

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MARCH 7, 2014

## State Prosecution Support Staff

**Charles A. Spahos**  
Executive Director

**Todd Ashley**  
Deputy Director

**Chuck Olson**  
General Counsel

**Joe Burford**  
State Prosecution Support Director

**Laura Murphree**  
Capital Litigation Resource Prosecutor

**Sharla Jackson**  
Domestic Violence, Sexual Assault,  
and Crimes Against Children  
Resource Prosecutor

**Todd Hayes**  
Traffic Safety Resource Prosecutor

**Gary Bergman**  
State Prosecutor

**Lalaine Briones**  
State Prosecutor

**Jenna Fowler**  
State Prosecutor

## THIS WEEK:

- **Character; Prosecutorial Misconduct**
- **Indictments; Sexual Assault Under O.C.G.A. § 16-6-5.1(b)(1)**
- **Juveniles; Sentencing**
- **Sentencing; Merger**
- **Batson; Discovery**
- **Disclosure of Confidential Informants**
- **Prosecutorial Misconduct; Attorney-Client Privilege**
- **Double Jeopardy; Ordinance Constitutionality**
- **Tattoos; Sentencing**
- **Courthouses; Jury Charges**
- **Demurrers; O.C.G.A. § 16-12-81**
- **Miranda; Form of Court Orders**
- **Double Jeopardy; Withdrawal of Guilty Plea**
- **Out-Of-Time Appeals; O.C.G.A. § 15-6-21**

---

---

---

### ***Character; Prosecutorial Misconduct***

*Nichols v. State, A13A2210 (2/21/14)*

Appellant was convicted of aggravated sexual battery, aggravated sodomy, false imprisonment, and public indecency. He contended that the trial court erred in denying his motion for a mistrial on the ground that the prosecutor violated the trial court's motion in limine to exclude references to his being in custody. Specifically, appellant asserted that the prosecutor's reference improperly inserted his character into evidence. The Court disagreed.

The record showed that prior to trial, the trial court granted appellant's motion in limine to preclude testimony about any prior bad acts, criminal conduct, or criminal investigations of appellant. At trial, the prosecutor asked a witness whether she had communicated with appellant or sent him cards in jail following his arrest. The Court found that contrary to appellant's claim, the entirety of the prosecutor's question showed that he was referring to appellant's time in jail based upon his arrest in this case, not any prior incarcerations. But, the Court stated, even if, as appellant contended, the trial court's ruling on his motion in limine precluded all references to his ever being in custody, the prosecutor's statement was not so prejudicial as to require a mistrial. Notably, appellant did not previously object to the admission of other evidence of his arrest in this case. Also, the jury was obviously alerted to the fact that appellant had been in jail at some point. The fact that the prosecutor briefly mentioned appellant's time in jail did not put his character at issue and did not require a mistrial. Accordingly, the Court concluded that the trial court did not abuse its discretion in denying appellant's motion for mistrial.

### ***Indictments; Sexual Assault Under O.C.G.A. § 16-6-5.1(b)(1)***

*State v. Hammonds, A13A2023 (2/24/14)*

The State appealed from the dismissal of its indictment against Hammonds. The record showed that Hammonds was indicted under O.C.G.A. § 16-6-5.1(b)(1) on three counts of sexual assault. Specifically, the indictment alleged that she engaged in sexual contact

with three males that she knew were students at the high school where she was employed as an “administrator” with supervisory or disciplinary authority over the students. The record also showed that Hammonds was a secretary at the school’s ninth grade academy, as well as an assistant coach for the junior varsity cheerleading team. The three male students involved were between the ages of 17 and 19 years old. One was a junior and the other two were seniors, and they were not members of the cheerleading team. The Court stated that the sole issue in this case was whether Hammonds, as a secretary and an assistant cheerleading coach, is among the classification of individuals with supervisory or disciplinary authority subject to prosecution under O.C.G.A. § 16-6-5.1(b)(1).

The Court noted that O.C.G.A. § 16-6-5.1(b)(1) provides in relevant part: “A person who has supervisory or disciplinary authority over another individual commits sexual assault when that person . . . [i]s a teacher, principal, assistant principal, or other administrator of any school and engages in sexual contact with such other individual who the actor knew or should have known is enrolled at the same school . . . .” The trial court granted the motion to dismiss the indictment, finding that Hammonds did not fall within the ambit of O.C.G.A. § 16-6-5.1(b)(1). Specifically, the trial court found that Hammonds was not a teacher, a principal, an assistant principal, or an administrator at the school, and that she lacked the requisite disciplinary and supervisory authority over the students. The trial court further found that Hammonds, in her capacity as an assistant cheerleading coach, was not in a position of authority over the three students with whom she was sexually involved.

