), theft by taking (Count 13), and tampering with evidence (Count 14). A jury found him guilty of Counts 4, 5, 10, 11, and 14 and not guilty on the remaining counts against him. See *id.*

Appellant filed a motion for new trial, which the trial court granted based on ineffective assistance of counsel. Before his retrial, appellant orally raised a plea in bar based on double jeopardy to bar retrial on Counts 1-3, 6-9, 12, and 13, the counts of which he was found not guilty in his first trial. The trial court deferred ruling on the plea in bar but orally granted it after the close of the State's evidence in the bench trial. The trial court later found appellant guilty of Counts 4, 5, 10, 11, and 14 and entered an order granting the plea in bar nunc pro tunc as to Counts 1 through 3, 6 through 9, 12, and 13. Appellant never filed a plea in bar in regard to Counts 4, 5, 10, 11, or 14, nor did he raise a collateral estoppel claim at any time leading up to or during the bench trial on those counts.

Appellant contended that his retrial on Counts 4, 5, 10, 11, and 14 violated the constitutional prohibition on double jeopardy. He argued that even though his plea in bar as to these counts was not granted by the trial court, he was retried on essentially the same offenses of which he had been acquitted by a jury in his first trial because Counts 4, 5, 10, 11, and 14 "have the same elements and therefore constitute the same offense" as the crimes of which he was found not guilty by the jury. Specifically, appellant contended that because the armed robbery charges (of which he was acquitted) and the aggravated assault charges (of which he was found guilty) were all premised on the same incident, by virtue of the jury's acquittal of him on the armed robbery charges and the corresponding felony murders, the jury also necessarily found, as a matter of fact, that he did not commit the charged aggravated assaults and the felony murders that correspond to them.

The Court found that appellant clearly was claiming that he was subjected to a successive prosecution as to Counts 4, 5, 10, 11, and 14. Accordingly, any resulting double jeopardy claim was procedural in nature. However, by failing to file a plea in bar as to those counts or otherwise contest the initiation of the second trial as to those counts on the basis of former jeopardy, appellant failed to preserve this question for the Court's review. Thus, the Court rejected the enumeration of error without addressing the merits of his contentions.

## **Brady Violations; Post-Trial DNA Testing**

*Downer v. State, S22A0632 (9/20/22)*

Following a bench trial, appellant was found guilty of felony murder, armed robbery, and other crimes in connection with the death of Hill. Very briefly stated, the evidence showed that appellant lived in a camper on Brown's property, where Brown lived with his girlfriend, Joyce, and her adult son, Jamie. Believing Hill was not at home, appellant and Brown drove to Hill's home to commit a burglary. Hill was at home and after surprising appellant and Brown, they killed Hill using a baseball bat. Then, they drove his body back to Brown's property and torched Hill's body in a burn pit. At trial, Brown testified extensively about what he and appellant did.

Appellant argued that the State withheld evidence that could have been used to impeach "its two most critical witnesses" in violation of his due process rights under *Brady v. Maryland*, 373 U.S. 83 (83 SCt 1194, 10 LE2d 215) (1963). Specifically, he contended that the State arranged for a wedding for Brown and Joyce in a building adjacent to the county jail, in exchange for Brown's guilty plea and agreement to testify against appellant at trial. Appellant asserted that he did not hear about the marriage until after the trial.

The Court stated that to prevail on a Brady violation claim, a defendant must show: (1) the State possessed evidence favorable to his defense; (2) he did not possess the favorable evidence and could not obtain it himself with any reasonable diligence; (3) the State suppressed the favorable evidence; and (4) had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the trial would have been different.

The Court noted that the record showed that when Brown and Joyce testified at trial, they consistently referred to each other as husband and wife. Joyce also testified that at the time appellant was living on her property, she and Brown were not "ceremonially married" but were "living together, which is kind of the same." And Jamie testified that Brown was "now married to [his] mother." During his initial interview with the lead investigator, appellant himself referred to Joyce as Brown's wife. Thus, appellant's counsel had the opportunity to cross-examine Joyce about the nature of her relationship with Brown but chose not to. Moreover, the most damaging portion of Joyce's testimony for appellant was the statement that she saw three men, including appellant, back a car up to the burn pit, though she could not recall the date. But appellant's participation in the crimes was corroborated by witnesses other than Joyce, as well as his own statements and conduct after the crimes.

