

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 5, 2010

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THIS WEEK:

- **Grand Jury; Police Officers**
- **Brady; Judicial Comments**
- **Habeas Corpus; Pre-trial Confinement**
- **Remittiturs; Extraordinary Remedies**
- **Speedy Trial**
- **Right to Speedy Appeal**
- **Impeachment Evidence; Juror Questions**
- **Opening Statements; Bruton**
- **Victim's Violent Acts; Notice Requirements**
- **Waiver of Jury Trial**
- **Equal Access Rule**
- **Juvenile Court; Jurisdiction**

Grand Jury; Police Officers

State v. Smith, S09G1287

Appellant, a police officer, was convicted of three counts of false statements and writings. The crimes occurred while he was in the performance of his duties. Pursuant to OCGA §§ 17-7-52 and 45-11-42, the DA's Office notified him of the special presentment to the county grand jury during the January term, 2007, but did not indicate to him when during that term the presentment would occur. Appellant contended that he was entitled to specific notice of when the proposed indictment would be presented to the grand jury. The Court agreed. The Court held that "contrary to the State's assertion, timely serving the accused with a copy of the proposed bill of indictment but failing to timely inform the accused of when and where the reckoning with the grand jury will occur, is not substantial compliance with

the requirements of OCGA §§ 17-7-52 and 45-11-4 in regard to notification to the accused." A person who comes within the ambit of § 17-7-52 is entitled to reasonable notice; notice calculated to provide the accused a fair and full opportunity to exercise the rights provided by OCGA § 45-11-4.

Brady; Judicial Comments

Hall v. State, S09A1468

Appellant was convicted of malice murder, aggravated assault, theft by taking, and financial transaction card theft. The evidence showed that he and his co-defendant murdered the victim in the victim's apartment and stole his credit card. He contended that the State failed to produce exculpatory evidence when it 1) did not provide the apartment video surveillance tape until after the commencement of trial; 2) did not print for publication to the jury still pictures of every frame of the apartment building video surveillance tape and/or 3) failed to secure the proper video equipment to play the tape to the jury. In order to prove a *Brady* violation, the defendant must show, among other things, that the State possessed evidence favorable to defendant. Appellant argued the State's failure precluded him from substantiating his testimony that there was a fourth person who could corroborate that the victim was "aggressive." But, the Court held, since appellant admitted the alleged fourth person was not present in the apartment when the stabbing took place and appellant admitted he stabbed the victim and that the co-defendant cut the victim's neck, a videotape which would only show a fourth person in the apartment building elevator on the night in question could not be considered exculpatory in nature.

Appellant also argued that the trial court's charge on justification was erroneous because it allegedly contained improper commentary in violation of OCGA § 17-8-57. The trial court instructed the jury as follows: "The defendant Hall is suggesting a defense of justification, and if you find that the defendant's conduct was justified, this is a defense to the prosecution for any crime based on that conduct." The trial court also instructed the jury on appellant's claim self-defense: "I think the defense Mr. Hall is claiming that the victim was committing an aggravated assault on him." Appellant argued that the words "suggesting" and "I think" constituted improper commentary in violation of OCGA § 17-8-57. The Court disagreed. It found that these statements neither intimidated the trial court's opinion on what had or had not been proven nor intimidated the trial court's opinion on appellant's guilt or innocence.

Habeas Corpus; Pre-trial Confinement

Jackson v. Bittick, S09A1487

Appellant failed to appear for trial and was subsequently arrested on a bench warrant. Three weeks prior to trial, he filed a habeas corpus petition alleging the illegality of the bench warrant. He was subsequently tried and convicted. He contended that the trial court erred in denying his petition without holding a hearing. The Court held that his claims of illegal incarceration under a bench warrant based upon an indictment were moot because he had been tried, convicted, and sentenced and would therefore not derive any benefit from the grant of the petition. The remaining claims in his petition, including the alleged denial of his right to counsel or self-representation, were matters that could be asserted in the context of the criminal prosecution. Appellant must address them in the trial court and on appeal, but not by means of a pre-trial petition for habeas corpus. The trial court correctly dismissed his petition without conducting an evidentiary hearing.

Remittitur; Extraordinary Remedies

Jackson v. State, S09C2010

Appellant appealed from the denial of his motion to vacate a void sentence. Although

appellant was transferred to another prison and notified the appellate court of his change of address, the Court of Appeals sent the decision affirming the trial court to him at his old address. Consequently, appellant's motion for reconsideration was untimely filed. The Court of Appeals denied the motion, noting that the remittitur had already issued, but suggested appellant file a petition for certiorari requesting that the Supreme Court order the Court of Appeals to recall the remittitur.

