

THIS WEEK:

- **Sentencing; Sexual Offenses**
- **Motions to Withdraw Guilty Plea; Motions to Modify Sentence**
- **Civil Forfeiture; Secondary Metals Recyclers Act**
- **Constitutional Right to Speedy Trial; Barker-Dogget Factors**

Sentencing; Sexual Offenses

Mejia v. State, A22A1711 (2/21/23)

In November 2019, appellant entered a negotiated plea of guilty to a 16-count indictment, which included three counts of aggravated child molestation and two counts of incest. In January of 2020, he filed a motion to correct a void sentence, which the trial court denied.

The Court noted that appellant pled guilty to the aggravated child molestation counts in exchange for a negotiated sentence of 20 years to serve with the remainder of his lifetime on probation. The trial court accepted the plea and sentenced appellant to “life to serve 20 years” on each count of aggravated child molestation, with the second and third count to be served concurrently to the first. Relying on OCGA § 17-10-1 (a) (1) (A), appellant contended that the sentence is illegal because it amounts to an unlawfully probated life sentence. The Court noted that the statute provides as follows: “except in cases in which life imprisonment, life without parole, or the death penalty may be imposed,” the trial court may “suspend or probate all or any part of the entire sentence under such rules and regulations as the judge deems proper.” If a life sentence is imposed, however, the trial court lacks the discretion to probate or suspend the life sentence, unless otherwise provided by law.

Here, however, pursuant to OCGA § 17-10-6.1 (b)(2)(C) and (e), appellant and the prosecuting attorney agreed to depart from the mandatory minimum 25-year split sentence such that the total negotiated sentence was 20 years’ incarceration followed by a lifetime on probation. Thus, the Court rejected appellant’s position that the pronounced sentence of “life to serve 20 years” rendered the sentence unlawful. The final disposition sheet, when read as a whole, made it clear that appellant’s punishment for each count of aggravated child molestation amounted to a split sentence comprised of a 20-year term of imprisonment, followed by probation for life, as agreed to by the parties, and such sentencing is expressly contemplated by the relevant statutory provisions.

Next, the Court noted that with respect to the crime of incest, appellant pled guilty to two counts and was sentenced to 10 years’ incarceration on each count, to be served concurrently to each other and to the sentence imposed for the crime of aggravated child molestation. Appellant argued that his sentence of 10 years straight incarceration violated the split-sentence requirement of OCGA § 17-10-6.2 (b). The Court stated that it was constrained to agree.

The Court found that the trial court’s sentence of 10 years straight confinement violated the split-sentence requirement of OCGA § 17-10-6.2 (b). Although subsection (c) (1) of that statute authorized the trial court, with the agreement of appellant and the prosecuting attorney, to deviate from the split-sentencing requirement, the record contained no evidence that the parties negotiated anything beyond the aggregate sentence to be served. Moreover, during the sentencing hearing,

the prosecuting attorney did not address any specific count of the indictment when setting forth the agreed-upon plea, nor did the trial court impose sentence on any specific count when it otherwise pronounced the agreed-upon aggregate sentence. Consequently, the Court ordered that upon remand, the trial court should resentence appellant on the incest counts.

Motions to Withdraw Guilty Plea; Motions to Modify Sentence

Sanders v. State, A23A0475 (2/21/23)

Appellant pled guilty to a series of crimes committed in 2004 and was sentenced accordingly. The superior court subsequently vacated the sentences. Appellant again pled guilty to the crimes, and the superior court re-sentenced him in May 2019. In August 2019, he filed a motion to modify his sentences. In June 2022, appellant filed a motion to withdraw his guilty pleas and an amended motion to modify his sentences. The superior court issued an order dismissing both June 2022 motions as untimely.

