

THIS WEEK:

- ***Giglio*; State's Use of False Testimony**
- **Dismissals for Want of Prosecution; Statute of Limitation**
- **Conflicts of Interest; Ineffective Assistance of Counsel**
- **Search & Seizure; Inevitable Discovery**

***Giglio*; State's Use of False Testimony**

Mitchell v. State, A22A1521 (2/22/23)

Appellant was convicted of trafficking methamphetamine, manufacture of methamphetamine, possession with the intent to distribute, possession of methamphetamine, possession of altered ephedrine or pseudoephedrine, and conspiracy to manufacture methamphetamine. He argued that the trial court erred in denying his motion for new trial because Jumper, a prosecution witness, provided false testimony at trial. Specifically, appellant contended that he was entitled to a new trial because Jumper denied having an agreement to testify at appellant's trial, the State knowingly failed to correct this false testimony, and the false statement was material to the trial's outcome.

The Court stated that in general, a *Giglio* claim alleges that a prosecutor knowingly presented false testimony against the defendant. To establish a *Giglio* violation, it must be shown that: (1) the testimony given was false; (2) the prosecutor knew the testimony was false; and (3) the statement was material.

Here, the Court noted, the State did not dispute that Jumper offered false testimony, i.e., falsely stating that he did not have an agreement with the State to testify at appellant's trial. However, the burden is on the defendant to prove each of these elements, and reversal of the trial court is required only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.

The Court stated that false evidence is material if there is any reasonable likelihood that the false testimony could have affected the judgment of the jury. And here, the Court found, a search of appellant's property uncovered several items and substances associated with the clandestine manufacture of methamphetamine. Additionally, the arresting officer testified that appellant had admitted he both used and manufactured methamphetamine, that appellant had detailed how he secured the substances used to manufacture the drug, and that appellant secured pills from Jumper and others by paying for them in cash and methamphetamine, which was consistent with Jumper's testimony. Appellant also, according to the arresting officer, stated that he heard that the drug task force had been visiting people, and that he needed to clean up some of the items used to manufacture methamphetamine, which explained why some items discovered during the search of appellant's residence were hidden.

Additionally, while Jumper's agreement to testify could have been used to question his credibility, appellant's trial counsel challenged Jumper's credibility at trial through other testimony. For example, appellant's trial counsel highlighted the fact that Jumper only told the police that he bought the pills for appellant after the officers stated that they did not believe his initial story. Moreover, trial counsel highlighted the fact that Jumper was at appellant's house before the drug task force's search, and counsel asked the arresting officer whether it was possible that Jumper may have planted some of the evidence

found on appellant's property in hopes of working out “a decent plea[.]” Thus, although the fact that Jumper had an agreement with the State could have been used to challenge his credibility further, his credibility was questioned on other grounds during the trial.

Therefore, the Court concluded, given the evidence of guilt presented by the State, Jumper's false testimony was not material as there was no reasonable probability that, had the agreement been disclosed, the result of the proceeding would have been different.

Dismissals for Want of Prosecution; Statute of Limitation

State v. Walker, A22A1623 (2/27/23)

After the trial court dismissed an initial accusation against Walker for want of prosecution, the State filed a second, identical accusation, again charging her with DUI (per se), DUI (less safe), and other traffic-related offenses. Walker filed a plea in bar and motion to dismiss, arguing that the second accusation was filed outside the statute of limitation. The trial court granted that motion and the State appealed.

The State contended that the savings provision of OCGA § 17-3-3 gave it an additional six months from the date of the dismissal for want of prosecution to file the second accusation. The Court noted that OCGA § 17-3-1 (e) provides that “[p]rosecution for misdemeanors shall be commenced within two years after the commission of the crime.” The misdemeanor crimes at issue, as charged in both accusations, allegedly were committed on December 30, 2016. The State's second accusation was dated November 14, 2019, nearly three years after the commission of the crimes. OCGA § 17-3-3 provides, in pertinent part, that “[i]f an indictment is found within the time provided for in Code Section 17-3-1 . . . , and is quashed or nolle prosequi entered, the limitation shall be extended six months from the time the first indictment is quashed or the nolle prosequi entered.” (Emphasis supplied.) Thus, the Court found, since Walker's first accusation was neither quashed nor nolle prosequi, the trial court properly granted the plea in bar.

Nevertheless, the State argued, it filed the second accusation within six months of this dismissal and thus, the statute's savings provision should apply to the dismissal because there is no appreciable difference between the dismissal and the grant of a motion to quash or of an order of nolle prosequi, as referenced by the statute. The Court disagreed.

The Court stated that a dismissal for want of prosecution is not an exception or condition that our legislature has made part of OCGA § 17-3-3, which addresses only indictments that are quashed or nolle prosequi. A motion to quash is used to attack an indictment or accusation for a defect appearing on its face. The State pointed to no argument by Walker indicating any defect on the face of the accusation, and it was undisputed that Walker did not file a motion to quash, nor did the trial court sua sponte quash the indictment. Further, nothing in the record indicated that the State asked for a continuance or requested the entry of an order of nolle prosequi in order to extend the statute of limitation for an additional six months. Finally, the Court declined to read into the statute an element that is not present. Accordingly, the Court concluded, construing the statute properly, the trial court did not err.

