

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 9, 2007

Legal Services Staff Attorneys

David Fowler
Deputy Executive Director
for Legal Services

Bob Keller
Executive Counsel

Chuck Olson
General Counsel

Joe Burford
Trial Services Director

Lalaine Briones
Trial Support

Laura Murphree
Capital Litigation

Fay McCormack
Traffic Safety Coordinator

Patricia Hull
Traffic Safety Prosecutor

Tom Hayes
Regional Offices Director

Gary Bergman
Staff Attorney

Tony Lee Hing
Staff Attorney

Rick Thomas
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Brad Rigby
Staff Attorney

THIS WEEK:

- Appeals - State's Right to Appeal
- Ex Post Facto Law
- Grand Jury – Indictment
- Double Jeopardy
- Evidence – Experts

Appeals - State's Right to Appeal

State v. Glover, S06A1550 (02/26/07)

On November 9, 2005, the trial court dismissed the State's appeal of a February 2001 ruling that barred the trial of the appellee on the basis that his constitutional right to a speedy trial had been violated. In dismissing the State's appeal, the trial court relied on O.C.G.A. § 5-6-48 (c) which provides, "the trial court may, after notice and opportunity for hearing, order that the appeal be dismissed where there has been an unreasonable delay in the filing of the transcript and it is shown that the delay was inexcusable and was caused by such party. In like manner, the trial court may order the appeal dismissed where there has been an unreasonable delay in the transmission of the record to the appellate court, and it is seen that the delay was inexcusable and was caused by the failure of a party to pay costs in the trial court or file an affidavit of indigence; provided, however, that no appeal shall be dismissed for failure to pay costs if costs are paid within 20 days (exclusive of Saturdays, Sundays, and legal holidays) of receipt by the appellant of notice, mailed by registered or

certified mail or statutory overnight delivery, of the amount of costs."

The State appealed the order of the trial court dismissing its appeal. The Supreme Court concluded that an order dismissing an appeal is not an order that the State has a right to appeal under O.C.G.A. § 5-7-1. The Court acknowledged that the State has a right to appeal void orders, O.C.G.A. § 5-7-1 (a) (5), however, even if the order dismissing the State's appeal was erroneous, it was not void. A judgment is not void so long as it was entered by a court of competent jurisdiction. Thus, even assuming that the trial court erred; the order is not void because it was entered by a court of competent jurisdiction.

Ex Post Facto Law

Madison v. State, S06A1754 (02/26/07)

Appellant appealed the trial court's ruling allowing the retrospective application of the Criminal Justice Act of 2005 to his trial. Appellant committed the offenses for which he was convicted on August 1, 2004; and his trial took place on July 11-12, 2005. Section 17 of the Criminal Justice Act of 2005 provides that it shall apply to all trials which commence on or after July 1, 2005. Specifically, appellant challenged three portions of the act: a) the order of closing argument, O.C.G.A. § 17-8-71; b) character evidence in the form of prior convictions of a defendant who chooses to testify, O.C.G.A. § 24-9-20 (b), O.C.G.A. § 24-9-84, O.C.G.A. § 24-9-84.1; and c) number of preemptory strikes, O.C.G.A. § 15-12-165. With regard to closing argument, the Supreme Court declined to rule on the

constitutional issue because it clearly appeared from the record that the trial court did not distinctly rule on the issue below. With regard to the issue of defendant's prior convictions as character evidence, although the trial court ruled that the Act applied to appellant's case, the trial court sustained appellant's objection to the introduction of the evidence. Thus, there was no harm to appellant and no issue before the Court. The Supreme Court determined that the only issue properly before them was the change in peremptory strikes. The prohibition on ex post facto laws applies only to substantive rights, not procedural rights. "The exercise of peremptory strikes has long been recognized as a procedure created to assist litigants in obtaining a fair and impartial jury and not an independent substantive right." Strikes are procedural and not substantive in nature. The Court held that appellant was not deprived of any protected right by the application of the amended version of O.C.G.A. § 15-12-165, regardless of whether such application was retroactive.