The Court agreed. The Court found that Hammonds’ job as a secretary at the school was strictly clerical in nature and, as such, did not fall within the ordinary, logical, and common definition of an “administrator.” “If we were to hold that a secretary is equivalent to an administrator, we would be judicially expanding the term ‘administrator’ beyond its ordinary, logical, and common meaning for the purposes of O.C.G.A. § 16-6-5.1(b)(1). This we cannot do.” Thus, the Court held, under the facts and circumstances of this case, Hammonds, in her secretarial position, was not an “administrator” for the purposes of

prosecution under O.C.G.A. § 16-6-5.1(b)(1).

Nevertheless, the State argued, Hammonds could be considered a “teacher” for the purposes of O.C.G.A. § 16-6-5.1(b)(1) because she was an assistant cheerleading coach who helped “teach” cheerleading. The Court disagreed. Even if Hammonds could be considered a teacher by virtue of her position as an assistant cheerleading coach, the record showed that she lacked the requisite supervisory and disciplinary authority over the students at the school in general, and any supervisory or disciplinary responsibilities she arguably may have had as an assistant cheerleading coach would have been confined to the members of the junior varsity cheerleading team. Here, the three male students were not members of the junior varsity cheerleading team, and therefore, Hammonds had no direct supervisory or disciplinary control over them in her capacity as an assistant cheerleading coach.

Finally, the Court stated, in O.C.G.A. § 16-6-5.1(b)(1), the Legislature chose to specify the classification of individuals who may be prosecuted for sexual assault in the school context. In other contexts, O.C.G.A. § 16-6-5.1(b)(2) through (5), the Legislature provided that any “employee or agent” with supervisory or disciplinary authority may be prosecuted. When the five components of subsection (b) of the statute are read in pari materia with each other and strictly construed, it is clear that the classification of individuals who may be prosecuted under O.C.G.A. § 16-6-5.1(b)(1) is limited to teachers, principals, assistant principals, or other administrators of the school. Thus, a mere “employee or agent” of the school, such as Hammonds, was not subject to prosecution under O.C.G.A. § 16-6-5.1(b)(1).

## **Juveniles; Sentencing**

*In the Interest of T. D. J. Jr., A13A2022 (2/21/14)*

Appellant was found guilty of six counts of aggravated assault and one count of possession of a handgun by an underage person. As a consequence, he was adjudicated to be a designated felon under former O.C.G.A. § 15-11-63, committed to the Department of Juvenile Justice for 60 months, and required to serve 48 of those months in restrictive custody, with credit for 75 days of time served.

In reaching the decision on sentencing, the juvenile court considered the child’s needs and best interests, his record and background, the nature and circumstances of the offense, the need for protection of the community, and the age and physical condition of the victim.

Appellant challenged his four year sentence as being in violation of *Miller v. Alabama*, \_\_\_U. S. \_\_\_, 132 S. Ct 2455, 183 LE2d 407 (2012). But, the Court found, *Miller* is distinguishable and not applicable to appellant’s case. In *Miller*, the United States Supreme Court determined that the Eighth Amendment’s prohibition of cruel and unusual punishment forbids a sentencing scheme that mandates life in prison without possibility of parole for juvenile offenders. In so holding, the *Miller* Court noted that children are constitutionally different from adults for purposes of sentencing. Because juveniles have diminished culpability and greater prospects for reform, they are less deserving of “the most severe punishments.”

Here, however, appellant was not subject to one of the “most severe punishments” allowed by law. Rather, he was tried as a child in the juvenile justice system where the goal is rehabilitation and treatment and where an adjudication of delinquency is not considered a conviction of a crime. Moreover, he was sentenced under O.C.G.A. § 15-11-63, the central purpose of which was the rehabilitation and treatment of the child and not punishment. And O.C.G.A. § 15-11-63(c)(1) specifically required the juvenile court to take into account the “needs and best interests of the child,” which the juvenile court did. Accordingly, the Court found, *Miller v. Alabama* was not applicable to this case.

