

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 3, 2012

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THIS WEEK:

- Search & Seizure
- Speedy Trial; *Barker v. Wingo*
- Jury Charges; Family Violence
- Right to Counsel
- Competency
- Juveniles; OCGA § 15-11-39 (a)
- Impeachment; OCGA § 24-9-84.1 (a) (2)
- Marijuana Identification; Harper

Search & Seizure

State v. Reid, A11A1660 (1/23/12)

The State appealed from the grant of Reid's motion to suppress. Reid moved to suppress marijuana and other evidence obtained as a result of a traffic stop, asserting that the deputy had no proper basis for the stop. In response, the State argued that the deputy had two distinct grounds for stopping Reid, namely that Reid was driving a car without side view mirrors and that someone in the car had littered by throwing something from the car. The trial court rejected the justifications that the State offered for the stop. The court reasoned that no law absolutely requires that a car be equipped with side view mirrors, and even if an officer properly may stop a person based merely on his good faith belief that the person has violated the law, the court found that the deputy did not really believe at the time of the stop that the absence of side view mirrors supplied proper grounds for a stop. The court also found, after viewing the video

of the traffic stop, that the deputy did not, in fact, see anyone toss anything from the car, and there was, therefore, no reason to stop the car for littering.

On appeal, the State did not argue the facts as found by the trial court and instead argued that the deputy was entitled to stop the car because he really believed that the absence of side view mirrors is unlawful and because he really saw someone littering. However, the Court stated, it cannot "just ignore factual findings, and on the record before us, we cannot find that they are clearly erroneous." Moreover, the findings were also based upon an assessment of the credibility of the deputy, and the Court must defer to the trial court on questions of credibility. Accepting the facts as found by the trial court, the Court stated, "we see no error in the way in which that court applied the law to those facts."

Speedy Trial; *Barker v. Wingo*

Leverett v. State, A11A1995 (1/26/12)

Appellant was charged with possession of marijuana with intent to distribute and obstruction. He appealed from the denial of his motion to dismiss on constitutional speedy trial grounds. The State conceded under the four-part test of *Barker v. Wingo* that the 30 month length of the delay from appellant's September 5, 2008, arrest to the trial court's March 7, 2011 denial of his motion to dismiss, was presumptively prejudicial. The trial court therefore properly proceeded to apply the *Barker* factors in the second stage of the analysis.

As for the second *Barker* factor, the reason for the delay, the trial court found that both the state and appellant contributed to the

delay, a finding supported by the record. And because there was no evidence the state deliberately attempted to delay the trial in order to hamper the defense, to the extent a portion of the delay can be attributed to the state, it was relatively benign.

The third *Barker* factor is the defendant's assertion of the right to a speedy trial. It is the defendant's responsibility to assert the right to trial, and the failure to exercise that right is entitled to strong evidentiary weight against the defendant. A defendant may assert his constitutional right to a speedy trial at any time after he is arrested; he need not wait until indictment. However, once his constitutional right accrues, the defendant has the responsibility to assert it, and delay in doing so normally will be weighed against him. Here, the trial court found that appellant was arrested on September 5, 2008, but did not file his motion to dismiss on speedy trial grounds until March 7, 2011. The trial court therefore properly weighed this factor against appellant.

As to the last factor, prejudice, the trial court found that appellant did not suffer oppressive pretrial incarceration, as he was out on bond, and that his general claim of suffering great anxiety and concern from the delay, as the trial court found, was not supported by testimony or other evidence.

Finally, appellant argued that his defense was impaired because he was unable to contact the three passengers of the Jeep he was driving in which the marijuana was found. Appellant testified that he only knew one passenger by nickname, his son's friend, and that the passengers' names were not listed in the discovery provided by the State. He argued that these witnesses were crucial to his equal access argument. But the Court noted, the trial court found that appellant failed to show any diligence in identifying the witnesses he said could assist him, and he made no offer of proof of what the witnesses would testify or how their testimony would be favorable. The trial court also found that appellant did not show that he made any effort to obtain the video footage. Since the trial court's factual findings were supported by the record, it did not abuse its discretion in concluding that the delay did not impair appellant's defense.

Thus, in weighing the four factors, the trial court did not abuse its discretion in denying the motion to dismiss the indictment.

Jury Charges; Family Violence

Dean v. State, A11A2387 (1/26/12)

Appellant was convicted of aggravated assault stemming from an altercation with his female housemate. He argued that the trial court erred in giving the State's requested charge on family violence. The Court agreed and reversed his conviction.

