

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 16, 2012

State Prosecution Support Staff

Stan Gunter
Executive Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Resource Coordinator

Gary Bergman
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Todd Hayes
Traffic Safety Resource Prosecutor

THIS WEEK:

- *Miranda Rights*
- *Restitution*
- *Speedy Trial*
- *Search & Seizure*
- *Juvenile Law; Probation Revocation*
- *Reopening Evidence; Child Hearsay*

Miranda Rights

Martinez v. State, A11A2066 (3/2/2012)

Appellant was convicted of trafficking in cocaine. He contended that the trial court erred in denying his motion to exclude his custodial statement to the investigating drug officers. The Court discerned no error and affirmed. The record showed that Albertino Garcia-Soto was arrested for possession of cocaine and following his arrest, agreed to cooperate with the officers' investigation and agreed to take them to his drug supplier. Soto led the officers to his residence, where the officers found appellant in a bedroom. Soto told the officers that appellant was his drug supplier. During a search of appellant's person, the officers seized \$1,750 from his pants pocket. A trained drug dog performed a free-air search outside appellant's vehicle that was parked at the residence and alerted on the driver's side door, indicating that drugs had previously been inside the vehicle.

Appellant was arrested and transported to the ICE satellite office. Since appellant spoke only Spanish, an officer who was fluent in both Spanish and English served as an interpreter

during appellant's communications with the officers. The officer read appellant his *Miranda* rights in Spanish, using a standard written form that set forth the rights. After being advised of his rights, appellant agreed to a custodial interview. When the officers asked appellant about the cocaine, he initially denied having had any knowledge of it. Upon further questioning, however, appellant confessed that he had given the cocaine to Soto, and told the officers that they could take him to jail and deport him.

Appellant contended that the trial court erred in denying his motion to exclude his custodial statement to the drug officers. Specifically, he challenged the admissibility of his statement since the standard written form used to inform him of his rights was not signed and his interrogation was not recorded. However, the mere fact that there was no written waiver of *Miranda* rights or other written record of such waiver did not render his statement inadmissible. Likewise, the officer's failure to electronically record his waiver did not render his waiver involuntary. The trial court's denial of appellant's motion to exclude his custodial statement, therefore, was proper.

Restitution

Johnson v. State, A11A2271 (3/2/2012)

The State produced evidence that an unoccupied, family-owned farm house in Cobb County was entered by force and burglarized. The owner charged with maintaining and securing the property testified that, during her daily check of the house on November 29, 2009, she discovered that the house had been broken into through a door; that items of personal property—a Buck® wood-burning

stove, a Jenn-Air® stove, a vacuum cleaner, a rug, and copper pipe—valued in excess of \$500.00 had been stolen from the house; and that the house had been extensively damaged as a result of the copper water pipes being cut out of the walls and from under the house. As a result of the cut water pipe, the house basement was flooded, and the owner hired a company to pump out the water. An employee of the company testified that he found a wallet in the basement which was given to police investigating the burglary. The wallet contained appellant's driver's license and other personal papers including a document identifying appellant as a customer of Marietta Recycling, a business that buys scrap metal. An employee of Marietta Recycling testified that on November 30, 2009, the day after the burglary, appellant sold them 108 pounds of copper pipe of the type used as water piping in houses. As similar transaction evidence, the State produced evidence that in 2005 appellant plead guilty to the burglary of an unoccupied house where there was forced entry through a door and items of personal property were stolen from the house. The owner of the present house testified that she did not know appellant and that he did not have permission to enter the house.

The Court affirmed the judgment of conviction; but vacated the restitution order; and remanded for a new hearing on restitution. The Court agreed with appellant that the portion of the trial court's sentence ordering him to pay restitution to the victim in the amount of \$5,000.00 for the value of stolen personal property and damage to the house must be vacated for lack of sufficient evidence. The measure of damages is the fair market value of the stolen personal property and the cost of repairs to the house. As to the stolen personal property, the State failed to produce evidence of fair market value at the restitution hearing; instead showing what the victim paid for the property when it was new or what the victim would have to pay for new replacement property. As to the cost of repairing the house, the State produced only inadmissible hearsay—testimony from the victim as to repair estimates she received from third parties not available to be cross-examined. Accordingly, the order of restitution to the victim in the amount of \$5,000.00 was vacated and the case remanded to the trial court for a new hearing on restitution.