## **Sentencing; Merger**

*Broyard v. State, A13A2318 (2/21/14)*

Appellant was convicted of armed robbery, two counts of aggravated assault, possession of a firearm during the commission of a felony, and fleeing or attempting to elude an officer. Although appellant did not raise the issue, the Court merged one of the aggravated assault convictions with the armed robbery conviction. The Court noted that appellant was indicted for and convicted of armed robbery (Count 1) as a party to his accomplice’s actions in taking a Burger King’s money while in the immediate presence of the

manager by use of a gun. Although appellant's indictment for aggravated assault (Count 2) alleged that the crime was committed by the act of striking the manager about the head with the gun, the evidence showed that the armed robbery began when the accomplice pointed the gun at the manager and demanded cash from the register. The accomplice hit the manager on the head with the gun when the manager did not immediately comply with his demand to give him the cash. Because the aggravated assault arose out of the same act or transaction as the armed robbery, it was included in and merged with the armed robbery as a matter of fact. For this reason, the Court found, appellant's conviction and sentence for aggravated assault against the manager must be vacated. Accordingly, the Court remanded the case for resentencing.

## **Batson; Discovery**

*Ananaba v. State, A13A2425 (2/26/14)*

Appellant was convicted of theft by receiving stolen property and possession of a vehicle with an altered Vehicle Identification Number (VIN). Appellant argued that the trial court erred in denying his *Batson* challenge to the State's preemptory strikes of three African American venire members. Appellant argued that the three prospective jurors were struck by the State because they had problems with law enforcement because of their race and, he argued, striking them because they said they had such problems is not a race-neutral reason. But, the Court found, appellant described only one of the three African American venire members struck by the State as having articulated her belief that she had had problems with law enforcement due to her race. The other two simply said they had had bad experiences with law enforcement. A venire member's prior negative experience with law enforcement officers is a race-neutral reason supporting the exercise of a preemptory challenge. Furthermore, the Court stated, the State may reasonably base its use of a preemptory strike upon a prospective juror's apparent belief that, in general, law enforcement officers are racially motivated. Therefore, the trial court's ruling on appellant's *Batson* claim was upheld.

Appellant also contended that the trial court erred in denying his motion for a new trial because of the prosecution's

failure to disclose the existence of certain documents. The record showed that when the police investigator testified that he found an Alabama registration card in the stolen vehicle, appellant objected because the State did not provide him with photocopies of the registration or VIN sticker, which were not listed among the items seized from the car. The State responded that it had noted on the front of the discovery packet it sent appellant that "all physical evidence can be viewed by appointment," but Appellant had never contacted the State to view any of it. The trial court overruled the objection and after the witness identified it, the registration card was admitted into evidence.

The Court noted that O.C.G.A. § 17-16-4(a)(3)(A) generally requires the prosecuting attorney no later than ten days before trial to permit the defendant to inspect and copy any tangible objects in the possession, custody, or control of the State that it plans to use as evidence or that belong to the defendant. Trial began on February 29, 2012, and the State's disclosure certificate, which was filed and served on appellant on February 13, 2012, listed numerous attached documents. It then said: "Items available for inspection by appointment: [X] Physical Evidence," followed by this notice in bold capital letters: "PLEASE CONTACT ME IMMEDIATELY SO THAT WE MAY ARRANGE A TIME FOR YOU TO INSPECT AND COPY OR PHOTOGRAPH THESE ITEMS."

The Court noted that appellant did not dispute having received the discovery packet with the notice quoted above. Rather, he argued that the investigator never made a report about having removed these items from the car, that he was "not aware that these items had been seized" from his car, and that therefore he had no opportunity to file a motion to suppress them. But, the Court found, appellant did not show that he might have succeeded with a motion to suppress, and there was no error in the trial court's overruling his objection to the admission of this physical evidence. The plain language of the statute does not require the State to take the initiative and furnish the defense with copies of physical evidence. The State fulfilled its obligation by making the evidence available to the defense to inspect and copy. Accordingly, the trial court did not err in denying the motion for new trial.

## **Disclosure of Confidential Informants**

*King v. State, A13A1983 (2/21/14)*

Appellant was convicted of VGCSA. The evidence showed that the police used a Confidential Informant (CI) to purchase cocaine from appellant's home. The person who sold the cocaine was not appellant, but rather appellant's nephew. A week after the sale, officers went to appellant's house and appellant consented to a search of it. Appellant was convicted of possession with intent to distribute the cocaine found during the search.

