

# Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JUNE 8, 2018

## State Prosecution Support Staff

**Peter J. Skandalakis**  
Executive Director

**Todd Ashley**  
Deputy Director

**Robert W. Smith, Jr.**  
General Counsel

**Lalaine Briones**  
State Prosecution Support Director

**Sheila Ross**  
Director of Capital Litigation

**Sharla Jackson**  
Domestic Violence, Sexual Assault,  
and Crimes Against Children  
Resource Prosecutor

**Gilbert A. Crosby**  
Sr. Traffic Safety Resource Prosecutor

**Jason Samuels**  
Sr. Traffic Safety Resource Prosecutor

**William Johnson**  
Adult Abuse, Neglect, and  
Exploitation Prosecutor

**Gary Bergman**  
State Prosecutor

**Kenneth Hutcherson**  
State Prosecutor

**Austin Waldo**  
State Prosecutor

**Lee Williams**  
SAKI Prosecutor

## THIS WEEK:

- Appellate Jurisdiction; Transfer Orders
- Habeas Corpus; Record Evidence
- Pleas in Bar; Prosecutorial Misconduct
- Credit for Time Served; Mandamus
- Indictments; Motions for New Trial

---

---

---

### Appellate Jurisdiction; Transfer Orders

*In re K. S., S17G1344 (5/7/18)*

The State filed a delinquency petition against appellant and then sought to have the case transferred to the superior court. The trial court granted the motion. Appellant filed a direct appeal to the Court of Appeals, which dismissed it. The Court of Appeals concluded that the plain language of OCGA § 15-11-564 required a party appealing a transfer order to follow the interlocutory appellate procedures of OCGA § 5-6-34 (b). The Supreme Court granted certiorari and reversed.

OCGA § 15-11-564 (a) provides: “The decision of the [juvenile] court regarding transfer of the case [to superior court] shall only be an *interlocutory judgment* which either a child or the prosecuting attorney, or both, *have the right to have reviewed* by the Court of Appeals.” (Emphasis supplied). The Court stated that by training its focus on the words “interlocutory judgment,” the Court of Appeals rendered meaningless a key phrase of the statute, namely that the parties “have the right to have review[ ].” By including the phrase “have the right to have reviewed” within OCGA § 15-11-564 (a), the General Assembly removed all discretion from the trial and appellate courts that is prescribed via

OCGA § 5-6-34 (b) and, instead, made these interlocutory orders directly appealable. Thus, the Court held, OCGA § 15-11-564 provides that decisions regarding the transfer of juveniles to superior court, though interlocutory in nature, are directly appealable to the Court of Appeals. Consequently, the Court of Appeals erred in dismissing appellant’s appeal. Accordingly, the Court remanded the case to the Court of Appeals to consider appellant’s claims on the merits.

### Habeas Corpus; Record Evidence

*Holt v. Ebinger, S18A0052 (5/7/18)*

Ebinger was convicted of aggravated assault. The evidence showed that Ebinger and Lord were involved in a road rage incident that came to a head in a shopping center parking lot. Video recordings from two store surveillance cameras were admitted as State’s Exhibits 2 and 3 and played for the jury. Testimony at trial suggested that each of the videos showed at least some portion of the interactions between Ebinger and Lord. His conviction was affirmed on appeal. *Ebinger v. State*, 334 Ga. App. XXV (Nov. 18, 2015) (unpublished).

Thereafter, Ebinger filed a habeas corpus petition alleging ineffective assistance of both trial and appellate counsel. Specifically, Ebinger alleged that a woman named Kitchens was an eyewitness and would have testified that Lord, not Ebinger was the aggressor. Thus, he alleged, he was denied the effective assistance of counsel by failing to present her testimony at trial or the motion for new trial. He also alleged that counsel failed to raise an immunity defense. The habeas court agreed and granted his petition.