On the other hand, the Court noted, the State's primary witness against appellant - Brown - was thoroughly cross-examined and impeached, such that the trial court "did not give substantial weight to Brown's testimony, as [the trial court] did not find him to be a very credible witness." And, as noted by the trial court, "Brown received a far more valuable benefit in exchange for his testimony, which was disclosed and used by the Defendant during the course of the trial to illustrate Brown's motivation for testifying." Recognizing that Brown had been thoroughly impeached, the trial court specifically stated in its order that the disclosure of the wedding ceremony and the use of it to further impeach Brown would not have changed the court's determination of appellant's guilt. Thus, the Court concluded, appellant could not meet his burden of showing the fourth prong - that the outcome of the trial would have been different had the State properly disclosed evidence of the wedding ceremony.

Appellant also contended that the trial court erred in denying his post-trial motion pursuant to OCGA § 5-5-41 (c) for DNA testing. The Court noted that the record showed that four days before trial began, the State disclosed a GBI lab report with the results of DNA testing on the baseball bat recovered from the shed on Brown's property. The report indicated that the sample taken from the bat contained the DNA profile of two individuals, the victim and an unknown person. Appellant filed a post-trial motion for DNA testing pursuant to OCGA § 5-5-41. At a hearing on the motion,

Harman testified as an expert in DNA testing. She explained that the GBI took four swabs from the wide end of the bat, that the remaining swabs could still be tested, and that the GBI never conducted any DNA testing on the handle end of the bat because the test kits available at that time could not cut through the chemicals used during their latent fingerprint testing. However, newer test kits would enable an analyst to test the handle end of the bat for DNA despite the presence of chemicals from the previously conducted fingerprint testing. Harman testified that newer testing may also yield a more "discriminating result" regarding the identity of the second DNA contributor on the wide end of the bat. Harmon acknowledged that testing would not be able to determine when or how any particular DNA was deposited on the bat. The trial court denied the motion, finding that appellant failed to show a reasonable probability that the DNA evidence would call into question the court's confidence in the verdict.

The Court stated that because appellant could have been convicted of armed robbery and felony murder predicated on burglary as a party to those crimes, whether appellant actually used the bat to strike the fatal blows was not required to prove those crimes. At most, the lack of appellant's DNA on the bat could have been used to impeach Brown's testimony that appellant had beaten Hill with the bat. And the trial court was already aware that there was no physical evidence linking appellant to the bat, but nonetheless concluded that the weight of evidence was sufficient to find appellant guilty as a party to the crimes for which he was convicted. Thus, even if post-trial DNA testing would have proven that appellant's DNA was not on the bat, there was not a reasonable probability that the results would have led to appellant's acquittal. Accordingly, the Court concluded, the trial court did not abuse its discretion in denying appellant's motion.

### **Photo Lineups; Substantial Likelihood of Misidentification**

*Lewis v. State, S22A0757 (9/20/22)*

Appellant was convicted of malice murder and other offenses. Varner, the State's main witness, told the police that appellant, whom she knew all her life as "Weasel," shot the victim. Appellant contended that the trial court committed reversible error when it failed to grant his motion to suppress evidence that Varner identified a photograph of appellant from a photographic lineup. The Court disagreed.

The Court stated that if an out-of-court identification by a witness is so impermissibly suggestive that it could result in a substantial likelihood of misidentification, evidence of that out-of-court identification violates due process and is inadmissible at trial. Our courts employ a two-step process in examining a trial court's admission of identification evidence for error. First, the court decides whether the identification procedure used was impermissibly suggestive. An identification procedure is not impermissibly suggestive unless it leads the witness to the virtually inevitable identification of the defendant as the perpetrator and is the equivalent of the authorities telling the witness, "This is our suspect." Second, if a trial court properly concludes that the State employed an impermissibly suggestive pretrial identification procedure, the issue becomes whether, considering the totality of the circumstances, there was a substantial likelihood of irreparable misidentification. If, however, a trial court properly determines that the identification procedure is not unduly suggestive, it is not necessary to consider whether there was a substantial likelihood of irreparable misidentification.

