

THIS WEEK:

- **Ineffective Assistance of Counsel; Evidentiary Hearings**
- **Motions to Modify Sentence; OCGA 17-10-1 (f)**
- **Juveniles; Informal Adjustments**
- **Sufficiency of the Evidence; State's Right to Appeal**
- **Discovery Violations; Bad Faith**
- **Search & Seizure; Probate Courts**

Ineffective Assistance of Counsel; Evidentiary Hearings

Walker v. State, A18A0847 (7/18/18)

Appellant was convicted of rape and false imprisonment. The Court affirmed his convictions, *Walker v. State*, 341 Ga. App. 742, 745-47 (2) (2017). However, the Court remanded for the trial court to make findings of fact and conclusions of law pursuant to *Lafler v. Cooper*, 566 U.S. 156, 168(II) (B) (132 SCt 1376, 182 LE2d 398) (2012) regarding the prejudice prong of appellant's claim that his trial counsel was ineffective for failing to adequately advise him regarding a pre-trial plea deal offered by the State. On remand, the trial court, without holding an evidentiary hearing, held that appellant was not prejudiced. The Court agreed.

The record showed that when the State made the plea offer, both the prosecutor and appellant's trial counsel erroneously believed that 20 years was the maximum sentence that appellant could receive on the rape charge, when, in fact, he could receive a life sentence. Based on counsel's erroneous advice that 20 years was the maximum rape sentence, appellant rejected the plea offer, went to trial, was convicted on both charges, and received a sentence of life imprisonment for rape plus five years for false imprisonment.

The Court noted that the testimony at the hearing on appellant's motion for new trial established, and the trial court found, that the State, appellant, and his counsel believed 20 years to be the maximum available sentence for his rape charge when the State made its plea offer. Appellant nonetheless rejected this offer and elected to proceed to trial. Even once appellant and his counsel became aware that appellant actually faced a life sentence on his rape charge (after being so advised by the State prior to trial), nothing in the record suggested that appellant instructed his counsel to re-open plea negotiations or ask the State whether the 20-year offer remained open. Moreover, the Court found, appellant presented no evidence to the trial court to suggest that once the State disabused itself of this notion that the prior offer or, for that matter, any offer for less than a life sentence, would still be considered by the State. Appellant therefore failed to carry his burden of showing that the initial 20-year offer would have ultimately been presented to the trial court and not withdrawn by the State due to the intervening circumstances involved in this case, namely the State's late realization that the maximum sentence available in this case was life imprisonment. Accordingly, the Court held, the trial court did not err in finding that appellant failed to establish the prejudice prong of *Strickland* and *Lafler*.

Nevertheless, appellant contended, the trial court erred when, upon remand, it did not hold a new hearing to allow him to develop a record relating to the *Lafler* factors. However, the Court noted, appellant offered no authority suggesting that a new hearing was required. Moreover, it was clear from the parties' briefs, the arguments presented at the motion for new trial, and the trial court's orders, that all parties and the trial court were aware of the legal standard set forth in *Lafler* as well as Georgia appellate decisions applying that standard when the motion hearing was held. Thus, appellant was on notice of the burden he carried in advancing his claim of ineffectiveness relative to the plea offer and his sentence, and made no showing that a second hearing following remand was necessary. Accordingly, the Court found no error.

Motions to Modify Sentence; OCGA 17-10-1 (f)

Patterson v. State, A18A0984 (7/19/18)

On February 13, 2017, appellant entered a negotiated plea to voluntary manslaughter as a lesser-included offense of malice murder, possession of a firearm by a convicted felon as a lesser-included offense of felony murder, possession of a firearm during the commission of a felony, and interstate interference with custody. The trial court sentenced appellant to 15 years to serve for voluntary manslaughter and consecutive sentences of 5 years to serve on each of the remaining counts to which he pled guilty, resulting in a total sentence of 30 years to serve. In August of 2017, appellant filed a motion to modify his sentence pursuant to OCGA § 16-1-7 (f), contending that his sentence was illegal and void because the trial court should have merged all of his convictions under OCGA § 16-1-7 (a) (1) and sentenced him only to 15 years to serve for voluntary manslaughter. The trial court denied the motion.

The Court noted that because appellant filed his motion to modify sentence within one year of when the trial court imposed his sentence, his motion was timely under OCGA § 17-10-1 (f). But the authority granted to a trial court to correct a sentence pursuant to OCGA § 17-10-1 (f) does not, on its face, include the power to vacate the conviction on which the sentence is based. Thus, a motion to correct or modify a defendant's sentence under OCGA § 17-10-1 (f) is not the proper procedural vehicle for a challenge to the defendant's underlying conviction, rather than to the defendant's sentence. And, a claim that a defendant's convictions should have merged under OCGA § 16-1-7 (a) (1) is a challenge to a defendant's underlying conviction rather than to the defendant's sentence. Thus, the trial court was correct in denying his motion.