Conflicts of Interest; Ineffective Assistance of Counsel

Burnett v. State, A22A1640 (2/28/23)

Appellant was convicted of aggravated sodomy and child molestation. Appellant argued that he was denied effective assistance of counsel because his attorney had a conflict of interest. Specifically, he contended that a conflict of interest existed because his counsel's law firm concurrently represented DFCS as a Special Assistant Attorney General (“SAAG”) representing five counties including the county in which he was prosecuted. Appellant contended that this necessitated

the law firm working with the same District Attorney that prosecuted his case and any request to inspect the DFCS files of the victim would be directed to the same agency the law firm represented. To support this claim, appellant presented evidence at the motion for new trial hearing from counsel's law firm website that, as the trial court found, "arguably implies that [trial counsel] and his mother are law partners[.]" Appellant argued that this conflict appears to have affected counsel's representation, in that counsel did not file a motion for in camera inspection of DFCS files in this case.

However, the Court found, the trial court did not clearly err in its further factual findings that trial counsel testified that he shares office space with his mother, that they were not a partnership, and that she did not pay his salary. Additionally, it was uncontroverted that counsel's mother did not practice in that county as a SAAG and that, more importantly, DFCS was not involved as either a party or as a witness in these proceedings. Moreover, there was no evidence of record reflecting that counsel discussed appellant's case with his mother or that she or anyone else from DFCS advised the State as to any aspect of the case. Therefore, the Court concluded, the trial court did not clearly err in finding there was no actual conflict.

Appellant also contended that his attorney had a conflict of interest because he had already applied for and accepted a prosecutorial position with the Army JAG Corps. The Court again disagreed.

Here, the Court found, trial counsel testified at the motion for new trial hearing that he had not yet begun working as a JAG officer when he tried appellant's case, that the case had nothing to do with the military, and that his role as a JAG officer would also involve defense work. Consequently, the Court concluded that the trial court did not clearly err in finding that there was "no indication that [trial counsel's] post-trial employment as a JAG had any significant or adverse effect on his representation." Accordingly, the trial court did not err in denying appellant's motion for new trial on this ground either.

Search & Seizure; Inevitable Discovery

State v. Wood, A22A1453 (2/28/23)

Wood and Carter were indicted for trafficking methamphetamine and other drug offenses. Briefly stated, the evidence showed that Carter called 911 to report that Wood had possibly overdosed and needed emergency services at their hotel room. Officer Seager arrived at the scene, saw Wood lying unresponsive on the hotel room floor, and began providing emergency care to him. Carter told Officer Seager that Wood had used methamphetamine the night before and that orange pills lying on a nightstand were the prescription drug Flexeril. Emergency medical technicians arrived a few minutes later, took over providing medical assistance to Wood, and carried him out of the room.

Officer Seager, who had left the hotel room when Wood was removed, returned to the room, began questioning Carter, and observed a bag containing residue of suspected methamphetamine. The officer left the room again, spoke to her superior officer, and then went back into the room. She asked another officer who was also inside the room, Officer Gordy, to take pictures and to open a cigarette box on the nightstand. Officer Gordy opened both the cigarette box and a knotted black bag that was on the nightstand, finding suspected methamphetamine inside the black bag. Officer Seager left the room again, spoke to her supervisor again, and then returned to the room. Meanwhile, Officer Gordy began searching the room. After Carter was arrested and placed in a patrol car, she was questioned again by Officer Seager. Following that conversation, the drug task force was called in. They obtained a warrant and seized methamphetamine and other items from the room.

Carter and Wood moved to suppress the evidence found in the room. The trial court granted the motion and State appealed.

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE

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First, the State argued that exigent circumstances justified the officers' warrantless searches of the hotel room. The Court disagreed. The Court noted that it was undisputed that Officer Seager's initial warrantless entry into the hotel room was lawful since she was responding to the 911 call and entered to render emergency assistance to Wood. But once the emergency medical technicians arrived, took over the medical care of Wood, and removed him from the room, the exigent circumstances authorizing the officer's initial entry for the limited purpose of rendering emergency aid had expired. An officer's conduct immediately after a legal entry must be carefully limited to achieving the objective which justified the entry: the officer may do no more than is reasonably necessary to ascertain whether someone needs assistance and to provide that assistance.

And here, the Court found, Officer Seager re-entered the hotel room after that initial emergency had expired and officers conducted warrantless searches of the room. Since the medical emergency which authorized the initial warrantless entry had expired, even if the officers had probable cause, absent exigent circumstances or proper consent, the subsequent warrantless searches and seizures within the hotel room by the officers were presumptively unreasonable.

Nevertheless, the State argued, the evidence seized after law enforcement officers' unlawful warrantless entries and searches of the hotel room was admissible under the inevitable discovery exception to the exclusionary rule because the drug task force agents later obtained a search warrant for the room. But, the Court stated, for this exception to apply, there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct. This active pursuit rule prevents application of the inevitable discovery doctrine from emasculating the search warrant requirement of the Fourth Amendment.

And here, the Court found, the record did not show that officers were actively pursuing a search warrant at the times they entered the hotel room and began searching it without a warrant. Thus, absent proof that the officers were actively pursuing a warrant at those points in time, the mere fact that drug task force agents obtained a warrant later that day was not enough to bring this case within the inevitable discovery exception. Accordingly, the Court affirmed the grant of the motion to suppress.