The Warden appealed. He argued that the claims were procedurally defaulted. However, the Court found that it need not resolve the issue of procedural default because all of Ebinger's claims failed for a different reason. As a petitioner in a habeas proceeding, Ebinger bears the burden of proof. A silent or ambiguous record is not enough to carry the petitioner's burden to prove ineffective assistance of counsel. The petitioner bears the burden to complete the habeas record with relevant records from the trial proceedings, even if those particular records are not helpful to his case on habeas, and the failure to meet that burden forecloses habeas relief. And here, the two videos of the altercation were not a part of the record.

In order to establish any of his claims of ineffectiveness, Ebinger must show both that counsel's performance was deficient, and that the deficient performance prejudiced his defense. In order to show prejudice, Ebinger must show that a reasonable probability exists that, but for counsel's errors, the outcome of the case would have been different. With respect to both Ebinger's claim that trial counsel was ineffective for failing to secure Kitchens' testimony and his claim that trial counsel was ineffective for failing to pursue an immunity defense, the strength of the other evidence presented at trial — which included the video evidence — is relevant to the question of whether such failures affected the outcome. Put another way, to show a reasonable probability that the trial would have turned out differently if only trial counsel had made different choices, Ebinger had to show what actually happened at the trial, and he must, therefore, provide the habeas court with a complete record of the relevant proceedings in the trial court. Moreover, because the video evidence is relevant to those claims that trial counsel was ineffective, it is equally relevant to Ebinger's argument that appellate counsel was ineffective for failing to raise those claims of trial counsel's alleged ineffectiveness. Because the video evidence was relevant to all of the claims on which the habeas court granted relief, Ebinger's failure to introduce this evidence in the record doomed all of those claims. Accordingly, the Court held, Ebinger failed to carry his burden to show that he was entitled to a writ of habeas corpus, and the habeas court erred when it issued the writ.

## **Pleas in Bar; Prosecutorial Misconduct**

*Yarbrough v. State, S18A0113 (5/7/18)*

Appellant was indicted for murder and other crimes related to a home invasion. Briefly stated, the case against appellant depended substantially on Pegues, and he was called by the prosecution as its first witness at the trial. The prosecution ran into trouble when it tried to get Pegues to positively identify Yarbrough in court. Pegues described a gunman in a white t-shirt and a gunman in a red hat that he knew only as "Uptown." Pegues identified the gunman that he selected from the photographic lineup. But, when asked if he saw that person in the courtroom, he said, "No." Upon further examination, Pegues testified that, when he had spoken with investigators, he told them that "Uptown" was the gunman in the white t-shirt. The prosecuting attorney confronted Pegues with a transcript of his police interview, in which Pegues apparently admitted that he was not 100 percent certain that the man in the white t-shirt was "Uptown." But Pegues refused to confirm that admission and continued to insist that he had identified "Uptown" as the gunman in the white t-shirt. Switching tactics, the prosecuting attorney asked Pegues whether the photograph marked on appellant's lineup was a photograph of "Uptown." Pegues answered, "No." The prosecuting attorney then pointed at appellant (who was seated at the defense table) and asked, "Is that this person here, sitting here today?" Appellant's lawyer objected immediately, and at the same time, Pegues answered, "Yes." The trial court sustained the objection, and then, outside the presence of the jury, appellant moved for a mistrial. In response, the prosecuting attorney explained that he had pointed to appellant intentionally, but he argued that it was not improper because the marked photograph on appellant's lineup was, at least in his view, clearly a photograph of appellant. The trial court declared a mistrial.

Thereafter, appellant filed a plea in bar based on double jeopardy. The trial court held a hearing and thereafter denied the motion. The trial court found that the prosecutor did not act in bad faith with the intention of goading appellant into moving for a mistrial.

The Court stated that where a mistrial is granted on the motion of the defendant, the principle of double jeopardy generally will not

bar a retrial unless the defendant demonstrates that the prosecution intentionally goaded the defendant into moving for a mistrial. To that end, the defendant must show that the State was purposefully attempting through its prosecutorial misconduct to secure an opportunity to retry the case, to avoid reversal of the conviction because of prosecutorial or judicial error, or to otherwise obtain a more favorable chance for a guilty verdict on retrial. The key issue is not whether the prosecutor acted improperly, or even how egregious the misconduct was, but rather, what objective the prosecuting attorney was trying to achieve. Unless a prosecutor was trying to abort the trial, his or her misconduct will not prohibit a retrial.