Appellant argued that the trial court erred in denying his pretrial motion to require the State to disclose the identity of the CI. The Court stated that the decision as to whether a confidential informant's identity is discoverable rests within the sound discretion of the trial court. In making this decision, the court must engage in a two-step process. First, the court must hold a hearing and receive evidence as to 1) whether the CI is an alleged witness to, or participant in the crime, whose testimony appears to be material to the defense on the issue of guilt or punishment; 2) whether the testimony for the prosecution and the defense is or will be in conflict; and 3) whether the CI is the only available witness who could amplify or contradict the testimony of these witnesses. It is the movant who bears the burden of establishing the relevance, materiality, and necessity of the identity of the informant as a predicate for disclosure, and if the movant carries this burden the trial court must then conduct an in camera hearing of the informant's testimony and balance the public interest in protecting the flow of information against the defendant's right to prepare his defense.

Appellant conceded that the controlled buy made by the CI was not the subject of the prosecution and the CI was neither a witness to nor a participant in the crimes for which he was on trial. Nevertheless, he argued that he was entitled to discover the CI's identity because the CI's testimony was relevant to his equal access defense. Specifically, he contended that testimony that someone other than he was selling drugs out of his residence would have supported his claim that the drugs found in his kitchen did not belong to him. The Court disagreed. Citing *Turner v. State*, 247 Ga. App.

775 (2001), the Court noted that appellant was indicted for possessing with intent to distribute the cocaine found in his kitchen. He was not charged with selling cocaine to the CI. The informant was not present during the search and arrest and was neither a participant in nor a witness to the specific offense with which appellant was charged. His testimony would not have been material to the issue of appellant's guilt or punishment. Thus, the threshold requirements of the first step of the inquiry were not met, and the trial court did not err in refusing to require the State to reveal the informant's identity.

Moreover, the Court added, even assuming that evidence of the controlled buy was relevant to appellant's defense of equal access, the CI was not the only witness qualified to testify regarding that buy. The officer, who worked with the CI on the controlled buy and monitored the transaction, testified regarding that buy at the motion hearing. The officer's testimony showed that he was competent to testify as to the fact that someone other than appellant sold cocaine to the CI. Accordingly, the Court concluded, appellant also failed to demonstrate the necessity of the CI's testimony.

### **Prosecutorial Misconduct; Attorney-Client Privilege**

*Inman v. State, S13A1458 (3/3/14)*

Appellant was convicted of murder, two counts of kidnapping, and related crimes. The record showed that appellant's original lawyer hired Shouse, an unlicensed investigator, to help prepare appellant's case. Shouse later discussed the case to some extent with the assistant district attorney (ADA) prosecuting the case. Appellant changed lawyers before trial, and his new counsel, claiming that Shouse had violated appellant's attorney-client privilege, filed a motion asking the trial court to bar the State from calling Shouse or any witnesses with improperly obtained information, to suppress any evidence coming from Shouse, and to recuse the ADA who spoke to Shouse. At a hearing held before trial to discuss pending motions, however, counsel for both parties advised the court that the State had agreed not to call Shouse or anybody with knowledge of Shouse's information as a witness; thus, the court was not asked to rule on appellant's motion.

Appellant argued that the ADA's discussion with Shouse constituted prosecutorial misconduct requiring his convictions to be reversed. The Court disagreed. The Court found that even assuming that Shouse improperly provided information about appellant's case to the prosecutor, appellant was not harmed because the State agreed not to present any information provided by Shouse at trial and there was no evidence that the State failed to honor that agreement or used Shouse's information in any other way. Although appellant testified that at the pretrial hearing on his motion for immunity based on defense of habitation, he "could tell then that by some of the things that were said that [the ADA] had inside information on some things that were said that nobody knew except me and Shouse," appellant did not, however, identify what any of those "things" might be, and appellant's trial counsel testified that the ADA had said he did not believe Shouse's information. Therefore, the Court held, appellant's argument was entirely lacking in merit.

### **Double Jeopardy; Ordinance Constitutionality**

*Wilbros LLC v. State, S13A1410 (2/24/14)*

Appellant corporation entered into a consent order with the Environmental Protection Division ("EPD") of the Georgia Department of Natural Resources in November of 2012. Appellant agreed to pay \$25,000 to the Department of Natural Resources in compromise and settlement of various disputed violations referenced in the Consent Order. The Consent Order stated that the EPD representatives who visited the facility on various dates in June of 2012 noted strongly offensive offsite and onsite odors and, on one of the inspection dates, noted numerous flies in the area related to one of appellant's operations.

