

THIS WEEK:

- Ineffective Assistance of Counsel; Burden of Proof
- Ineffective Assistance of Counsel; Right to Testify
- Constitutional Right to Speedy Trial; Retrials
- Search & Seizure; Juror Bias

Ineffective Assistance of Counsel; Burden of Proof

Warren v. State, S22A0466 (9/20/22)

Appellant was convicted of malice murder and related offenses. Relying on *Debelbot v. State*, 308 Ga. 165 (2020), he argued that his counsel was ineffective for failing to object when the prosecutor remarked during his closing argument that the State's burden of proof—proof of guilt beyond a reasonable doubt—did not mean "to a mathematical certainty, it's not 95 percent, 85 percent."

The Court stated that remarks like the prosecutor's in this case were at the very least inadvisable. But even assuming trial counsel's failure to object to those remarks amounted to deficient performance, appellant was not prejudiced. The evidence of appellant's guilt was strong. Moreover, the DNA evidence from the knives used in the murder made it more likely that appellant had stabbed the victim. Finally, appellant failed to point to anything in this case like the circumstances in *Debelbot* that made the prosecutor's more egregious remark (that the jury did not have to be "ninety percent," or "eighty percent," or even "fifty-one percent sure") uniquely harmful there, and the trial court here explained presumption of innocence, burden of proof, and reasonable doubt accurately and at length. Thus, the Court concluded, it was not reasonably probable that counsel's failure to object to the prosecutor's remark affected the outcome of appellant's trial. Therefore, appellant's claim of ineffective assistance failed.

Next, appellant contended that his trial counsel was ineffective for failing to adequately advise him about his right to testify. Following the motion for new trial, the court found that counsel had consulted with appellant about his decision whether to testify. The court found that counsel "always" told clients if he thought it would be bad to testify, and that he "always" told clients the "pros and cons" of testifying, but that counsel "did not in the end tell [appellant] he should or should not testify."

Appellant argued that this advice was deficient. He contended that constitutionally effective assistance required counsel to do more than merely lay out the reasons for and against testifying and then leave the decision to him. Instead, effective counsel would have told him what to do. If his counsel knew his testimony would be "detrimental," appellant contended, counsel should have advised him not to testify.

However, the Court stated, it has regularly concluded that advice along the lines trial counsel gave here was within the wide range of reasonable professional conduct. When advising a defendant about the decision whether to testify in his own defense, it is generally enough for counsel to advise the defendant about the "pros and cons" of testifying and explain that the ultimate choice is the defendant's to make, whether the defendant testifies and then regrets it (as here), or does not testify and later wishes he had. Of course, as with any issue in this context, the Court stated it must consider the

circumstances of each particular case to determine a lawyer's effectiveness in advising the defendant about the right to testify. But here, appellant pointed to nothing about the circumstances that would made counsel's advice deficient. So, the Court concluded, this claim of ineffective assistance failed as well.

Ineffective Assistance of Counsel; Right to Testify

Thomas v. State, S22A0798 (9/20/22)

Appellant was convicted of malice murder and possession of a firearm during the commission of a felony. The record showed that at the close of the State's evidence, the trial court asked appellant whether he planned to testify, and appellant responded that he did. Appellant's lead trial counsel then stated to the trial court that appellant's desire to testify put counsel in "an ethical situation" such that appellant may need to testify in narrative form. The trial court cleared the courtroom at defense counsel's request, and the trial court and defense counsel explained to appellant that his attorney could not participate in presenting perjured testimony. After a meeting with his lead counsel, appellant announced to the court that he had changed his mind and decided not to testify.

At the hearing on appellant's motion for new trial, appellant testified that his conversation with counsel at trial about testifying was "heated" and counsel told him, "I'm not going to do it." Based on this conversation, appellant said, he understood that if he decided to testify, he would lose lead counsel as his lawyer and be left with co-counsel; appellant testified that when lead counsel introduced him to co-counsel, lead counsel told him "that it was [co-counsel's] first trial and he'd never been through this kind of situation." Appellant said that his decision not to testify was based on this understanding. Proffering what he would have told the jury if he had taken the stand, appellant testified that he shot the victim in self-defense.