Speedy Trial

Harris v. State, A11A2427 (3/2/2012)

Following his indictment for aggravated assault on a peace officer, among other crimes, appellant moved to dismiss the charges against him on the ground that his constitutional right to a speedy trial had been violated. The facts briefly stated are as follows: Appellant was arrested on May 14, 2006, and, in connection with events occurring on that date, he was subsequently indicted on March 12, 2010, for aggravated assault on a peace officer, possession of a firearm during commission of a felony, possession of a firearm by a convicted felon, and possession of cocaine with intent to distribute. On July 27, 2010, appellant moved to dismiss the indictment based on the alleged violation of his right to a speedy trial. The trial court held a hearing on the motion to dismiss on May 9, 2011, and it denied the motion in an order entered on June 17, 2011.

In deciding a constitutional speedy trial claim, courts must engage in a balancing test by considering “(1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) prejudice to the defendant.” *Barker v. Wingo*, 407 U. S. 514, 92 SC 2182, 33 LE2d 101 (1972). Here, the trial court weighed appellant's delay in asserting his speedy trial rights against him, but only slightly, noting as mitigating factors the lengthy delay between the arrest and the indictment and that, once appellant retained counsel, his attorney filed a demand within two months. The Court reviewed the trial court's balancing of the four *Barker* factors, and its ultimate judgment, for abuse of discretion. The Court found no error in the trial court's findings of fact, but concluded that the trial court erred in attributing the reason for the delay following the indictment to neither party, in failing to reconsider the length of the delay in applying the four-part *Barker* test, and in weighing heavily appellant's inability to come forward with evidence of actual prejudice to his defense. The Court concluded that the latter two errors were material in this case. Therefore, the Court vacated the judgment and remanded the case to the trial court with direction that it exercise its discretion anew and, upon making findings of fact and conclusions of law consistent with *Barker*, enter its written order on appellant's motion to dismiss.

Search & Seizure

Canino v. State, A11A2202 (3/7/2012)

Appellant was charged with possession of cocaine with intent to distribute and reckless driving. The evidence showed that at approximately 5:00 or 6:00 p.m., Officer Terry Werho, along with three other officers, was in a shopping center walking toward a restaurant where they planned to have dinner. As he walked through the parking lot, Werho observed appellant's black BMW® enter the parking lot, “accelerating at a high rate of speed, making turns through the aisles recklessly,” and causing the tires to squeal on the pavement and the body of the vehicle to “sway to the passenger side” as it turned. An officer testified that appellant's car “fish-tail[ed]” and came within ten feet of the officer. Appellant parked in a marked parking spot near the four patrol cars and exited his vehicle. All four officers approached appellant, and Werho “[a]sked him why he was driving so recklessly” and for his identification. Appellant replied that he was meeting someone inside the restaurant, and produced two traffic citations, one for a traffic offense and one for driving under the influence, explaining that his driver's license had been confiscated by DeKalb County police and that his name and birth date were on the citations. At some point during this initial contact, Werho directed appellant to sit in his vehicle, and he complied. Werho checked appellant's information through GCIC, which indicated that Canino did in fact have a driver's license. Another officer was in a patrol car with Werho during the GCIC inquiry, and the other two officers remained standing “a few feet” behind appellant's car where he was sitting pursuant to the officer's instruction.

