

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 20, 2009

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THIS WEEK:

- **Speedy Trial**
- **Closing Arguments**
- **Statements; *Miranda***
- **Conspiracy; Continuance**
- **Statements; *Miranda***
- **Evidence; Hearsay**
- **Statements**

Speedy Trial

Bowling v. State, S09A0391

Appellant appealed from the denial of his motion to dismiss his indictment on the ground that his constitutional right to a speedy trial had been violated. Constitutional speedy trial claims must be analyzed under the four-part balancing test of *Barker v. Wingo*. Under this test, a trial court considers: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right to speedy trial; and (4) the prejudice to the defendant. In applying this test, the trial court found that (1) the delay of approximately 52 months from the date of appellant's arrest to the date that the second motion to dismiss was denied was presumptively prejudicial; (2) the reasons varied between requests from the state and appellant for delays but there was no evidence that the state deliberately tried to delay the trial; (3) appellant never asserted a statutory right to a speedy trial, agreed to some continuances and never objected to other continuances in his case; and (4) appellant's generalized claims of prejudice concerning the vehicle in which the crime occurred and a defense witness made

no real showing of harm to his defense. The Court held, in reviewing the findings of the trial court, that the trial court did not abuse its discretion in denying appellant's motion.

Closing Arguments

Alexander v. State, S08A1586

Appellant was found guilty of felony murder, aggravated assault, escape, and possession of a firearm during the commission of a felony. Appellant contended that the trial court erred in granting the State's motion in limine to prevent the defense from arguing during closing that the State possessed taped interviews of appellant and his wife that had not been introduced into evidence. The record showed that defense counsel wished to raise the issue of the omitted police statements in connection with the defense theory that the shooting of the victim occurred by accident. However, the Court held, the arguments that defense counsel desired to make were not derived from the evidence. First, with respect to appellant's statement, there was no evidence to suggest that a recorded statement even existed, let alone one that would support an accident theory, as the undisputed testimony at trial indicated that no recording was made of appellant's statement due to a malfunctioning tape recorder. Thus, there could be no basis for commenting on the alleged existence of this statement. Second, even if a recorded statement existed, it still would have been improper for defense counsel to try to raise the inference of accident by commenting on the statement's existence because appellant's self-serving pre-trial declaration of innocence would have been "inadmissible hearsay" since appellant did not testify. Similarly, it would have been inappropriate for defense counsel

to comment on the existence of a recorded statement by appellant's wife in support of an accident theory, as her statement was also inadmissible hearsay in light of her decision not to testify.

Statements; Miranda

State v. Folsom, S08A1621; S08X1622

Appellant was charged with kidnapping and murder. The trial court suppressed all pre-*Miranda* statements and evidence derived therefrom. The State appealed and appellant cross-appealed. The trial court used a four factor test to determine that appellant was in custody for *Miranda* purposes. This test, which was derived from the Supreme Court's decision in *Shy v. State*, 234 Ga. 816 (1975) and the Court of Appeals decisions in *State v. Wilson*, 257 Ga. App. 120 (2002) and *State v. Hendrix*, 221 Ga. App. 331(1996), analyzes (1) probable cause to arrest, (2) subjective intent of the police, (3) the subjective belief of the defendant, and (4) the focus of the investigation to determine if a defendant was restrained to a degree associated with formal arrest. The Court held that the "proper inquiry is how [a] reasonable person in [the] suspect's position would perceive his situation." Therefore, "*Shy v. State* and its progeny, including *State v. Wilson* and *State v. Hendrix*, are hereby disapproved insofar as they consider irrelevant factors in lieu of applying [this] objective inquiry." The Court remanded the case for the trial court to apply the correct legal standard.

The State also contended that the trial court erred by suppressing evidence obtained with knowledge learned from appellant's pre-*Miranda* statements. A violation of *Miranda* does not warrant the suppression of the fruit of otherwise voluntary statements. Appellant contended that his statements were involuntary due to his intoxication at the time the statements were made. The trial court made no findings regarding appellant's alleged intoxication and the voluntariness of his statements. Therefore, the case was also remanded for a determination by the trial court as to whether the statements were voluntary.