Grand Jury – Indictment

State v. Parlor, S06A1861 (02/26/07)

Appellee was indicted for malice murder on April 29, 2004. Appellee filed a motion to quash the indictment alleging that the grand jury was not legally constituted. The trial court concluded that the grand jury was not legally constituted because the grand jury list had not been revised as required by O.C.G.A. § 15-12-40 (a) (1). Therefore, the trial court granted the motion to quash. The record clearly indicated that the last revision of the jury list before appellee's 2004 indictment occurred on October 9, 2000, and that the indictment was returned by grand jurors selected from that list. The Supreme Court previously addressed a similar issue with the precursor to O.C.G.A. § 15-12-40, Code § 59-106. Previously, the Court found that the provisions of Code § 59-106 were directory only and, therefore, the failure to revise the jury list in accordance with the timetable set forth in Code § 59-106 does not invalidate the jury list or deprive the defendant any right to which he is entitled. McHan v. State, 232 Ga. 470 (1974). Thus, precedent is clear that

the statutory statement regarding revision of the grand jury list specifically is directory. Therefore, the Supreme Court held that the failure to comply with the requirements of O.C.G.A. § 15-12-40 (a) (1) will not afford cause for quashing the indictment. The Court also rejected appellee's argument that the use of the phrase "shall be updated" makes the revision mandatory rather than directory. The Court noted that the word "shall" was also used in the precursor statute. The Court wrote that it remained convinced that the provision is directory. In addition, the Court further concluded that the statutory origin of the directive to revise the lists are the same for both petit and grand jury lists. Therefore, the judgment of the trial court was reversed.

Double Jeopardy

State v. Aycock, A07A0695 (02/19/07)

The State appeals the trial court's order granting appellee's plea in bar. Appellee was indicted in October 2005 for the offenses of rape, kidnapping and aggravated child molestation which occurred on April 18, 1996. The State asserted no special circumstances to explain the delay in indicting the case. A bench trial was conducted in March of 2006. The State presented the sworn testimony of four witnesses, who testified that an unknown assailant sexually assaulted the victim. During the testimony of the fourth witness, the State tried to introduce DNA evidence to show that it did not learn of appellee's identity as the victim's attacker until September 2005. This evidence was presented because the seven year statute of limitation apparently ran in 2003, and the State was attempting to rely upon an exception to prevent the bar of the statute of limitations. Appellee objected to the introduction of the DNA evidence on the basis that "where an exception is relied upon to prevent the bar of the statute of limitations, it must be alleged and proved. Such proof is inadmissible unless the exception sought to be proved is alleged. The exception must be alleged in the indictment." In this case, the exception (O.C.G.A. § 17-3-1 (c.1)) was not alleged in the indictment, therefore, the trial court sustained appellee's objection. With the trial court's permission, the State nolle prossed

the charges over appellee's objection and argument, that jeopardy had attached. Four months later, the State re-indicted alleging the exception in each count. The appellee filed a plea in bar which the trial court granted. The State appealed.

O.C.G.A. § 16-1-8 (a) (2) provides that "a prosecution is barred if the accused was formerly prosecuted for the same crime based on the same facts, if such former prosecution was terminated improperly, in a trial before a court, without a jury, after the first witness was sworn but before findings were rendered by the trier of fact." The question before the Court of Appeals was did the nolle prosequere constitute an improper termination. In a bench trial, jeopardy attaches when the first witness is sworn. It is error to enter a nolle prosequere without the defendant's approval after jeopardy has attached. A nolle prosequere entered after jeopardy has attached and without the defendant's consent is equivalent to an acquittal on a plea of former jeopardy. When a nolle prosequere is entered over the defendant's objection after jeopardy has attached, a retrial on those charges is barred. The Court of Appeals affirmed the judgment of the trial court.

Evidence – Experts

Crawford v. State, A06A2455 (02/20/07)

On appeal, appellant contends that the trial court erred when it did not allow him to present expert testimony regarding cross-racial eyewitness identification and expert testimony regarding false confessions. Appellant argues that the trial court's rulings denied him his fourteenth and sixth amendment rights to a complete defense. The Court of Appeals found no merit in appellant's argument. With regard to the cross-racial eyewitness identification expert, the Court wrote that it was within the sound discretion of the trial court whether to permit such testimony, and the decision would not be disturbed on appeal absent a clear abuse of discretion. In affirming the trial court, the Court of Appeals noted that the Georgia Supreme Court has held that the admission or exclusion of such expert testimony lies within the sound discretion of the trial court, *even* in the situation where the

eyewitness identification is the key element of the state's case and there is no substantial corroboration of that identification by other evidence. See Johnson v. State, 272 Ga. 254 (2000). In this case, there was corroboration of the identification by other evidence. Lastly, with regard to the false confession expert, the Court of Appeals noted that the Supreme Court of Georgia has upheld the exclusion of such expert testimony on the basis that the theory is not reliable and has not yet reached a verifiable stage of scientific certainty. Riley v. State, 278 Ga. 677 (2004). Therefore, the trial court did not err.