Appellant contended that his identification should have been suppressed because the photograph of his face was the only one in the lineup with a tattoo and because at trial she identified appellant's picture in the photo lineup because it was the only one depicting a person with a tattoo on his face. Additionally, Varner testified that she was on drugs when she chose appellant's picture from the photo array. But, the Court found, the record did not support the conclusion that the photo lineup was "impermissibly suggestive." First, the police detective testified that he could not tell from appellant's photograph that appellant had a tattoo on his face. Likewise, even after examining appellant's black-and-white lineup photograph, the trial court concluded that it could not tell that there was a visible tattoo on appellant's face, noting in reference to the photograph that "I can't tell. He has got something over here, but it could be a shadow." Moreover, the Court found, the black-and-white photo lineup contained in the record on appeal did not contradict the trial court's finding on this point.

In fact, it showed that the photographs in the lineup at issue consisted of appellant and five other males of similar age, race, hairstyles, and facial features. And on this point, the record further showed that the detective read the standard admonitions to Varner, telling her, among other things, that she "should only make an identification if you can do so," "that photographs do not always depict the true complexion of a person," which "may be lighter or darker than shown," and that she should "[p]ay no attention to markings or numbers appearing in any particular photograph." The Court noted that under similar circumstances, it has held that trial courts have not abused their discretion in denying motions to suppress identifications from photo lineups.

Therefore, the Court concluded, given all of the above, it could not say that the trial court abused its discretion in concluding that the photographic lineup at issue was not impermissibly suggestive. And because the Court concluded that the photo line-up was not impermissibly suggestive, it was not necessary to consider whether there was a substantial likelihood of irreparable misidentification.

## **Collateral Order Doctrine; Motions to Withdraw as Counsel**

*Buckner-Webb v. State, S21G1281 (9/20/22)*

Buckner-Webb, Copeland, Davis-Williams, Jordan, Pitts, and Robinson (collectively, "defendants") were convicted along with others of at least one count of conspiracy to violate the RICO Act. Very briefly stated, the defendants filed motions for new trial through their respective trial attorneys. Thereafter, even though each defendant was represented by a separate attorney at trial, the Circuit Public Defender appointed only one attorney, Scarborough, to jointly represent defendants as appellate counsel, and he formally entered an appearance on defendants' behalf on April 26, 2017. On June 28, 2019, more than two years after Scarborough's appointment as appellate counsel for defendants and around the time defendants' particularized motions for new trial were due for filing, Scarborough filed a "Motion for Rule 1.7 Determinations" to address alleged conflicts of interest arising from his joint representation of defendants. Scarborough also filed a motion to withdraw as counsel based upon this conflict of interest. The trial court heard the motion to withdraw on August 8, 2019, which the trial court denied. On June 29, 2021, in a split decision issued by the whole court, the Court of Appeals dismissed defendants' direct appeal for lack of jurisdiction, concluding that the collateral order doctrine did not apply to the trial court's order denying the motion to withdraw as counsel. See *Buckner-Webb v. State*, 360 Ga. App. 329 (2021). Defendants then filed a petition for a writ of certiorari which the Court granted on December 14, 2021, to decide the first-impression legal question of whether a trial court's order denying a motion to withdraw as counsel based on alleged conflicts of interest is immediately appealable under the collateral order doctrine.

The Court stated that generally, when a party seeks to appeal a non-final order issued by a trial court before the case is fully adjudicated below, Georgia courts require adherence to the interlocutory procedures of OCGA § 5-6-34 (b) for appellate review. Although the framework for appellate review has been statutorily mandated by the General Assembly, our appellate courts have nonetheless created an exception by allowing immediate appeals of a very small class of interlocutory rulings that are effectively final in that they finally determine claims of right separable from, and collateral to, rights asserted in the action, too important to be denied review and too independent of the cause itself to require that appellate consideration be deferred until the whole case is adjudicated. To qualify for immediate appeal under this "collateral order doctrine," an interlocutory order must be effectively final—a status assessed by examining whether the order resolves an issue that is substantially separate from the basic issues to be decided at trial; would result in the loss of an important right if review had to await final judgment; and completely and conclusively decides the issue on appeal such that nothing in the underlying action can affect it.