Furthermore, where the time for filing a direct appeal from the criminal conviction or a motion for new trial has expired, a defendant attacking his underlying conviction is limited to the traditionally recognized proceedings of an extraordinary motion for new trial, a motion to withdraw his guilty plea, a motion in arrest of judgment, or a petition for habeas corpus. But, appellant's motion could not alternatively be construed as one of those traditionally recognized proceedings for challenging a conviction. Consequently, the Court concluded, irrespective of how his motion to modify sentence was construed, he was not entitled to relief based on his merger claim.

Juveniles; Informal Adjustments

In re S. M., A18A1221 (7/24/18)

The State filed a delinquency petition in the Juvenile Court alleging that appellant was delinquent for committing the act of theft by taking, a misdemeanor, in that appellant took a cell phone with a value of \$1,500 or less from its owner with the intention of depriving the owner of the property. After initially denying the allegations, appellant formally admitted the allegations and agreed to an informal adjustment of the matter that included restitution to the victim for the lost phone. After a hearing, the court determined that restitution of \$750 and entered an order for the informal adjustment, including restitution in that amount.

Appellant argued that the trial court erred in its findings regarding the amount of the restitution. However, the Court agreed with the State that the appeal should be dismissed. An informal adjustment is a “disposition of a case other than by formal adjudication and disposition.” OCGA § 15-11-2 (39). Generally, an informal adjustment holds all charges in abeyance pending completion of certain conditions in a certain period of time; upon successful completion all charges will be dismissed. Here, the court’s order provided for appellant’s informal adjustment for a period of 90 days. The order further provided that “[t]his order will not expire until such time as all conditions are met. Any violations of the conditions herein will result in the matter being set on the Court’s calendar for a final disposition.” Thus, the Court found, the order did not render a final judgment of adjudication and disposition. Accordingly, because the order appealed from was not the final judgment to be entered in the case by any court in Georgia, the appeal was premature, and the case dismissed without prejudice. In so holding the Court granted appellant permission to file a direct appeal from any subsequent final judgment.

Sufficiency of the Evidence; State’s Right to Appeal

State v. Wilkerson, A18A1253 (7/30/18)

Wilkerson was convicted of five counts each of aggravated assault with a deadly weapon and aggravated assault with a motor vehicle, but acquitted him of three counts of kidnapping. The evidence, briefly stated, showed that Wilkerson’s sister and her three children (ages 3, 2 and 1) were riding in a car driven by the sister’s boyfriend. A truck in which Wilkerson was a passenger plowed into the car and Wilkerson then got out and pointed a shotgun at the vehicle. He demanded the children and then took the children back to his mother’s home.

The trial court granted Wilkerson’s motion for new trial on the aggravated assaults against the children. The trial court found there was no evidence that Wilkerson pointed the shotgun at the children or threatened them, and the children were unaware of the firearm. Thus, the court concluded, “[t]he fact that a victim is unaware that a firearm has been pointed at the victim precludes a conviction of aggravated assault.” The court further found that the three counts of aggravated assault were “strongly against the weight and the principles of equity and justice and there was not sufficient evidence to allow a rational trier of fact to find [Wilkerson] guilty of these Counts.” Finally, the trial court found its original sentence to be excessive and modified it accordingly. The State appealed.

The State argued that the trial court erred in granting the motion for new trial on the three counts because awareness is not an essential element of the crime of aggravated assault and there was evidence that Wilkerson pointed the gun at the

children when he pointed it at the car in which the children were riding. The Court agreed. Under OCGA § 16-5-20 (a), the State may prove an assault by showing that the defendant attempted to commit a violent injury to the person of another or committed an act which placed another in reasonable apprehension of immediately receiving a violent injury. Here, the State charged an assault by way of either manner contained in the assault statute. Accordingly, the children's awareness was immaterial; it was enough that Wilkerson's sister confirmed that Wilkerson intentionally pointed the shotgun at the vehicle in which the children were riding in an effort to get the boyfriend and sister to stop the vehicle. Accordingly, the Court reversed the trial court's ruling that the evidence was insufficient to sustain Wilkerson's convictions for these three counts.

Nevertheless, Wilkerson argued, the State failed to enumerate as error the trial court's reversal of these three counts on the general grounds. The Court disagreed. Given the wording of the trial court's order, the Court found that the State implicitly challenged the ruling in its claim that the trial court erred in finding the evidence insufficient to sustain the three convictions. Specifically, the Court found that the trial court conflated the legal issues relative to review under *Jackson v. Virginia* and under the general grounds. Thus, the Court found, it was unable to determine which standard the trial court applied to its ruling under the general grounds. Accordingly, the Court vacated the ruling and remanded the case to the trial court for reconsideration of the general grounds.

Finally, the State challenges the trial court's modification of Wilkerson's sentence, contending that the original sentence imposed by the judge presiding over the trial was "within the minimum and maximum sentences prescribed by law" under OCGA § 17-10-1 (a) (1). However, the Court agreed with Wilkerson that the State had no right to appeal the sentence modification because it is not enumerated as an "appealable issue" under OCGA § 5-7-1. The fact that the trial court included the sentence modification in its order granting Wilkerson's motion for new trial does not render the issue directly appealable as it has long been established that alleged irregularities in a sentence do not authorize the grant of a new trial.