On August 1, 2012, appellant was charged with violation of a county ordinance prohibiting nuisances. Appellant and the state court solicitor filed a written stipulation in the case stipulating that appellant had been ordered by the EPD to pay a \$25,000 fine for statutory violations of odor issues at the facility and that the operative dates for those violations encompassed the same dates alleged in the local ordinance violation charge. The parties further

stipulated that both the county ordinance violation charge and the EPD Consent Order allege an ongoing odor nuisance and that "each proceeding has a goal of restraining, deterring, promoting retribution and abating the odor nuisance." Appellant filed a plea in bar of prosecution, raising double jeopardy, a preemption challenge, and a constitutional challenge asserting the ordinance is void for vagueness. The trial court denied appellant's plea, specifically concluding there is no Georgia authority that permits a corporation to assert Fifth Amendment double jeopardy protection under the Georgia or United States constitutions, finding that the preemption argument fails, and finding that the county ordinance is constitutional.

Appellant first argued that the trial court erred in determining it has no constitutional rights against Double Jeopardy. The Court agreed. First, the Court found that the Double Jeopardy Clause of the Fifth Amendment has long been applied to corporate entities. As to the Georgia Constitution, the Court found this issue to be one of first impression. The Court noted that a corporation is a "person" pursuant to Georgia law, and thus, entitled to due process and equal protection from the state. Therefore, the Court found, "[i]t follows that a corporation is entitled to the double jeopardy protection afforded by the Georgia Constitution."

Next, the Court turned to whether appellant's double jeopardy rights were violated by the county ordinance charges. The prohibition against double jeopardy applies only to *criminal* punishments for the same offense. Whether a particular punishment is criminal or civil is, at least initially, a matter of statutory construction. Even in those cases where the legislature has indicated an intention to establish a civil penalty, a court must inquire further to determine whether the statutory scheme was so punitive either in purpose or effect as to transform what was clearly intended as a civil remedy into a criminal penalty. In making such a determination, a number of factors are to be used as guideposts. These include: 1) whether the sanction involves an affirmative disability or restraint; 2) whether it has historically been regarded as a punishment; 3) whether it comes into play only on a finding of scienter; 4) whether its operation will promote the traditional aims of punishment, retribution

and deterrence; 5) whether the behavior to which it applies is already a crime; 6) whether an alternative purpose to which it may rationally be connected is assignable for it; and 7) whether it appears excessive in relation to the alternative purpose assigned. In any event, only the clearest proof will suffice to override legislative intent and transform what has been denominated a civil remedy into a criminal penalty.

The Court considered the various guidepost factors for determining whether a civil sanction rises to the level of a criminal penalty, along with the terms of the parties' agreement, and concluded that the Consent Order in this case did not amount to criminal punishment to which double jeopardy prohibitions apply. Even though the parties stipulated that both the Consent Order and the criminal action allege the same nuisance conduct and each proceeding has the same goals of restraint, deterrence, retribution, and abatement of the odor nuisance, the criminal action was not barred by the sanctions imposed in the Consent Order.

Appellant also contended that the trial court erred in rejecting its plea that the county ordinance involved in this case is preempted by the Georgia Comprehensive Solid Waste Management Act, O.C.G.A. § 12-8-20, et seq. (the "Act"). In support, appellant relied on Article III, Section VI, Paragraph IV (a) of the Georgia Constitution of 1983 which provides: "Laws of a general nature shall have uniform operation throughout this state and no local or special law shall be enacted in any case for which provision has been made by an existing general law, except that the General Assembly may by general law authorize local governments by local ordinance or resolution to exercise police powers which do not conflict with general laws." The Court disagreed. O.C.G.A. § 12-8-30.9 states that no provision of the Act: "shall be construed to be a limitation: (1) On the power of a municipality, county, authority, or special district to adopt and enforce additional regulations, not in conflict with this part, imposing further conditions, restrictions, or limitations with respect to the handling or disposal of municipal solid waste; (2) On the power of a municipality, county, authority, or special district to declare, prohibit, and abate nuisances." Here, the Court found, the county ordinance was, by its terms, aimed at

abating certain nuisances. Further, it did not set forth regulations that are in conflict with the Act. Consequently, the Court found, the ordinance fell within the constitutional exception to preemption because it was expressly authorized by statute.

Finally, appellant contended that the ordinance was unconstitutionally vague and unenforceable. The Court again disagreed. The void for vagueness doctrine of the due process clause requires that a challenged statute or ordinance give a person of ordinary intelligence fair warning that specific conduct is forbidden or mandated and provide sufficient specificity so as not to encourage arbitrary and discriminatory enforcement. Vagueness challenges that do not implicate First Amendment freedoms must be examined in the light of the facts of the case to be decided.