Appellant contended that the trial court erred in dismissing his motion to withdraw his guilty pleas. The Court stated that a motion to withdraw a guilty plea must be filed within the same term of court at which the guilty plea or judgment being challenged was entered. When the term of court in which the defendant was sentenced has expired, a trial court lacks jurisdiction to allow a defendant to withdraw a guilty plea. This is true even if a defendant attempts to withdraw his plea on the grounds of manifest injustices and the ineffectiveness of trial counsel. And here, the Court found, appellant filed the motion to withdraw his May 2019 guilty pleas in June 2022, well beyond the expiration of the term in which he was re-sentenced. Accordingly, the Court concluded that the trial court lacked jurisdiction over the out-of-term motion and properly dismissed it as untimely.

Nevertheless, appellant contended, he should be allowed to withdraw his guilty pleas because his sentences are void. The Court stated that motions to vacate a void sentence generally are limited to claims that — even assuming the existence and validity of the conviction for which the sentence was imposed — the law does not authorize that sentence, most typically because it exceeds the most severe punishment for which the applicable penal statute provides. And here, the Court found, appellant's twenty-year sentence for burglary, ten-year sentences for kidnapping and armed robbery, five-year sentences for attempted armed robbery and possession of a firearm during the commission of a felony, and one-year sentences for false imprisonment, aggravated assault, and theft by taking were all sentences that the law permitted at the time appellant committed the crimes in 2004.

Finally, appellant argued that the trial court erred in dismissing his June 2022 amended motion to modify his sentences. The Court agreed. The Court stated that as the State acknowledged in its appellate brief, “it appears the superior court did not notice that the June 2022 filing was actually an amended motion which referred back to the timely August 2019 motion to modify.” (Emphasis omitted.) Under OCGA § 17-10-1 (f), appellant's August 2019 motion to modify his sentences was timely filed following the trial court's May 2019 re-sentencing. Accordingly, the Court agreed with the State that the trial court's dismissal of appellant's June 2022 amended motion to modify must be vacated and the case remanded for the superior court to resolve the timely pending motion.

Civil Forfeiture; Secondary Metals Recyclers Act

Smith v. State of Georgia, A22A1455 (2/21/23)

In December 2021, the State filed an in rem civil asset forfeiture complaint against over \$1 million in various accounts, several vehicles, and other property. The complaint alleged that the properties were contraband and subject to forfeiture under the Secondary Metals Recyclers Act. Garrett Smith, Stacey Smith, and SmithCo Recycling, LLC, who were named

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in the complaint as potential claimants, filed an answer identifying SmithCo Transfer, LLC, as a potential claimant. SmithCo Transfer, LLC, then filed an answer to the forfeiture complaint.

In February 2022, the State filed an amended complaint. The four claimants (hereinafter “appellants”) filed a motion to dismiss the amended complaint or, in the alternative, motion for judgment on the pleadings, arguing, among other things, that the State was prohibited from amending the complaint and that both the original and amended complaint failed to allege the essential elements of any criminal violation. Following a hearing, the State filed a second amended complaint. Appellants filed a motion to strike the second amended complaint, a motion to dismiss the second amended complaint, and a motion for release of the property.

In March 2022, the trial court granted, in part, appellants' motions as to property located in Florida, but otherwise denied their motions to dismiss, their motion to strike, and their motion for release of the property. After appellants obtained a certificate of immediate review, they filed an application for interlocutory appeal, which was granted.

Appellants first argued that the trial court erred in holding that the State satisfied the applicable pleading requirements of OCGA § 9-16-12 (a) because the State failed to allege the essential elements of the offense. The Court noted that in the second amended complaint, the State alleged, inter alia, that SmithCo Recycling and Garrett Smith enlisted Cal Cowart to steal catalytic converters, that Cowart stole 23 catalytic converters and sold them to SmithCo Recycling, and that SmithCo Recycling knew or should have known that the catalytic converters were stolen. The State also alleged that an employee of SmithCo Recycling stole between 10 and 15 roll-off containers and sold them to SmithCo Recycling, and that SmithCo Recycling knew or should have known that the containers were stolen. Although the second amended complaint did not explicitly allege that the catalytic converters or the roll-off containers were taken with the intent to deprive the rightful owners of the property, the requisite intent can be inferred from the allegations of the complaint. Consequently, the Court held that the second amended complaint alleges the essential elements of OCGA § 16-8-2 for purposes of OCGA § 9-16-12 (a).