Discovery Violations; Bad Faith

Phillips v. State, A18A1180 (8/1/18)

Appellant was convicted of family violence aggravated assault and reckless conduct as a lesser included offense of aggravated battery. The evidence showed that the victim, appellant's boyfriend, was found shot in the back, approximately 10 to 15 feet from the front door. At trial, the State's theory of the case was that appellant shot her boyfriend in an act of revenge as he was attempting to leave their home after they had stopped fighting. In contrast, the defense's theory of the case was that appellant fired the gun as a warning shot in an act of self-defense as her boyfriend was violently attacking her near the front door.

One of the issues at trial was whether appellant had any visible injuries requiring medical treatment that would corroborate her contention that she was violently attacked by the victim when she fired the gun. The State produced witnesses that testified appellant showed no sign of injury and requested no medical assistance. Conversely, appellant testified to her injuries and introduced at trial a supplemental police report and an affidavit for the arrest of the victim. These two documents were prepared by the lead detective who had died prior to trial. The documents showed that appellant had visible injuries.

During trial, the defense sought to introduce medical records from the jail that it had just obtained. These medical records could have corroborated appellant's contentions regarding her injuries at the hands of the victim. The State objected to the introduction of the jail medical records, contending that the defense had opted into reciprocal discovery but had failed to timely produce the records under those discovery procedures. The court agreed and prevented the defense from using them at trial.

Appellant contended that the trial court abused its discretion by excluding the jail medical records as a discovery sanction. The Court agreed. The Court noted that the trial court excluded the jail medical records because appellant, having opted into reciprocal discovery, had not made the records available to the State at least five days before trial as required by OCGA § 17-16-4 (b) (1), and that the court sanctioned the defense by excluding the records pursuant to OCGA § 17-16-6. But, under OCGA § 17-16-6, a trial court is authorized to impose the severe sanction of excluding evidence for a discovery violation only if the State shows, among other things, that the defendant acted in bad faith. And, a defendant's failure to timely provide a document to the State, without more, is insufficient to show bad faith. And here, the Court found, there was no showing by the State of bad faith in the belated production of the jail medical records. Rather, the record reflected that defense counsel notified the State prior to trial of her efforts to obtain the jail medical records and of her difficulty in obtaining them. Then, when defense counsel ultimately received the records, the records were provided to the State at the same time. There was no evidence that defense counsel made any effort to hide the jail medical records, and the prosecutor herself noted that she was not arguing that defense counsel was being untruthful. Accordingly, the Court concluded, because the record failed to show bad faith, the trial court erred in excluding the jail medical records as a discovery sanction instead of imposing a lesser sanction, such as granting the State a continuance to interview the jail medical staff.

The Court then addressed whether the error was harmless and found that it was not. First, the Court found, the evidence was not overwhelming and the jury acquitted appellant of one of the charged offenses. Second, a jury could have found that these jail medical records, with their observations and diagnoses by medical professionals of appellant's injuries and documentation of appellant's complaints, provided independent and objective support to appellant's trial testimony that she shot her boyfriend while being physically attacked by him, sustained visible injuries as a result of the attack, and needed medical treatment for her injuries. And finally, the exclusion of the jail medical records was not harmless in light of the emphasis placed on the absence of medical testimony and records during the prosecutor's closing argument at trial. Specifically, the prosecutor repeatedly argued to the jury that the absence of medical testimony or records further demonstrated that appellant was lying about her injuries and thus about being physically attacked when the shooting occurred. Accordingly, the Court reversed appellant's convictions and remanded for a new trial.

Search & Seizure; Probate Courts

Joyner v. State, A18A1294 (8/3/18)

Appellant was indicted for multiple felony offenses, including manufacturing marijuana, possession of methamphetamine, theft by receiving stolen property, and possession of a firearm by a convicted felon. He moved to suppress, contending that the probate court judge was not authorized to issue the search warrant of his home that led to his arrest. The trial court denied the motion but issued a certificate of immediate review.

Prosecuting Attorneys' Council of Georgia
CaseLaw UPDATE

WEEK ENDING SEPTEMBER 14, 2018

Issue 37-18

The Court granted appellant an interlocutory appeal. However, the Court stated that because the probate court judge was authorized to hold a court of inquiry under OCGA § 17-7-20, the probate court judge was also authorized to issue a search warrant pursuant to OCGA § 17-5-21 (a).

Nevertheless, appellant argued, the search in this case was invalid because there is a state court in the county and OCGA § 40-13-21 (b), should be read to prohibit probate court judges from issuing warrants in counties where there is also a state court. The Court disagreed. OCGA § 40-13-21 (b) is part of our motor vehicles code and governs the jurisdiction of probate courts in misdemeanor cases arising under the traffic laws of this State. So even if this code section could be construed to divest probate courts of the authority to issue search warrants in misdemeanor traffic cases in counties where there is a state court, the Court found that it had no applicability to the instant case, which was not a misdemeanor traffic case and instead was a case involving multiple felony offenses.