The charge stated as follows: "Whenever law enforcement responds to an incident in which an act of family violence has been committed, the officer shall not base a decision of whether to arrest and charge a person on specific consent of the victim or on a request by the victim solely or on consideration of the relationship of the parties. No other officer investigating an incident of family violence shall threaten, suggest or otherwise indicate the arrest of all parties for the purpose of discouraging requests for law enforcement intervention. *Where complaints of family violence are received from two or more opposing parties, the officer shall evaluate each complaint separately to attempt to determine who was the primary aggressor.* If the officer determines one of these parties was the primary physical aggressor, the officer shall not be required to arrest any other person believed to have committed an act of family violence during the incident. In determining whether a person is the primary physical aggressor, an officer shall consider prior family violence involving either party; the relative severity of the injuries inflicted on each person; the potential for future injury; and whether or not one of the parties acted in self-defense." (Emphasis supplied).

The Court found that the charge was not adjusted to the evidence. The State presented no evidence that appellant made a report about the incident, so the portion of the charge discussing "complaints of family violence . . . from two or more opposing parties" was not supported. More importantly, the State did not present any evidence that any law enforcement officer made a determination that appellant was the primary aggressor. Although the officer who took the victim's report at the hospital testified at trial, he did not give any testimony about determining who the primary aggressor was.

Appellant's defense was that he acted in self-defense. The victim admitted that she hit appellant with her cane, and two witnesses

testified about his injury. And, pursuant to appellant's request, the trial court charged the jury on self-defense. But the court also charged the jury under OCGA § 16-3-21 (b) (3) that a person is not justified in using force if that person was the aggressor. The erroneous jury instruction could have misled the jury to conclude that the police officer did not arrest the victim because he had determined that appellant was the primary aggressor, thereby undermining appellant's claim of self-defense. Therefore, because the instruction was not authorized by the evidence and could have misled the jury, a new trial was required.

Right to Counsel

Calloway v. State, A11A2130 (1/26/12)

Appellant was convicted of kidnapping, aggravated assault, aggravated battery, and false imprisonment. He argued that the trial court denied him the counsel of his choosing when it declined to continue the trial proceedings after he indicated that he had retained new counsel. The constitutional right to counsel confers upon every person indicted for a crime the right to be defended by counsel of his own selection whenever he is able and willing to employ an attorney and uses reasonable diligence to obtain his services. Whether a defendant has used "reasonable diligence" is a question of fact, and it is within a trial judge's discretion to either grant or deny a requested continuance when retained counsel is absent.

The record showed that when trial began, appellant was represented by his third appointed public defender. After the jury was empaneled and right before the trial was to begin, appellant announced that he wanted to be represented by a particular private attorney he claimed was retained and was allegedly on the way. After questioning by the trial court of appellant and the attorney's wife, who was in the courtroom, the trial court denied that request and proceeded with trial.

The Court found no error. The record reflected that appellant failed to use reasonable diligence in obtaining substitute counsel. The trial court stated its belief that because of appellant's timing, his requested continuance was made for purposes of delay; and the record supported the court's conclusion. Specifically, appellant's family met with the lawyer for the first time during the lunch break after a jury had been empaneled and just prior to the start

of trial. Further, the lawyer was never formally retained, as evinced by his wife's statement to the court. Accordingly, the trial court did not abuse its discretion in denying appellant's request for a continuance and instead proceeding with his appointed counsel, who was prepared for trial.

Appellant also contended that he was constructively denied counsel due to his strained relationship with his appointed attorney. Ordinarily, to prove ineffective assistance of counsel, appellant would need to show that his counsel's performance was deficient and that his defense was prejudiced by this deficient performance. Nevertheless, there are some situations in which a court will presume prejudice; however, the Court noted, these are "extremely limited and apply in only a narrow range of circumstances." In fact, there are only three instances in which a defendant may rely upon a presumption of prejudice: (1) an actual or constructive denial of counsel; (2) government interference with defense counsel; and (3) counsel who labors under an actual conflict of interest that adversely affects his performance.

Appellant argued that the first instance applied in his case —namely, that a strained relationship with his appointed attorney amounted to a constructive denial of counsel. But constructive denial of counsel is only present when counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. And this, appellant failed to show.

Accordingly, the Court found, appellant was not constructively denied counsel.