A nuisance ordinance is not vague if it uses terms which have well established common law meanings or which are significantly explained in the context of the ordinance as a whole. The term "offensive" does not render a nuisance standard unconstitutionally vague. The test of whether an act is a nuisance is whether it would be offensive to persons of ordinary feelings and sensibilities. Thus, in reviewing the ordinance as a whole, the Court rejected appellant's assertion that the ordinance gave unfettered discretion to a health official to determine what constitutes a violation. In light of the facts to be decided, the Court interpreted the ordinance to require the opinion of a health officer that the prohibited pollution is sufficient to be disagreeable or discomforting to a person of ordinary sensibilities or detrimental to health or well-being. According, the provisions are not unconstitutionally vague or grant unfettered official discretion.

### **Tattoos; Sentencing**

*Moore v. State, S13A1569 (3/3/14)*

Appellant was convicted of malice murder, felony murder, armed robbery, aggravated assault, burglary, and three counts of unlawful possession of a firearm during the commission of a crime. He contended that the trial court erred when it admitted evidence that he had a tattoo upon his arm that depicted a gun like the one carried by the intruder at the victims' home, along with the words "Chopper Zone."

The record showed that when this evidence was tendered, appellant objected that the evidence was irrelevant and unfairly prejudicial, but the trial court overruled his objection. Citing *Belmar v. State*, 279 Ga. 795, the Court held that the existence of a tattoo, in and of itself, does not establish a defendant's propensity to act in conformance with that depicted in the tattoo. Here, the Court found, the tattoo was not offered as evidence of identity or motive. It was offered, instead, simply to suggest a propensity to carry or use a firearm like that depicted in the tattoo. For that purpose, the evidence of the tattoo was inadmissible under *Belmar*, and its admission was error. However, the Court concluded, given the overwhelming evidence of guilt, the error in its admission was harmless.

Appellant also argued that he could not properly be convicted of three distinct counts of unlawful possession of a firearm during the commission of a crime. The Court agreed. Where multiple crimes are committed together during the course of one continuous crime spree, a defendant may be convicted once for possession of a firearm during the commission of a crime as to every individual victim of the crime spree, as provided under O.C.G.A. § 16-11-106(b)(1) (crimes against the person), and additionally once for firearm possession for every crime enumerated in subsections (b) (2) through (5) (unlawful entry, theft, controlled substances, and drug trafficking crimes). Here, the evidence was that the robbers had one gun, and there were two victims of the crimes charged in the indictment. Consequently, the trial court should have convicted appellant of only two counts of possession of a firearm while committing a crime, one for each of the victims, and it should have merged the third count. Therefore, the Court vacated the conviction and sentence for possession of a firearm during the commission of an armed robbery of one of the two victims.

### **Courthouses; Jury Charges**

*Dubose v. State, S13A1842 (2/24/14)*

Appellant was convicted of felony murder. The evidence showed that appellant entered the house of the victim during the night and shot the victim as he was sleeping. Prior to entering the home, appellant called a woman in the house to ask why the victim's children were still awake. The woman, who had

knowledge of appellant's intentions, identified appellant by his "build" as the person she saw leave the house after the shooting.

Appellant contended that the trial court improperly tried him in the wrong county. The Court found that at the time of trial, the Telfair County courthouse was undergoing renovation, the courtroom available therein was deemed inadequate, and consequently appellant's trial was held in the Wheeler County courthouse. O.C.G.A. § 15-6-18, as in effect at the time of trial, and specifically O.C.G.A. § 15-6-18(c)(1), required essentially two things for a criminal trial in a county the size of Telfair County to be held in a location other than the county courthouse of that county: 1) provision for such a location by the proper governing authority of the county; and 2) the consent of the accused. Although the record showed that appellant consented to the move, nothing in the record showed a proper resolution by the Telfair County Board of Commissioners authorizing the action. However, the Court stated, a failure to show full compliance with then—O.C.G.A. § 15-6-18(c)(1) does not establish reversible error; harm from the irregularity must also be shown and here, appellant failed to show any such harm. Although appellant asserted that, had his trial been held in the Telfair County courthouse, certain evidence that appellant believed might have been useful would have been readily at hand, appellant produced no evidence that the conduct of his trial was negatively impacted by the change in location, and thus failed to establish any harm thereby.