Appellant also argued that the State failed to allege a sufficient connection between the property to be forfeited and the alleged criminal activity. The Court found that the second amended complaint alleges that bank accounts seized “were directly or indirectly used or intended for use to facilitate the purchase of stolen regulated metals acquired in violation of [OCGA § 16-8-2 and other statutes] ... or are proceeds derived or realized from a violation of” various statutes, including OCGA § 16-8-2, and that currency seized consisted of “payments to SmithCo Recycling by the companies to which it supplied the said regulated metals.” The second amended complaint further alleged that the real property and other property seized was “purchased with funds derived from and commingled with monies gained through SmithCo Recycling's illegal activities” including violations of OCGA § 16-8-2. Under OCGA § 10-1-359.3, property which is, directly or indirectly, used or intended for use to facilitate a crime, including theft by taking (if the subject of the theft was regulated metal property), and “any proceeds derived or realized therefrom” are contraband and subject to forfeiture. Thus, the Court concluded, the second amended complaint alleged a sufficient connection between the property to be forfeited and the alleged criminal activity. And, because the second amended complaint alleged the essential elements of at least one criminal violation which is claimed to exist and sufficiently connected the property to be forfeited to the alleged illegal conduct, the second amended complaint met the pleading requirements of OCGA § 9-16-12 (a) and the trial court correctly denied appellants' motion to dismiss the second amended complaint.

Next, appellants contended that the trial court should have dismissed the case because the trial was not timely held or continued. The Court noted that OCGA § 9-16-12 (b) (1) provides that a copy of a forfeiture complaint and summons “shall be served on any person known to be an owner or interest holder and any person who is in possession of the property.” “If an answer is filed, a bench trial shall be held within 60 days after the last claimant was served with the complaint; provided, however, that such trial may be continued by the court for good cause shown.” OCGA § 9-16-12 (f).

Here, the Court found, the State's original complaint was filed on December 3, 2021. The complaint and summons were served on Garrett Smith, Stacey Smith, and SmithCo Recycling on December 6, 2021, and they filed their answer on December 31, 2021. On January 13, 2022, the State filed a motion to join SmithCo Transfer, LLC, as a necessary party. SmithCo Transfer filed an answer on January 21, 2022, and the trial court granted the motion to join on January 24.

Appellants argued that the 60-day period began to run on December 6, when Garrett Smith, Stacey Smith, and SmithCo Recycling were served, and that the case should have been dismissed because a trial was not held, or a continuance obtained on or before February 4, 2022. But, the Court found, the last claimant, SmithCo Transfer, filed its answer on January 21. And SmithCo Transfer, in its answer, did not raise the defense of insufficient service. Citing *McDowell v. State of Ga.*, 290 Ga. App. 538, 540 (2) (2008), the Court noted that in similar circumstances, it held that the 60-day period began to run when the last claimant answered. Thus, because SmithCo Transfer filed an answer without raising the defense of insufficient service, the time SmithCo Transfer's answer was filed is the equivalent of the time the last claimant was served. Consequently, the 60-day period began to run on January 21. As a result, contrary to appellants' argument, the trial was not required to be held (or a continuance obtained) on or before February 4, 2022.

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

State v. Ray, A22A1741 (2/21/23)

Ray was convicted of rape and two counts of sexual battery. The State argued that the trial court erred in determining that Ray received ineffective assistance of counsel because counsel failed to file a plea in bar based on a violation of Ray's constitutional right to a speedy trial. The Court disagreed.