Appellant's lead trial counsel testified at the hearing that, based on his prior conversations with appellant, he was confident that appellant would perjure himself if he testified. Counsel testified that, after appellant announced that he wished to testify, counsel made a phone call to an unspecified person whom he consulted on his ethical obligations. Counsel said that he then had a private, "animated" conversation with appellant in which counsel explained that he could not elicit perjured testimony, such that appellant would need to testify in narrative form if he took the stand. Counsel testified that he also explained to appellant that testifying would be at odds with the strategy that the defense had employed at trial. Counsel said that he would not have intentionally suggested to appellant that counsel would abandon appellant mid-trial if he testified, while acknowledging that counsel may have said something that could be misinterpreted in this way.

The trial court denied the motion for new trial, concluding that "[t]here was no ineffective assistance of counsel, and [appellant] was not deprived of any constitutional rights when he decided not to testify." The trial court found that lead "counsel did not intend to convey he was walking away from representation" and "appropriately attempted to balance his ethical duties to his client and to the trial court."

Appellant argued that his waiver of his right to testify was not voluntarily made because his decision was the result of undue pressure from counsel that constituted ineffective assistance when counsel explained to him during the trial that any testimony by appellant would have to be offered in narrative form because counsel had concluded his testimony would be untruthful. The Court stated that although a criminal defendant's constitutional right to testify on his or her own behalf at trial is a right that is personal to the defendant, trial counsel has a duty to inform a defendant about this right, that the choice to testify is the defendant's to make, and about the implications of choosing to exercise this right. If a defendant decides to testify, counsel must accept that decision and call him to the stand.

And here, the Court noted, appellant did not contend that trial counsel failed to meet any of these obligations. Rather, he argued that counsel should have communicated more clearly to him that he would not lose his lead counsel if he chose to testify. But appellant pointed to no evidence that lead counsel said something to him that reasonably could be construed as a communication that lead counsel would abandon him if he chose to testify. Although appellant testified that counsel used the words, "I'm not going to do it," in context, the Court found, this was better understood as an explanation that counsel would not present any testimony by appellant in question-and-answer format. Even if it assumed that a lawyer's failure to clear up a client's obvious misunderstanding about the right to testify could in some circumstances constitute constitutionally deficient performance, appellant could not point to any evidence, let alone a finding by the trial court, that it was apparent to counsel that appellant thought lead counsel would abandon him if appellant chose to testify. All appellant pointed to was his own post-trial testimony that he was confused on that point. But when considering a claim of ineffective assistance of counsel, the reasonableness of counsel's performance is judged from counsel's perspective at the time. Thus, the Court found, appellant did not meet his burden to show that counsel performed deficiently.

Constitutional Right to Speedy Trial; Retrials

Williams v. State, S22A0794 (9/20/22)

In 2012, appellant was convicted of malice murder, felony murder, two counts of possession of a firearm during the commission of a crime, and aggravated assault. The Court reversed appellant's convictions and sentence and ordered that he receive a new trial due to the improper admission of his prior conviction for the offense of making terroristic threats. See *Williams v. State*, 299 Ga. 834 (2016). Appellant was convicted again in 2018.

Appellant argued that his constitutional right to a speedy trial was violated when he was not brought to retrial for 25 months after remittitur of his case to the superior court following the reversal of his convictions. The trial court determined that appellant's constitutional speedy-trial right was not violated and denied both a motion for discharge and acquittal that appellant filed three months prior to his trial and appellant's motion for new trial.

Initially, the Court noted that the trial court found that the delay in bringing appellant to retrial following remittitur of his case was 25 months and that it was therefore presumptively prejudicial. Neither party disputed whether the trial court properly calculated the length of delay or whether it properly determined that the delay was presumptively prejudicial. Thus, the Court stated, it must review the findings of the trial court using the four *Barker-Doggett* factors.

The Court noted that neither party contested that the trial court properly weighed the length of the delay against the State. Even though the trial court determined that the 25-month delay was not uncommonly long due to the extensive preparation required in this case, the trial court still weighed the length of delay against the State. Thus, the Court concluded that this did not constitute an abuse of discretion.