Werho then returned to appellant, asked him to exit his car, and told him that he was under arrest for reckless driving. Appellant complied, and Werho placed him in handcuffs while he was pressed face-first against the driver's side of his car, slightly behind the open driver's door and against the seat pillar. Another officer began searching appellant's car. At the initial suppression hearing, Werho testified that the search and the handcuffing were “almost simultaneous” and stated that “I can't tell you if [the search began] before handcuffs were completely on him, but it was after I informed him he was under arrest and before I finished the search of his person.” According

to Werho, the officer searched the car from the passenger's side. The officer testified that appellant was already in handcuffs before he began searching the vehicle from the driver's side of the car. After he was secured in handcuffs, the officer found a plastic bag, which contained a white powdery substance, in the gap between the driver's seat and the center console.

Appellant's vehicle was impounded following his arrest for reckless driving and possession of cocaine with intent to distribute. At some point during the incident, two women approached, and one of them told police that she knew appellant. Appellant's car was legally parked and did not constitute a hazard, and the property owner/manager did not request removal of the vehicle. The officers did not give appellant the opportunity to have a friend or family member remove his vehicle from the parking lot in lieu of impoundment, nor did they ask him if he wanted to make alternative arrangements for the car, despite the presence of the woman on the scene and the friends he was meeting in the restaurant.

Appellant argued that the trial court erred by denying his suppression motion because the search of his vehicle incident to his arrest was improper. The Court agreed and stated that in the instant case, the State did not contend that the police believed that there was evidence in appellant's car related to his arrest. Instead, the Court had to decide whether the State met its burden of proving that appellant was "unsecured and within reaching distance of the passenger compartment at the time of the search."

Four officers were present on the scene and appellant, who previously had been arrested only for a misdemeanor traffic offense, was fully compliant with the officers' commands. Based on the facts of this particular case, the Court concluded that although appellant was in close proximity to the interior of his vehicle, if he was in handcuffs during the search, it was an improper search incident to arrest. The record demonstrated, that the State failed to prove that he was free of handcuffs and otherwise unsecured at the time the search began such that this was the "rare" case justifying a warrantless vehicle search because officers were unable to fully effectuate an arrest. The State "therefore cannot argue that the search was justified based on [appellant]'s ability to access the passenger compartment of his vehicle at the time of the search."

Appellant also argued that the officers' purported impound inventory search of his vehicle was invalid. Again, the Court agreed and stated that the police may inventory the contents of a vehicle that has been lawfully impounded, but they may not use an impoundment or inventory as a medium to search for contraband. Impoundment of a vehicle is valid only if there is some necessity for the police to take charge of the property. The officers made no effort to determine whether one of appellant's friends could take possession of the car or whether he wanted to make arrangements for alternate disposition. In fact, there was no evidence that appellant was ever advised that his car was being impounded. Instead, the police began searching the car immediately after he was advised that he was under arrest and his failure to immediately volunteer or request alternative arrangements, before he was told that his car was being impounded, does not justify the search.

Juvenile Law; Probation Revocation

In the Interest of T.F., A11A1508 (3/6/2012)

At a hearing held on January 27, 2011, appellant entered an admission to the probation violation and a dispositional hearing was held on February 10, 2011.

At that hearing, the State requested that appellant's probation be revoked and that he be sentenced as a designated felon. Defense counsel argued that appellant could not be sentenced as a designated felon because the complaint filed against him was a complaint for violation of probation, not for revocation of probation, and because proper procedures had not been followed concerning his status as a designated felon. The juvenile judge rejected these arguments and ordered that appellant be committed to the Department of Juvenile Justice for five years and placed on restrictive custody for thirty months of that time. In the written commitment and restrictive custody order, the judge specifically noted that he had given appellant notice at an earlier hearing on January 27 that he would be adjudicated as a designated felon and was being "treated" pursuant to the provisions of the Designated Felony Act, OCGA § 15-11-63.

Appellant contended that the juvenile court lacked jurisdiction and that he was not afforded due process of law. Specifically, he

argued that the juvenile court lacked jurisdiction over him because he was over the age of 17 at the time the probation violation occurred. The record showed that appellant committed the probation violation shortly after he turned 17. Thus, appellant argued, when the probation violation occurred he was no longer a "child" as that term is defined in OCGA § 15-11-2 (2) (A) and that pursuant to OCGA § 15-11-28 (d), the juvenile court did not have jurisdiction over any new action that was initiated against him after he reached the age of 17 years.