The record showed that Ray first was indicted for sexual battery and two counts of aggravated battery in February 2011. More than four years later, in June 2015, his indictment was amended with additional charges including rape. His trial began on March 28, 2016. The Court found that as a threshold matter, the 61-month delay between Ray's indictment and trial was presumptively prejudicial, which the State did not contest. Accordingly, the trial court correctly proceeded to the second step of the *Barker—Doggett* analysis, which requires the application of the delicate, context-sensitive, four-factor balancing test to determine whether the accused has been deprived of the right to a speedy trial.

As to the first factor regarding the length of the delay, the trial court weighed this factor against the State. In doing so, the trial court found that the 61-month delay was uncommonly long and noted that the State bears the responsibility for bringing cases to trial. The State made no argument on this factor, and thus, the Court found no abuse of discretion in weighing this factor against the State.

As to the second factor, the reasons and responsibilities for the delay, the trial court found that the State was more to blame for the delay. The trial court found that the case lingered in the prosecutor's office for years with no explanation before a new prosecutor took over the case and began pushing toward trial. Additionally, a State's expert witness lost their notes, which delayed the defense's expert witness's ability to prepare. Thus, the Court found no error in the trial court's weighing of this factor against the State. In fact, the Court noted, the State's either willful or benign negligence in failing to bring Ray's case to trial for more than five years was due at least moderate weight against the State, particularly where the trial court found that the State intended to allow the case to dead docket.

As to the third factor, the assertion of the right to a speedy trial, the Court noted that there was no dispute that Ray did not file a speedy trial demand during the years-long delay, and he did not assert his right to a speedy trial until after he was convicted. The trial court acknowledged this fact and ultimately weighed this factor against Ray. The trial court also found

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that the State was not blameless on this factor, as the State had “led the defense to believe the charges would be dismissed which actively discouraged the defense from pursuing a speedy trial demand.” The Court found no abuse of discretion in the trial court's assignment of fault on this factor.

Nevertheless, the State contended, the decision not to file a plea in bar was strategic. The Court disagreed. The Court noted that there is extensive case law supporting the dismissal of Ray's indictment after such a lengthy delay. Trial counsel was made aware that, although the State had dead-docketed the case, it had received push back from the victim's family and “didn't have a choice” but to proceed with prosecuting the case. Thus, there was no longer any strategic reason for counsel to hold off filing a motion to dismiss the indictment, as the State had made clear that the case was being revived no matter what. Accordingly, the Court concluded that the trial court's findings on these issues were within its discretion, and deferred to its finding that the third *Barker-Doggett* factor should weigh against Ray but be mitigated by the State's actions.

As to the last factor, prejudice, appellant argued that the victim's Aunt Mae, to whom the victim apparently made her initial outcry, had influenced the victim to make a false report. Mae, however, had passed away approximately one year before Ray's trial began. The trial court found that Mae was a material witness who was unable to be confronted by Ray due to her untimely death. The State, however, contended that Mae was nothing more than a minor narrative witness and not of great importance to the State's case. However, the Court found, it could not say that the trial court clearly erred in its assessment concerning Mae's potential influence on the trial had she survived. The trial court made specific references to evidence introduced at trial that could have had a different effect had Mae been available for cross-examination, and other evidence that was not presented at trial because of her death. As the judge who presided over Ray's trial and subsequent proceedings, the trial court was in the best position to determine the influence that Mae's absence may have had on the trial. Accordingly, the Court deferred to the trial court on this final factor and agreed that it weighed against the State.

The Court noted that having determined that three of the four *Barker-Doggett* factors weighed against the State to some degree and finding that the only factor weighing against Ray was mitigated by the State's actions, the trial court found that Ray's speedy trial rights were violated and had counsel filed a motion to dismiss the indictment, it would have been granted. The Court found that this determination was within the trial court's discretion, and thus, affirmed the trial court's order vacating Ray's convictions and barring further proceedings.