The trial court weighed the reason for delay differently in its orders on appellant's two motions. In the first order, the trial court weighed this factor slightly against the State because it found that the State failed to provide an adequate reason for the delay and that there were two prosecutors assigned to the case who left the district attorney's office while the case was pending retrial. The trial court noted that in deciding to weigh this factor only slightly against the State, it considered that there were several joint requests for a continuance and that appellant never announced that he was ready for trial. But, the Court noted, in its later order denying appellant's motion for new trial, the trial court weighed the reason for delay against appellant because there was an 11-month delay caused by the withdrawal of appellant's first trial counsel and because of the efforts required to find new counsel for appellant after a conflict of interest arose. The trial court also noted that appellant's initial counsel filed four applications for leave of court. In making its determination, the trial court also considered plea negotiations between the parties but found that they did not weigh against either party and considered

that there were several changes in prosecutors. The Court found that the 11-month delay in securing conflict counsel supported the trial court's ultimate determination that the reason for delay should weigh against appellant, and that the trial court did not abuse its discretion in weighing this factor against appellant when it denied his motion for new trial.

As to the third factor, the trial court weighed appellant's delay in asserting his right to a speedy trial heavily against him. Appellant argued that his delay in asserting his right to speedy trial should not be weighed against him at all (or at least should not weigh against either party) because he "opted, in good faith, to give the Court, the State, and the public defender's office fair opportunity to bring this matter in a timely fashion" due to the "complex procedural posture in this case" and because he asserted his rights "once the delay became egregious. . . ." But the Court found, appellant did not assert his right to a speedy trial until three months before his trial — around 22 months after remittitur of his case to the superior court following the reversal of his convictions by the Court. And, while appellant was not required to seek a speedy trial at the first available opportunity, it was incumbent upon him to put the State on notice that he preferred to be tried as soon as possible. Therefore, the Court determined, it was not an abuse of discretion for the trial court to weigh appellant's failure to assert his right to a speedy trial until three months before trial against him.

As to the prejudice factor, the Court noted that the trial court found that appellant failed to present any evidence that he suffered personally or legally from the delay and therefore weighed this factor against him. Appellant contended this was error because affirmative proof of prejudice was not required and prejudice should have been presumed by the delay. However, the Court stated, while a presumption of prejudice always exists once the threshold of presumptive prejudice is satisfied, the prejudice prong may be weighed against the defendant even in cases of excessive delay. And here, the Court found that the trial court did not abuse its discretion by weighing the prejudice factor against appellant because he failed to establish oppressive pretrial incarceration or anxiety and concern beyond that which necessarily attends confinement and because he failed to present any specific evidence that his ability to defend himself had been impaired. Thus, in attempting to establish that his right to speedy trial was violated, appellant could not rely solely on the presumptive prejudice resulting from the 25-month delay.

Finally, the Court concluded, given appellant's delay in asserting his right to speedy trial and his failure to present any evidence of prejudice, the trial court did not abuse its discretion in finding that the *Barker-Doggett* factors weighed against appellant. Accordingly, the Court held that there was no abuse of the trial court's discretion in its conclusion that the 25-month delay in retrying appellant did not violate his constitutional right to a speedy trial.

Search & Seizure; Juror Bias

Jones v. State, S22A0548 (9/20/22)

Appellant was convicted of felony murder and other offenses. Briefly stated, the relevant evidence showed that Thurman and Young, two eye-witnesses to the shooting, identified appellant as the shooter. An investigator obtained an arrest warrant for appellant. After determining where appellant lived, they went to execute the warrant. According to the investigator, the officers first attempted to get an answer at the front door, but no one responded. The officers then went around to the back of the house through a low, gated chain link fence. The officers did not get an answer when they knocked on the back door of the house. The investigator testified that as the officers went around to the back door of the residence, they noticed a shotgun shell laying in the grass in the back yard. The officers photographed the shotgun shell and then sealed it into evidence packaging to be turned over to the GBI for processing. When the firearms examiner later compared the shotgun shell from the back yard to the shells found at the scene of the shooting, he determined that they were fired from the same 12-gauge shotgun that was used to kill the victim.

Appellant contended that the trial court erred in denying his motion to suppress the shotgun shell the officers collected from the back yard because, among other reasons, the officers did not have a search warrant authorizing them to seize the shotgun shell or any other object from the enclosed back yard of the residence, and the requirements of the plain-view exception to the warrant requirement had not been met. The Court disagreed.

First, the Court concluded that because the officers had a lawful arrest warrant for appellant, they were permitted to enter the property where appellant resided—including the back yard of the residence—to execute the arrest warrant. An arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within, and this authority includes the right to enter the back yard or the woods behind the suspect's residence.