The Supreme Court held that it and the Court of Appeals each have the power of its own accord to recall a remittitur, calling it "an accepted feature of modern appellate practice." Because it is an extraordinary remedy, the power should be used "sparingly." In this case, the Court of Appeals, by its own mistake, unintentionally deprived a party of appellate review that the law otherwise permits. Therefore, it granted the petition and ordered the Court of Appeals to recall the remittitur.

Speedy Trial

Rogers v. State, S09A1631

The trial court denied appellant's motion to dismiss his indictment for murder and appellant appealed. He argued that the trial court erred because his constitutional right to a speedy trial had been violated. The record showed that the indictment was returned on August 23, 2007 and appellant filed his motion to dismiss on September 2, 2008. The Court held that the constitutional right to a speedy trial attaches at the time of arrest or when formal charges are brought, whichever is earlier. Because appellant was serving a sentence on an unrelated charge in Mississippi when the indictment was returned, the date of the indictment was the crucial date in this case. Upon a showing that the delay was presumptively prejudicial, a trial court must then utilize the *Barker v. Wingo* balancing test to determine if a constitutional violation has occurred. Here, the Court found, the circumstances of this case warrant a finding that the twelve-month, ten-day delay between appellant's indictment and the filing of his motion to dismiss was not "presumptively prejudicial." Accordingly, the trial court did not err when it denied appellant's motion to dismiss based on a purported violation of his constitutional right to a speedy trial.

Right to Speedy Appeal

Loadholt v. State, S09A1995

Appellant was convicted of malice murder and other offenses. The evidence showed that he told witnesses he was going to kill the victim, he then killed the victim, and then told witnesses and the police that he killed the victim. He contended that the 9 year delay from his trial to his direct appeal violated his constitutional rights. The Court held that in analyzing a claim involving delayed resolution of direct appeals from judgments entered on criminal convictions in which the death penalty was not imposed, the Court utilizes the four speedy trial factors set forth in *Barker v. Wingo* to determine if the defendant was denied due process of law. The Court stated that it did "not approve of the delay." But, even assuming that the first three *Barker* factors tended to weigh in appellant's favor, appellant failed to show that he was prejudiced by the delay, and that considering all the *Barker* factors together, his due process claim must fail. Appellate delay is prejudicial when there is a reasonable probability that but for the delay, the result of the appeal would have been different. Appellant's only claim of prejudice was the bare assertion that because of the passage of time "counsel and witness[es] memories [as to] the events of [the crimes] are less clear." Thus, he failed to offer the specific evidence required to show that the delay prejudiced his appeal or that the result of the appeal would have been different but for the delay.

Impeachment Evidence; Juror Questions

Allen v. State, S09A1800

Appellant was convicted of felony murder, aggravated assault and other related offenses. He contended that the trial court erred by not allowing him to impeach a witness pursuant to OCGA § 24-9-84.1 with certified copies of the witness's prior convictions for robbery in 1992 and burglary in March 1996. OCGA § 24-9-84.1 (a)(1, 3) provides that a witness may be impeached with a prior felony conviction upon the trial court finding the probative value of the evidence to outweigh its prejudicial effect to the witness, or with a conviction for a crime involving dishonesty or making a false statement regardless of whether it was a felony or misdemeanor. However, such

evidence is not admissible if “more than ten years has elapsed since the date of the conviction or the release of the witness . . . from the confinement imposed for that conviction, whichever is the later date, unless the court determines, in the interest of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect[.]” and the proponent has given the adverse party sufficient advance written notice of the intent to use such evidence so that the adverse party has a fair opportunity to contest the use of such evidence. OCGA § 24-9-84.1(b). Appellant contended the statute authorized use of the convictions because probation qualifies as “confinement” for purposes of the statute and the witness was on probation for the 1992 and 1996 convictions within the ten-year period preceding the 2006 trial at which his impeachment was sought.

The Court disagreed. To interpret the statute, the Court looked at 1) legislative intent; 2) the interpretation of federal law which is identical to our statute; and 3) the interpretation given to identical laws in our sister states. The Court found that “[t]he legislature’s distinction of ‘confinement’ from release on parole and suspended and probated sentences, when coupled with the construction of identical statutory language by the federal courts and our sister states, lead us to conclude that probation does not qualify as confinement under OCGA § 24-9-84.1 (b).” Therefore, the trial court did not err when it declined to permit defense counsel to use the prior convictions at issue after determining that more than ten years had elapsed since the witness was released from the confinement resulting from the convictions. Moreover, defense counsel failed to provide specific facts and circumstances demonstrating that the probative value of the convictions outweighed their prejudicial effect.