Conspiracy; Continuance

Bradford v. State, S08A1470

Appellant was convicted of conspiracy to traffic amphetamine, trafficking amphetamine,

and conspiracy to traffic methamphetamine. He argued that the conspiracy statute, OCGA § 16-4-8, is unconstitutionally vague because it fails to define the term "overt act." The Court found that an overt act is one commonly understood to be "open," "manifest," or "public." In addition, OCGA § 16-4-8 further defines the overt act to which it speaks as committed "to effect the object of the conspiracy." Therefore, OCGA § 16-4-8 is not unconstitutionally vague because in its context, the statute clearly and unambiguously refers to a specific type of open or manifest act made in furtherance of a conspiracy to commit a crime.

Appellant also argued that the trial court erred by denying her motion for a continuance. Appellant was charged with trafficking in amphetamine on December 26. Approximately one week before trial, appellant filed a notice of alibi with the State and planned to present evidence at trial that she was in Tennessee on that date. At the beginning of trial, however, the State announced that it actually intended to prove that the trafficking in amphetamine occurred within two weeks of the date in the indictment, not necessarily on that date exactly. Appellant immediately, but unsuccessfully, moved for a continuance, stating that she had relied on the date in the indictment for her trial preparation. The Court held that normally, the date alleged in an indictment is not a material element of the offense and the State may prove the offense as of any date within the statute of limitation. But here, appellant's reliance on an alibi defense for the time alleged in the indictment entitled her to a continuance once she learned at trial that the State did not intend to prove the date alleged in the indictment.

Statements; Miranda

Timmreck v. State, S09A0155

Appellant was convicted of malice murder. He contended that the trial court erred in denying his motion to suppress his statements to an investigator. The evidence showed that appellant, who was injured, was initially identified by police as the victim and, until receiving the *Miranda* warnings, he was not under formal arrest. During the time he spoke with the investigator, he moved about his hotel room and the hotel parking lot without restriction, and he made and received telephone calls without restraint. The evidence also showed

that the investigator drove appellant to the hospital for further treatment. At the time, appellant was not handcuffed and he was taken in an unmarked car without equipment which would prevent him from exiting the back of the car. At the hospital, when appellant asked for a ride back to his hotel, he was placed under arrest and informed of his rights. The Court held that the fact that appellant became the focus of the investigation did not require the law enforcement personnel to give *Miranda* warnings. The relevant inquiry is whether a reasonable person in appellant's situation would perceive that he was in custody. "As long as a person is not in custody, it is irrelevant to the *Miranda* analysis that investigators '(1) might have focused their suspicions upon the person being questioned, or (2) have already decided that they will take the person into custody and charge (him) with an offense.'" Thus, the Court held, the evidence supported the finding that, prior to being placed under formal arrest, a reasonable person in appellant's place would not have felt so restrained as to equate to a formal arrest. Thus, any statements made to the investigator prior to his formal arrest, were admissible.

Evidence; Hearsay

Vega v. State, S09A0023

Appellant was convicted of first degree arson and felony murder. He contended the trial court erred in granting the state's motion in limine under *Momon v. State*, 249 Ga. 865 (1982) to exclude testimony of the investigating officer that Padilla, a third party at the scene of the fire, said that he was not present at the scene of the crime but that a person identified as "Nicaragua" told Padilla what happened. The *Momon* rule states that where the conduct and motives of an actor are not matters concerning which the truth must be found (i.e., are irrelevant to the issues on trial) then the information on which he or she acted shall not be admissible under OCGA § 24-3-2. The mere circumstance of an officer's initiation and continuation of an investigation, without more, is not a relevant inquiry. Here, the Court found, defense counsel wanted to elicit from the officer what an alleged witness had told him that another person said he had seen. Appellant failed to show regarding this potential inquiry how the motives or any conduct of the investigating officer was relevant to any issue

in the case. Thus, it concluded, the trial court correctly prohibited appellant's attempt to elicit testimony that was both double hearsay and irrelevant to explain conduct.

Statements

Lucas v. State, A08A2248

Appellant was convicted of aggravated child molestation. He argued that the trial court erred in finding that his pre-trial statement was voluntarily given because the trial court failed to require the testimony of a witness to the statement. The Court disagreed. The evidence showed that an employee of the Department of Family and Children Services was present when appellant gave his statement to the GBI. The Court held that a defendant is not entitled at a *Jackson-Denno* hearing to the testimony of everyone present when a pre-trial statement is made. Appellant provided no evidence to suggest that his statement was not voluntarily given or that the requested witness had indispensable evidence in that regard. Accordingly, the trial court's determination that his pre-trial statement was voluntarily given was not clearly erroneous.