The Court noted that the Court of Appeals' majority concluded that the interlocutory order here—an order denying counsel's motion to withdraw based on an alleged conflict of interest—was not immediately appealable under the collateral

order doctrine because “[defendants] would not lose an important right” by “waiting until the proper time for a direct appeal.” *Buckner-Webb*, 360 Ga. App. at 329, 330. The Court agreed but noted that the Court of Appeals majority opinion considered this question only with respect to defendants' interest in being represented by conflict-free counsel. The Court of Appeals was also presented with—but declined to consider—whether counsel's interest in avoiding a potential ethical conflict that could violate a client's constitutional rights warrants collateral-order review. The Court concluded that, even considering counsel's interest in this case, this category of orders—i.e., orders denying a counsel's motion to withdraw based on a conflict of interest—is not among the “very small class” of interlocutory rulings that can bypass the ordinary statutory procedures for appellate review.

The Court stated that orders denying a counsel's motion to withdraw based on an alleged conflict of interest are not effectively final, even as to counsel's interest, in the sense needed to justify application of the collateral order doctrine. Indeed, counsel will still have ways to obtain review of the interest at issue in such orders—that is, counsel's interest in avoiding a potential ethical violation arising from conflicted representation. First, an attorney who is denied permission to withdraw as counsel based upon an alleged conflict of interest can seek to immediately appeal that order through the interlocutory appeal procedures established by OCGA § 5-6-34 (b). And, although the Court acknowledged that, in this particular case, this avenue of review had been exhausted, it was nonetheless available and will be available to similarly situated attorneys in future cases.

Second, a long-recognized option, while not the most favorable, is for an attorney to disobey the order and potentially be held in contempt of court. If an attorney's motion to withdraw is denied and the attorney feels strongly enough that he or she is being compelled to violate the applicable rules of professional conduct, or otherwise imperil a client's constitutional rights, the attorney can refuse to comply with the trial court's order denying the motion to withdraw as counsel and potentially be held in contempt for violating that order. The attorney can then appeal directly from any resulting contempt ruling under OCGA § 5-6-34 (a) (2). And, although the Court recognizes that this avenue for appellate review places the attorney in a very difficult position, it is a means of obtaining direct appellate review set forth in Georgia statutory law that lifts the issue presented in this case out of the realm of non-reviewability.

Lastly, the Court acknowledged Scarborough's specific argument that he may face disciplinary action from the State Bar for violation of Rule 1.7 if he is required to continue the joint representation of defendants, but the Court concluded that any such discipline is speculative at this point. And, given its conclusion in this case, the Court stated that it need not address the issue at this time.

Accordingly, the Court concluded that a trial court's order denying a motion to withdraw as counsel based upon alleged conflicts of interest does not fall within the “very small class” of cases that are directly appealable under the collateral order doctrine, and thus, it affirmed the judgment of the Court of Appeals. And because the scheme for appellate interlocutory review is legislative in nature, should the General Assembly determine that the established framework does not adequately safeguard the interests at stake here, it is for that body to change it.

## Statements of Juveniles; *Riley* Factors

*State v. Burton*, S22A0684 (9/20/22)

Burton, a 16-year-old, was arrested for murder. The trial court granted his motion to suppress his statements during a custodial interview. Considering the nine factors set forth in *Riley v. State*, 237 Ga. 124 (1976), the court found that the State failed to show that Burton knowingly and voluntarily waived his rights under *Miranda*. The State appealed.

The Court noted that the nine factors set forth in *Riley* are as follows: (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 vel non 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.

The Court noted that the State did not dispute the trial court's findings as to the first three factors: Burton was 16 years of age, had just started his junior year in high school and there was no indication Burton initially knew that he was a suspect in the murder.

Regarding the fourth factor, the Court found that the trial court's finding that Burton did not consult with a parent or relative and that one of the investigators, Detective Ross, did not contact Burton's parents was based, at least in part, on Detective Ross's testimony that he did not notify Burton's parents that their son was in custody or why he was in custody "[a]t any point in time during that day." Notably, the trial court emphasized "in particular" the "absence of a parent during the interview" in its totality-of-the-circumstances analysis.