Appellant also argued that the trial court erred in its instructions to the jury. The record showed that the trial court instructed the jury on the law of witness identification and that it was for the jury to determine whether, under the facts and circumstances of the case, witnesses "sufficiently identif[ied] the defendant beyond a reasonable doubt as the perpetrator of the alleged crime or that he was a party to it." Appellant contended the reference to being a party to the crime was error because no eyewitness identified anyone but appellant, and that the trial identification of him was simply false. However, the court found, in addition to her testimony that it was appellant she saw running from the home immediately after the shooting, the female witness testified that appellant called her cell phone shortly before the shooting and asked

why the children were still up. The defense attacked the credibility of her eyewitness identification, elicited testimony that the victim's nine-year-old stepdaughter had given a description of the man who ran from the home that conflicted with her identification and with appellant's appearance, and argued that this discrepancy helped establish reasonable doubt. But, the Court stated, given the testimony regarding appellant's telephone call immediately before the shooting, the jury could infer that, even if her eyewitness identification of him was incorrect, he was working in concert with someone else in an attempt to insure that the children were not in a position either to be harmed when the victim was shot, or to serve as witnesses. Accordingly, the Court concluded, the portion of the jury instruction referring to appellant being a party to the crime was authorized by the evidence.

### **Demurrers; O.C.G.A. § 16-12-81**

*Warren v. State, S13A1904 (2/24/14)*

Appellant was indicted for violating O.C.G.A. § 16-12-81, with the indictment alleging that he sent an unsolicited text message containing an image of his genitalia to an adult female without notifying her that the message contained nudity. Appellant filed a general demurrer, arguing that § 16-12-81 does not criminalize his conduct. The trial court denied appellant's demurrer.

Appellant contended that the trial court erred in denying his general demurrer to the indictment, because the act alleged in the indictment, the sending of a nude image of his genitals from his cell phone to the victim's cell phone, is not prohibited by O.C.G.A. § 16-12-81. The Court agreed and reversed.

O.C.G.A. § 16-12-81(a) provides that "A person commits the offense of distributing material depicting nudity or sexual conduct when he sends unsolicited through the mail or otherwise unsolicited causes to be delivered material depicting nudity or sexual conduct to any person or residence or office unless there is imprinted upon the envelope or container of such material in not less than eight-point boldface type the following notice: 'Notice: The material contained herein depicts nudity or sexual conduct. If the viewing of such material could be offensive to the addressee, this container should not be opened but

returned to the sender.'" The Court stated, "To start, we note that O.C.G.A. § 16-12-81 is not inapplicable to electronic text messaging merely because that form of communication did not exist when § 16-12-81 was enacted in 1970." The Court further stated that the statute contains a specific prohibition against sending unsolicited through the mail material depicting nudity or sexual conduct without the required notice, followed by a more general prohibition against "otherwise unsolicited caus[ing] to be delivered material depicting nudity or sexual conduct to [a] person" without the statutory notice. The specific prohibition is clearly aimed at tangible material that is delivered in a tangible manner, and because appellant did not send anything through the mail, he did not violate this prohibition.

Nevertheless, the State argued, appellant violated the general prohibition of the statute. But, the Court concluded, considering the general prohibition in relation to the other words of the statute, the general prohibition is limited in the same manner as the specific. The notice provision of the statute says that the notice "must be imprinted on the envelope or container of such material." "Such material" clearly refers to the "material depicting nudity or sexual conduct" described in the specific and general prohibitions of the statute. Thus, the statute contemplates that the "material" that is the subject of both prohibitions has an envelope or container that can have the notice imprinted on it. Accordingly, the general prohibition of the statute does not apply to the text message that appellant sent in this case. The trial court therefore erred in denying appellant's general demurrer to the indictment.

### **Miranda; Form of Court Orders**

*Brown v. State, S13A1543 (3/3/14)*

Appellant was convicted of malice murder and aggravated assault. He contended that the order denying the motion to suppress his custodial statements was infirm because it did not explicitly state that the statements were made voluntarily. First, the Court noted, there was more than merely an implicit denial of the motion to suppress on the authority of *Jackson v. Denno*; the trial court explicitly denied the motion. Nor was this a case in which the record revealed that the trial court erroneously

believed that the question of whether the statements were freely and voluntarily made was simply for the jury. Nevertheless, the Court stated, “our preference for trial courts to make findings of fact, if the evidence warrants them, [is] substantially as follows: I find from a preponderance of the evidence that the defendant was advised of each of his Miranda rights, that he understood them, that he voluntarily waived them, and that he thereafter gave his statement freely and voluntarily without any hope of benefit or fear of injury. (If the defendant denies having been advised of any one of his Miranda rights or says that he requested an attorney, specific findings as to the point in controversy should also be made.)”