Here, the Court found, the trial court's observation of the prosecuting attorney's demeanor led it to conclude that he did not want or intend a mistrial to occur. The Court stated that it had no reason to doubt the accuracy of the trial court's assessment, which was consistent with the record. The relevant transcripts showed that the direct examination of Pegues did not proceed as planned and that the prosecuting attorney gestured toward appellant only after a frustrated attempt to get Pegues to identify appellant in court as one of the assailants, and only after consulting with his supervisor. Obtaining a positive identification from Pegues was critical to the State's case, and it was this identification — not a mistrial — that seems to have been the main goal of the prosecution. Thus, the Court found that the trial court did not clearly err in finding that the prosecution did not intend to goad the defense into moving for a mistrial. Consequently, the Court affirmed the denial of appellant's plea in bar.

## **Credit for Time Served; Mandamus**

*Warbington v. State, S18A0347 (5/7/18)*

In 2005, appellant was convicted of murder. After indictment and before his trial and conviction for murder, he was incarcerated in the state prison system for an unrelated offense after his parole was revoked. In 2017, he filed a pro se "Motion for Jail-Credit Time" in his original criminal proceeding, seeking to have the time served on the unrelated offense after his parole was revoked credited against his subsequently imposed sentence for murder. He appealed from the denial of his motion.

The Court noted that under the relevant statutory provisions of OCGA §§ 17-10-11 and 17-10-12, the amount of credit is to be computed by the convict's pre-sentence custodian, and the duty to award the credit for time served prior to trial is upon the Department of Corrections. The trial court is therefore not involved in this matter. If aggrieved by the calculations in awarding credit, appellant should have sought relief from the Department of Corrections. Dissatisfaction with that relief would not be a part of his direct appeal from his original conviction but would be in a mandamus or injunction action against the Commissioner of the Department of Corrections.

Accordingly, the Court held, even though appellant's motion was meritless, the Court would not overlook his failure to raise that claim through a petition for mandamus against the appropriate official in the Department of Corrections, rather than as a motion in his criminal case. While the trial court recognized this issue, noting that "pursuant to OCGA § 17-10-12, the duty to award credit for time served is the duty of the Georgia Department of Corrections," it denied the motion when it should have been dismissed as a nullity. Because the motion was a nullity, it presented nothing to appeal. Therefore, the Court dismissed the appeal.

## **Indictments; Motions for New Trial**

*Taylor v. State, S18A0038 (5/7/18)*

Appellant was convicted of malice murder and other offenses. He contended that Count 6 of his indictment charging him with burglary was defective. Specifically, appellant argued that, because he was charged with three felonies in the first three counts of his indictment (felony murder, malice murder, and aggravated assault), and because Count 6 failed to specify which particular felony he allegedly intended to commit upon entering the victim's hotel room, the indictment as to his burglary charge was defective.

The Court stated that to raise a defective indictment claim on appeal, a defendant must first raise the issue by general or special demurrer or by a timely motion in arrest of judgment after conviction. However, a motion for new trial is not a proper vehicle for raising questions as to the legal sufficiency of an accusation. And here, the Court found, appellant did not assert

this claim at the trial level by demurrer or by a motion in arrest of judgment. The only other avenue by which to raise this claim would be through a habeas proceeding. Accordingly, the Court held, the claim was not preserved for appeal and was not properly before the court for review.

Moreover, the Court held, "to the extent that the Court of Appeals has held otherwise, that case law is disapproved. See *Shelnutt v. State*, 289 Ga. App. 528 (2) (657 SE2d 611) (2008) (holding that "although [defendant] made no challenge to the indictment until she filed her motion for new trial, she has not waived her objection")."