Competency

Page v. State, A11A1500, (1/26/12)

Appellant was convicted of public drunkenness. He contended that he was not competent to stand trial. The record showed that shortly after arraignment, a state psychiatrist determined in June of 2009 that he was competent. But a month later, the same state psychiatrist re-evaluated him and determined him to be incompetent. The trial court then entered a judgment on a special plea of mental incompetency, and ordered that he be confined in a state facility for the mentally ill. Appellant was subsequently re-evaluated by two other state psychiatrists in April 2010. Both psychiatrists concluded that he was competent to stand trial because he was aware of the charges against

him and the possible consequences of a conviction, he adequately understood the roles of the participants at trial, and he would be able to assist his trial attorney. Based on this evaluation, he was administratively released from the state mental health facility, and returned to await trial. Appellant was subsequently tried and convicted by a jury in August 2010. A month later, he was determined by another state psychiatrist to be incompetent to stand trial on other charges.

The Court stated that competency involves a defendant's mental state at the time of trial. Once competency has been determined, the appropriate standard of appellate review is whether after reviewing the evidence in the light most favorable to the State, a rational trier of fact could have found that the defendant failed to prove by a preponderance of the evidence that he was incompetent to stand trial. A defendant's burden of establishing incompetency is consistent with the principles of due process. The threshold for competency is easily met in most cases; it exists so long as a defendant is capable at the time of the trial of understanding the nature and object of the proceedings going on against him and rightly comprehends his own condition in reference to such proceedings, and is capable of rendering his attorneys such assistance as a proper defense to the indictment preferred against him demands. Based on this standard, the Court concluded that a rational trier of fact could have found that appellant failed to prove by a preponderance of the evidence that he was incompetent to stand trial.

Appellant also contended that his due process rights were violated when his appointed counsel determined that he did not have the resources to obtain an independent psychiatric examination and instead relied solely on the evaluations conducted by state psychiatrists. The Court stated that although an indigent defendant has a due process right to obtain funds to hire an expert to examine critical evidence, this right is not without boundaries, and the right is contingent on a timely motion. Under *Ake v. Oklahoma*, 470 U. S. 68, 105 SC 1087, 84 LE2d 53 (1985), if a defendant cannot afford access to a psychiatrist's assistance when he has made a preliminary showing that his sanity at the time of the offense is likely to be a significant factor at trial, the State must provide such access. An indigent defendant does not, however, have a constitutional right

to choose a psychiatrist of his own liking or to receive funds to hire his own.

Here, appellant was provided with the assistance of three psychiatrists to address the issue of his competency. Therefore, his due process rights were not violated.

Juveniles; OCGA § 15-11-39 (a)

In the Interest of I. M. W., A11A1921 (9/20/12)

Appellant was convicted of violating OCGA § 16-11-38, which prohibits wearing a mask, hood, or other device that conceals the identity of the wearer, and a violation of OCGA § 16-11-36, for loitering or prowling. Appellant contended that the trial court erred by denying his motion to dismiss because the State failed to comply with the strict requirements of OCGA § 15-11-39 (a) which provides that for children who are not in detention, like appellant, "the court shall set a hearing thereon which shall be not later than 60 days from the date of the filing of the petition."

The record showed that the petition was filed on December 16, 2010; 60 days from that day was February 14, 2011. The case was scheduled for arraignment on January 12, 2011, but because of a snow storm, the arraignment was continued to February 1. On the day of arraignment, at which the appellant pled not guilty, appellant served discovery requests on the State. On February 8, the appellant was served with a summons to appear at a hearing to be held February 23, 2011. On February 18, 2011, appellant filed a motion to dismiss for failure to comply with the 60-day provision. On February 23, the hearing commenced with an argument on the motion to dismiss, which was denied. Thereafter, the State admitted that it had not complied with appellant's discovery request, and for that reason, the appellant requested a continuance of the adjudicatory hearing. The adjudicatory hearing ultimately was held on March 23, 2011.

The Court found that the adjudicatory hearing was neither set for nor held within 60 days of the date of the petition. The language of OCGA § 15-11-39 (a) is mandatory and the adjudicatory hearing must be set for a time not later than that prescribed by the statute. Nevertheless, the requirements of OCGA § 15-11-39 (a) can be waived, or continued for the securing of legal representation, OCGA § 15-11-30 (b), or for reasons within the discretion of the

juvenile court. Here, during the argument regarding the motion to dismiss, appellant's mother —his representative and apparently an attorney —acknowledged that she did not object when, at the arraignment hearing, it was announced that the adjudicatory hearing would be set for February 23, outside of the 60-day window. She also did not object within the statutorily prescribed 60-day time period; the motion to dismiss was filed outside of the 60-day requirement. Citing *In re A. T.*, 302 Ga. App. 713, 714 (1) (2010), the Court held that the juvenile court did not err in denying the appellant's motion to dismiss for failure to comply with OCGA § 15-11-39 (a).