Next, the Court addressed the plain view doctrine. Citing *Horton v. California*, 496 U.S. 128, 136-137 (II) (110 SCt 2301, 110 LE2d 112) (1990)), which established the plain-view exception to the Fourth Amendment's warrant requirement, the Court stated that an essential predicate to any valid warrantless seizure of incriminating evidence is that not only must the item be in plain view, but also its incriminating character must also be immediately apparent and the officer must have a lawful right of access to the object itself. And here, the Court concluded, the trial court did not err when it determined that the shotgun shell was admissible under the plain view doctrine. The evidence showed that, when the officers entered the residential property to execute the warrant for appellant's arrest—which the Court concluded they were legally authorized to do—they first approached the front door, and after getting no response, they went around to the back door. The investigator testified that, as the officers walked towards the back door through the back yard, they observed a shotgun shell laying in the grass. The shotgun shell's incriminating value was immediately apparent to the officers because (1) a shotgun was used to shoot and kill the victim; (2) several vehicles at the scene of the shooting were struck by buckshot from a shotgun; (3) three empty shotgun shells from a 12-gauge shotgun had been located in the street next to the scene of the shooting; and (4) officers were attempting to arrest appellant for this shooting. Therefore, the Court held, the trial court did not err in denying appellant's motion to suppress and allowing this evidence to be admitted at trial.

Appellant next contended that the trial court abused its discretion by not properly questioning and/or removing a juror, who disclosed mid-trial that she went to high school with Thurman. The record showed that on the first day of trial, Thurman testified on behalf of the State, and at the close of her testimony, court adjourned for the day. The next morning, the trial court advised the parties that Juror Number 10 had disclosed to the court that when Thurman testified, the juror realized she went to high school with Thurman. According to the juror, she recognized Thurman's face even though she had not previously recognized her name.

The State acknowledged that, when the potential jurors were questioned during jury selection, the jurors were asked whether any of them knew Thurman, to which Juror Number 10 did not respond. However, the State asserted that this failure to respond was understandable because "when people see people it brings back some memories." The State then asked if the parties could voir dire Juror Number 10 on this issue "to see if it would affect her opinion or anything." The trial court asked defense counsel what he wanted to do, and defense counsel opposed any questioning of the juror.

The trial court asked the parties whether the revelation that Juror Number 10 went to school with Thurman was "contrary to what was inquired of the jurors during voir dire." Defense counsel replied, Juror 10 should have replied affirmatively to the question of whether she knew any witnesses and that the defense would have struck her had she answered affirmatively. Nevertheless, the trial court did not remove the juror.

The Court noted that OCGA § 15-12-172 vests the trial court with broad discretion to replace a juror with an alternate at any point during the proceedings where, among other reasons, it is shown that the juror is unable to perform his or her

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE

WEEK ENDING NOVEMBER 4, 2022

Issue 44-22

duty or legal cause exists. Whether to strike a juror for cause lies within the sound discretion of the trial judge, and the trial court's exercise of that discretion will not be set aside absent a manifest abuse of discretion. To excuse for cause a selected juror in a criminal case on the statutory ground that her ability to be fair and impartial is substantially impaired, a challenger must show that the juror holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will not be able to set it aside and decide the case on the evidence or the court's charge on the evidence. This test is the same as that for prospective jurors: a potential juror is not disqualified as a matter of law when he or she expresses doubt about his or her own impartiality or reservations about his or her ability to put aside personal experiences.

Here, the Court found, although Juror Number 10 disclosed to the trial court that she recognized Thurman during her trial testimony and realized that they went to high school together, there was nothing in the record to support a conclusion that, as a result of this realization, Juror Number 10 held an unfair bias against appellant or in favor of the prosecution—in fact, appellant refused to even question this juror regarding any such impartiality. Because the record was devoid of any evidence to indicate this juror held a fixed opinion about appellant's guilt or innocence or was unable to decide the case based upon the evidence presented at trial and the trial court's instructions, the trial court did not abuse its discretion in refusing to remove Juror Number 10. Additionally, the Court concluded, by stating he did not want Juror Number 10 to be questioned, appellant affirmatively waived his claim that the trial court erred by not questioning this juror.