As for the fifth factor, the Court noted that the trial court found that an arrest warrant had been obtained before the interview began, even though there was some inconsistency in the evidence on this point. But the trial court was authorized to weigh search warrant applications indicating that Burton's arrest warrant was obtained "[d]uring the interview" against Detective Ross's statement to Burton at the end of the video-recorded-interview that Burton was "being charged" and "[t]hat happened before you even got here," and also to credit Detective Ross's testimony acknowledging that Burton was not "actually informed of [the arrest warrant's] existence" until "the end of the interview" and that "up until then he wouldn't have known about it," which, the Court found, appeared to acknowledge that the arrest warrant had at least been obtained at some point before or during the time of the interview.

With respect to the sixth factor, the Court noted that the trial court expressly credited Detective Ross's testimony in determining that the techniques employed during the interview were somewhat misleading and deceptive, even though they were not particularly abusive or coercive. The trial court noted, however, that Burton was "shackled to a railing in the interview room" during his interview, a finding that was supported by the video recording of Burton's interview and by Detective Ross's testimony. Moreover, in finding that the interview room was "very cold"—the type of factual finding that the Court noted it generally reviews with substantial deference—the trial court expressly considered Detective Ross's testimony about the room's temperature and pointed to the video recording's depiction of Burton pulling his arms into his shirt and sitting in a way that appears to indicate he was trying to stay warm. As for the seventh factor, Detective Ross testified that Burton was held in the interview room for "a good part of the day, probably," and the State did not dispute the trial court's finding that the interview "was lengthy, even in the context of an adult interrogation."

With respect to the eighth factor, even apart from the trial court's ultimate determination that Burton "invoked his right to silence"—a conclusion the Court expressly declined to evaluate—the trial court also found as part of its *Riley* analysis that Burton "clearly indicated that he did not wish to speak to police." And that point was consonant with the trial court's earlier findings that Burton "shook his head [no]" while saying, "Yeah, I don't want to," to the question of whether he wished to speak to the detectives, and that after Burton responded to lead Detective Dobbs after she advised Burton of his rights under *Miranda*, Burton "appeared to shrug ... and his body language was not that of an individual who seemed open to conversation." Moreover, the trial court also found with respect to the eighth factor that "[t]he record is devoid of evidence as to whether [Burton] declined to give [ ] any statements on earlier occasions," suggesting that it was not persuaded by evidence the State presented about Burton's delinquency history and prior interactions with law enforcement,

*Prosecuting Attorneys' Council of Georgia*  
**CaseLaw** UPDATE

WEEK ENDING NOVEMBER 11, 2022

Issue 45-22

which the State offered to show that Burton was “streetwise” and had been read his rights under Miranda on previous, unrelated occasions.

And finally, regarding the ninth factor, the Court found that the trial court's finding that Burton had not repudiated the custodial statements he made to the detectives, while also acknowledging that Burton had pleaded not guilty to the charges against him, was an accurate recitation of what had happened in the case at that point in time.

Thus, the Court determined, the record showed that the trial court reviewed and weighed the evidence presented at the motion-to-suppress hearing, and that it also made factual and credibility determinations in reaching its conclusion that, considering all of the Riley factors, the State failed to meet its burden of establishing that Burton knowingly and voluntarily waived his rights under Miranda. Moreover, in considering the totality of the circumstances, the trial court placed great weight “in particular” on the factors of Burton's age, the length of the interview, law enforcement's failure to inform Burton of the charges against him or that an arrest warrant had already been obtained for him, and the absence of either of Burton's parents. Therefore, the Court concluded, given the undisputed aspects of the evidence; the trial court's extensive findings; and the credibility determinations the trial court made after listening to witness testimony and weighing the evidence, it could not say that the trial court's factual and credibility findings were clearly erroneous, or that the trial court erred in concluding that the State failed to meet its heavy burden of showing that, under a totality of the circumstances in this case, Burton knowingly and intelligently waived his rights under Miranda. Accordingly, based on the specific facts and circumstances presented, the trial court did not err in granting Burton's motion to suppress.