Impeachment; OCGA § 24-9-84.1 (a) (2)

Hogues v. State, A11A2291 (9/26/12)

Appellant was convicted for felony theft by receiving stolen property. He argued that the trial court erred in admitting prior felony convictions to impeach him. OCGA § 24-9-84.1 (a) (2) provides in relevant part that “[f] or the purpose of attacking the credibility of . . . the defendant, if the defendant testifies . . . [e]vidence that the defendant has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more under the law under which the defendant was convicted if the court determines that the probative value of admitting the evidence substantially outweighs its prejudicial effect to the defendant.” The trial court must make express findings regarding the balancing test prescribed in the statute.

Appellant contended that the trial court did not conduct the proper balancing test or make the required statutory findings on the record. The record showed that when the prior conviction evidence was introduced at trial, the court found that “the probative value of admitting the evidence outweigh[ed] its prejudicial effect.” But, in its order denying appellant's motion for new trial, the court found that “the probative value of each of the convictions *substantially outweighed* any prejudicial effect and the convictions were properly admitted.” (Emphasis supplied.) The trial court also made findings in that order regarding the kind of felonies involved in the prior convictions, the dates of the prior convictions, and the importance of appellant's credibility in the case. The Court held that as long as the trial court

makes express findings on this issue of the prior convictions' admissibility, even if made in an order on a motion for new trial, the intent of OCGA § 24-9-84.1 is satisfied.

Appellant also argued, citing *Clements v. State*, 299 Ga. App. 561 (2009), that the court “should have deemed the convictions inadmissible” under OCGA § 24-9-84.1 because the crimes involved in the prior convictions (burglary and criminal damage to property) did not involve dishonesty. The Court disagreed. *Clements* concerned whether a prior misdemeanor conviction could be used to attack a witness's credibility under OCGA § 24-9-84.1 (a) (3), which provides that such conviction shall be admitted if the crime “involved dishonesty or making a false statement, regardless of the punishment that could be imposed for such offense.” But OCGA § 24-9-84.1 (a) (2), which applies to prior felony convictions such as those at issue here, does not require that the crimes involve dishonesty or making a false statement.

Marijuana Identification; Harper

Salinas v. State, A11A2344 (9/26/12)

Appellant was convicted of trafficking in marijuana. He contended that the trial court erred in allowing law enforcement officers to testify as experts in the identification of marijuana. The Court stated that expert testimony is not necessary to identify a substance, including drugs. And even if police officers are not formally tendered as expert witnesses, if an adequate foundation is laid with respect to their experience and training, their testimony regarding narcotics is properly admitted.

Here, the trial court admitted the opinion testimony of four investigating officers who positively identified the substance in the package as being marijuana based upon their visual and olfactory examinations of the substance. The trial testimony established that each officer had become familiar with the characteristics of marijuana and could identify it based upon his knowledge and experiences in law enforcement. The testimony established that each officer had prior experience in handling numerous drug cases and that each had extensive contact with marijuana on prior occasions. The officers testified based upon their training and experience that the substance in the package smelled and looked like marijuana. In light of

the testimony establishing the officers' training and experience, the trial court was within its discretion to find that a sufficient foundation had been laid to allow the officers to state their opinion that the substance in the package was marijuana.

Appellant nevertheless argued that the officers' testimony was inadmissible since there had been no showing pursuant to *Harper v. State*, 249 Ga. 519, 524-526 (1) (1982) that their visual and olfactory identification techniques had reached a scientific stage of verifiable certainty. The Court disagreed. Although the officers were presented as experts, it was apparent that their testimony did not deal with scientific principles but with observation of a physical object, with matters not of science but of skill and experience. Since the officers' observations were not a matter of scientific principle or technique, the *Harper* standards did not apply. Moreover, the expert opinions of the officers —based on visual observation, and sometimes feel or smell —plus that circumstantial evidence is enough, even absent conclusive scientific testing. But, more importantly, the Court noted, notwithstanding the officers' testimony, the substance in the package was identified as marijuana through the testimony of an investigator who tested the drug substance. The investigator testified that he was certified through the GBI to test marijuana. Drug testing was a part of the investigator's regular duties, and he had performed at least 60 tests in prior cases. The investigator was admitted, without objection, as an expert in marijuana testing and analysis. The tests confirmed that the substance was marijuana. Thus, to the extent that the officers' testimony was merely cumulative of the investigator's identification of the substance as marijuana based upon scientific drug testing procedures, appellant's challenge to the admissibility of the officers' testimony failed to present a basis for reversal. Evidence which is cumulative of other legally admissible evidence renders harmless the admission of incompetent evidence.