Appellant also argued that the trial court abused its discretion when it permitted the prosecutor to ask a witness during re-direct a question that addressed a concern voiced by a juror at the conclusion of appellant’s cross-examination of the witness. The Court held that while jurors in Georgia courts may not ask questions of witnesses directly, a trial court may receive written questions from the jury and ask those questions which the court finds proper, or allow counsel for either party to ask a testifi-

ing witness the questions found to be proper. Consequently, the trial court did not abuse its discretion in following this procedure.

Opening Statements; Bruton

Zachery v. State, S09A1860

Appellant was convicted of malice murder, armed robbery, and aggravated assault. He contended that the trial court erred by allowing the prosecutor to make certain statements during opening argument. The prosecutor said, “These defendants were all identified as potential suspects in this case based upon information from a confidential informant. They were immediately identified.” Appellant argued that the statements were assertions of fact that could not be established by the evidence. The Court held that since there was no evidence that the prosecutor acted in bad faith and the trial court instructed the jury that evidence did not include the opening statements by the attorneys, no reversible error occurred.

Appellant also argued that the trial court committed reversible error by denying his request for a mistrial based upon the prosecutor’s injection of statements made by a co-defendant in violation of *Bruton v. United States*. In opening statements, the prosecutor said, “[The co-defendant] made the statement to the police or a police officer that he felt that [appellant] and [a second co-defendant] were involved in the crime...” The Court stated that a *Bruton* violation occurs when a non-testifying co-defendant’s statement inculcating a defendant, who was not a party to the statement, is admitted into evidence. Therefore, since opening statements are not evidence, and the jury was so instructed, the appropriateness of a *Bruton* challenge in the situation of comments made in the course of the State’s opening statement are subject to question. Moreover, for the admission of a co-defendant’s statements to constitute a *Bruton* violation the statements *standing alone must clearly inculcate* the defendant. Here, the co-defendant’s statement that he “felt” that appellant and the second co-defendant were “involved” merely expressed the speaker’s speculation, and as such, fell short of clearly inculcating appellant. Finally, even assuming arguendo a *Bruton* violation, the complained-of statements echoed evidence that was admit-

ted at trial, and thus, provided no basis for reversal of appellant’s convictions.

Victim’s Violent Acts; Notice Requirements

Cook v. State, S09A1649

Appellant was convicted of malice murder, aggravated assault, and possession of a firearm during the commission of a felony. He argued that the trial court erred in failing to admit certain evidence of specific acts of violence by the victims directed at third parties, as authorized by *Chandler v. State*, 261 Ga. 402 (1991). Appellant filed a pretrial notice of intent to claim justification and to present at trial evidence of three acts of violence by the victims. However, at trial he sought to introduce evidence of 18 other alleged acts of violence by the victims against third parties which were obtained from the victims’ juvenile court records. The State was not provided with written notice of the additional acts, but defense counsel argued before the trial court that the evidence was admissible because the State had verbally been given “proper notice” of the intent to present such acts. The State denied receiving any such oral notice, and the trial court refused to allow the acts into evidence after implicitly accepting the State’s denial of notice and finding that there was no written notice.

Uniform Superior Court Rule 31.6 (B) provides in part that “[t]he notice shall be in writing, served upon the state’s counsel, and shall state the act of violence, date, county and the name, address and telephone number of the person for each specific act of violence sought to be introduced.” Appellant argued that his alleged oral notice was sufficient, and was the best that could be provided because defense counsel did not receive the victims’ juvenile records until after filing the motion due to the State’s refusal to voluntarily provide the records. The Court acknowledged that in regard to specificity, a standard of substantial compliance has been applied in assessing the sufficiency of notice under USCR 31.6. But, the Court stated, assuming that application of such standard was appropriate in this situation, the delivery of any notice at all to the State was disputed. Moreover, even if appellant did indeed provide the State with oral notice of the intent to present additional acts, there was no evidence that such notice contained any of the specific act or third-party information required

by USCR 31.6. “Under these circumstances of a complete lack of meaningful information, a notice of intent must be deemed insufficient.” Thus, the evidence of the 18 additional acts was not erroneously excluded.