Here, the Court found, the order denying appellant’s motion did not follow this recommended procedure. Generally, such a failure would require a remand for clarification. However, because appellant did not assert that there was evidence that would render the statements inadmissible for any reason, resting his argument solely on the procedural ground, and the record did not reveal such evidence, remand was unnecessary. “However, we would remind the trial courts of this state of our preference for findings of fact which comport with the form suggested in *Berry v. State*, [254 Ga. 101, 104-105 (1), fn. 6 (326 SE2d 748) (1985).]”

### **Double Jeopardy; Withdrawal of Guilty Plea**

*Pierce v. State*, S14A0053 (3/3/14)

Appellant was indicted in 1999 on charges of malice murder (two counts), felony murder (four counts), aggravated assault (three counts) and possession of a firearm by a convicted felon. The State filed a notice of intent to seek the death penalty but withdrew its notice when appellant entered negotiated guilty pleas to some but not all of the charges filed against him. He subsequently was sentenced to two terms of life without parole on the malice murder convictions and consecutive terms of years on his remaining convictions. In *Pierce v. State*, 289 Ga. 893 (2011), the Court vacated appellant’s sentences of life without parole on direct appeal because the trial court did not specify an aggravating circumstance at the time of sentencing as required under former O.C.G.A. § 17-10-32.1.

On remand, appellant moved to withdraw his guilty pleas as to all charges. The trial court granted the motion with regard to the two malice murder counts because the malice murder sentences had been vacated on appeal. See O.C.G.A. § 17-7-93(b). The trial court denied the motion as to appellant’s remaining convictions, however, because those convictions and sentences were affirmed on appeal and appellant had no statutory right to withdraw those pleas. Appellant filed a plea in bar based on double jeopardy seeking to preclude the State from continuing its prosecution of the charges for which appellant’s pleas had been withdrawn. The State again noticed its intent to seek the death penalty, causing appellant to move to vacate the trial court’s order allowing him to withdraw his guilty pleas. After a hearing, the trial court denied the plea in bar and granted appellant’s motion to vacate the order allowing the withdrawal of his guilty pleas. With the consent of all parties, the trial court then resentenced appellant on the remanded convictions.

Appellant contended the trial court erred by denying his plea in bar because the grant of his motion to withdraw his guilty pleas as to only certain charges created an improper second prosecution in violation of constitutional and statutory double jeopardy. The Court disagreed. Here, appellant entered guilty pleas to the charges against him and based on these pleas, judgments of conviction were entered. His convictions were not overturned on appeal, although his sentences as to certain charges were vacated due to trial court error, and on remand, the trial court properly determined that appellant was entitled to withdraw his guilty pleas as to those charges. The record established, however, that the order authorizing the withdrawal of appellant’s guilty pleas was vacated on appellant’s own motion, thereby reinstating his original guilty pleas and convictions. Accordingly, there was not a second prosecution and the trial court did not err by denying appellant’s plea in bar.

### **Out-Of-Time Appeals; O.C.G.A. § 15-6-21**

*Hagan v. State*, S14A0280 (3/3/14)

Appellant pled guilty in Catoosa County for malice murder of his wife and attempted murder of her lover. Fifteen months later,

on June 13, 2011, appellant filed a pro se motion to withdraw his guilty plea. The trial court denied the motion, and the order was affirmed, because the motion was untimely. *Hagan v. State*, 290 Ga. 353 (2012). On March 13, 2013, appellant filed a pro se motion for an out-of-time appeal, claiming that he told his plea counsel to file a direct appeal of his convictions but counsel failed to do so. Appellant amended the motion on July 15, 2013, and filed a pro se “motion for compliance” pursuant to O.C.G.A. § 15-6-21 on July 19, 2013. The trial court denied the amended motion on September 10, 2013.

Appellant argued that O.C.G.A. § 15-6-21 required the trial court to grant his motion for an out-of-time appeal. The Court disagreed. O.C.G.A. § 15-6-21(a) provides that a trial judge in a county with less than 100,000 residents (like Catoosa County) must rule on a motion within 30 days after the date the motion was submitted, unless “providently hindered” or unless counsel for both parties agree in writing to extend that deadline. However, if the judge fails or refuses to rule within that period, the remedy is not to require the motion to be granted, regardless of its merit. Instead, such conduct can be grounds for impeachment, (§ 15-6-21(d)), or the moving party may seek a writ of mandamus to compel the judge to decide the motion. Thus, the Court concluded, the remedy appellant sought was not authorized.