The State argued that jurisdiction was proper in this case because OCGA § 15-11-2 (2) (B) specifically provides that a "child" includes a person under the age of 21 years "who committed an act of delinquency before reaching the age of 17 years, and who has been placed under the supervision of the court or on probation to the court; . . ." But, the Court found, this jurisdiction is limited by OCGA § 15-11-28 (a) (1) (F), which provides that "such jurisdiction shall be for the sole purpose of completing, effectuating, and enforcing such supervision on a probation begun prior to the child's seventeenth birthday." Construing these provisions, the Court held that when a violation of probation occurs after the juvenile's seventeenth birthday "[t]he juvenile court's jurisdiction . . . extends only to revoking the juvenile's probation for his previous adjudication of delinquency," and a delinquency petition alleging a probation violation is not sufficient to invoke that jurisdiction. The Court recognized that before a juvenile court may revoke an order granting probation, a petition must be filed requesting such relief. Here, the complaint and amended complaint were, on their face, for a "violation of probation," not a revocation of probation and the Court found that the juvenile court lacked jurisdiction over this matter.

Reopening Evidence; Child Hearsay

Adorno v. State, A11A2272; A11A2273 (3/11/2012)

Appellant was convicted on two counts of cruelty to children in the first degree, and her co-defendant was convicted on four counts of child molestation. Both appealed their convictions and the denial of their respective motions for new trial. Appellant challenged the sufficiency of the evidence supporting her convictions, and her co-defendant, Ramirez,

contended that the trial court erred in reopening the evidence after closing arguments were completed. The Court consolidated their separate appeals for review and affirmed both their cases.

The evidence showed that S. R. told one of her teachers that Ramirez had been sexually molesting her. The teacher informed the school's counselor about S. R.'s outcry, and thereafter, the counselor met with S. R. who while crying, admitted that Ramirez had inappropriately touched her and that she had told her mother about the molestation. The counselor contacted the police, and an officer was sent to interview S. R. and her older sister, N. R. A few days later, a counselor with a local child advocacy center conducted separate interviews with S. R. and N. R. Both S. R. and N. R. recounted an incident, in which N. R. woke up in the night and found Ramirez was in the bed where both girls slept and was licking S. R.'s privates. When N. R. attempted to hit Ramirez, he stopped, and both girls ran into their mother's bedroom to tell her what had happened. Ramirez denied doing anything inappropriate and began whipping both girls with a belt until their mother eventually intervened. Both girls told the child advocacy counselor that the only thing their mother did to try to stop Ramirez's sexual abuse was to install a dead-bolt on their bedroom door and tell them to lock their door at night.

The Court found that the evidence was sufficient to support appellant's convictions and that the trial court did not err in reopening evidence. Here, the trial court ruled that the officer could not testify about her interviews with S. R. and N. R. because such testimony would constitute inadmissible hearsay and initially prohibited the State from having the child advocacy counselor testify regarding her forensic interviews of the girls and from playing the video recordings of those interviews. However, after all parties completed their closing arguments, but before the jury was charged, the trial court held a bench conference outside the presence of the jury, in which it informed the parties that it had made a mistake in excluding the police officer and child advocacy counselor's testimony. The trial court informed the parties that upon further review, it had misread applicable case authority and instead should have allowed the excluded testimony into evidence pursuant to the Child Hearsay Statute. Consequently, the trial court

determined that it would reopen the evidence to allow the State to call the child advocacy counselor as a witness and to introduce the recordings of the counselor's forensic interviews into evidence. In addition, the trial court ruled that both defendants could also introduce additional evidence if they chose to do so. Both defendants then objected, but neither moved for a mistrial.

The Court found that the trial court was correct in determining that it had erred by initially excluding the child advocacy counselor's testimony and the recordings of her forensic interviews of N. R. and S. R. Accordingly, the Court concluded that it did not abuse its discretion in reopening the evidence to the testimony and recordings.