Waiver of Jury Trial

Barr v. State, A10A0015

Appellant was convicted of trafficking in cocaine following a bench trial. He argued that he did not knowingly and intelligently waive his right to a jury trial. The right to trial by jury is one of those fundamental constitutional rights that a defendant must personally, knowingly, voluntarily, and intelligently choose to waive. When a defendant challenges the defendant’s purported waiver of the right to a jury trial, the State bears the burden of showing the waiver was made both intelligently and knowingly, either (1) by showing on the record that the defendant was cognizant of the right being waived; or (2) by filling a silent or incomplete record through the use of extrinsic evidence which affirmatively shows that the waiver was knowingly and voluntarily made. Here, the record showed that the trial court explained to appellant that a bench trial meant that appellant was waiving his right to have a jury try the facts and was instead agreeing that the judge would try the facts. Appellant agreed that such was his understanding. The judge asked appellant if that was what he wanted, whereupon appellant stated he was confused. The trial court then “patiently” re-explained the distinction between a jury and a bench trial. The judge then asked appellant again what he wanted. Appellant responded that he wanted the judge to hear the case. Under these circumstances, the trial court did err in determining that appellant freely and voluntarily waived his right to a trial by jury.

Equal Access Rule

Rogers v. State, A10A0170

Appellant was convicted of felony possession of marijuana. He appealed contending the evidence was insufficient to support his conviction. The Court agreed and reversed. The evidence showed that an officer made a traffic stop of a car appellant was driving. The car was uninsured and its registration was suspended. There was no evidence that appellant owned

or leased the vehicle. Appellant had no license and was arrested. A search incident to arrest led to the discovery of less than an ounce of marijuana on his person. Appellant’s passenger was not arrested. The vehicle was impounded. An inventory later uncovered digital scales on the floorboard behind the passenger seat and two bags of marijuana (approx. 2 ounces) concealed inside a sweat shirt on the backseat. The sweat shirt was not introduced into evidence, and there was no evidence adduced by the State establishing to whom it belonged. Appellant alone was charged with possession. At trial, the passenger testified that the scales and sweatshirt and marijuana were his and his alone.

The Court stated that where the State prosecutes only one of two or more people who had equal access to the contraband, the State must show sole constructive possession by the defendant. Although a finding of constructive possession must be based upon some connection between the defendant and the contraband other than spatial proximity, a presumption of constructive possession of the entire premises and all the property therein will arise from ownership or control of the premises. That presumption may be rebutted by a showing of equal access. For the equal access rule to rebut the inference of possession of contraband, affirmative evidence must show that a person other than the defendant or a member of his immediate household had equal access to the specific location where the contraband was found. When affirmative evidence of equal access is shown but there is evidence connecting the defendant to the contraband other than his own equal access, the jury must resolve the question of guilt or innocence. Thus, the Court found, because, under these circumstances, the passenger’s equal access to the marijuana in the back seat of the car rebutted any presumption of appellant’s possession of the marijuana that arose out of his possession and control of the car he was driving, the State was required to adduce other evidence which proved beyond a reasonable doubt that appellant had sole, constructive possession of the marijuana. Here, the only legal evidence linking appellant to the marijuana in the back seat was his spatial proximity to it. Therefore, the evidence adduced was insufficient as a matter of law to support appellant’s conviction of possession of more than one ounce of marijuana.

Juvenile Court; Jurisdiction

Bonner v. State, A09A2001

Appellant, a 15-year-old, appealed from the trial court’s denial of his motion to dismiss his indictment for armed robbery and possession of a handgun during the commission of a felony. He argued that the indictment was barred on double jeopardy grounds because he had already been adjudicated a delinquent on the charges in juvenile court. The Court stated that the protection against double jeopardy applies to juvenile proceedings. But, the judgment of a court having no jurisdiction of the person or subject matter, or void for any other cause, is a mere nullity. A void judgment does not bar a successive prosecution for the same offense under principles of double jeopardy.

Juvenile court is a court of special and limited jurisdiction, having only those powers given to it by the legislature. In OCGA § 15-11-28 (b) (2) (vii), exclusive jurisdiction over the trial of a child 13 to 17 years old, who is alleged to have committed armed robbery with a firearm, is given to the superior court rather than the juvenile court. Because the superior court had exclusive jurisdiction under OCGA § 15-11-28 (b) (2) (vii), the juvenile court lacked jurisdiction to adjudicate appellant delinquent for acts constituting armed robbery, notwithstanding the State’s initial participation in the juvenile proceedings or appellant’s admission of the allegations in that court. Accordingly, the trial court correctly determined that the juvenile court’s adjudication of appellant as delinquent was void, and jeopardy did not attach during the juvenile court proceeding. Moreover, the Court found no merit to appellant’s contention that, because the juvenile court held that it had jurisdiction, the doctrine of res judicata barred the State from raising the issue of jurisdiction before the superior court. Res judicata does not apply to a judgment that is void for lack of jurisdiction.