Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 9, 2014

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THIS WEEK:

Out-of-time Appeals

Wetherington v. State, S14A0527 (5/5/14)

Appellant pled guilty to malice murder and other crimes in 1986. He did not file a direct appeal. The record showed that in 2009, he filed a motion for an out-of-time appeal. It was denied and he timely appealed from that order. The clerk, however, never transmitted the record to the Court. Over the next four years, appellant filed four more motions for an out-of-time appeal. The second one was denied, timely appealed, and again not transmitted to the Court. The third and fourth were not ruled upon by the trial court. Finally, appellant filed a fifth motion for an out-of-time appeal in 2013. The trial court denied this one, appellant timely appealed, and the clerk transmitted the record to the Court.

The Court found that although appellant's appeal from the denial of his first motion for an out-of-time appeal was never docketed in the Court because the trial court clerk failed to transmit the notice of appeal and corresponding record, the first appeal nevertheless remained pending. And because the pending appeal acted as a supersedeas, it deprived the trial court of the power to affect the judgment appealed. Thus, because appellant's fifth motion for an out-of-time appeal challenged the same judgment of conviction that was challenged in the first pending appeal, the trial court lacked jurisdiction to rule on the fifth motion, and therefore, the Court reversed the court's order denying the fifth motion.

However, the Court again noted, the first appeal remains pending and if the clerk's office continues not to transmit the notice of appeal and the corresponding record to the Court in accordance with O.C.G.A. § 5-6-43(a), it may be appropriate for appellant to file a petition for mandamus seeking to compel the clerk to perform her statutory duty.

Speedy Trial; Barker v. Wingo

State v. Alexander, S14A0439 (5/5/14)

The State appealed from the grant of Alexander's motion to dismiss on constitutional speedy trial grounds. The record showed that in 2004, Alexander was indicted for malice murder, felony murder, and cruelty to children. In 2005, a jury acquitted him of murder, convicted him of cruelty to children and deadlocked on the felony murder charge. The trial court therefore ordered a mistrial on the felony murder charge and sentenced Alexander on the cruelty to children charge. Alexander filed a motion for new trial, but after its denial, he elected not to appeal. He subsequently served four of the eight years of his sentence and was paroled in 2009. In 2013, the State realized the felony murder charge was still pending and placed in on a jury trial calendar. Alexander then filed his motion to dismiss, which was granted.

The State argued that the trial court erred in applying the four factors of *Barker v. Wingo*. Under the *Barker* test, when an accused moves to dismiss his case based on a denial of his constitutional right to a speedy trial, a court first must consider whether the case has been delayed for long enough to raise a presumption of prejudice and to warrant a more searching judicial inquiry into the delay. In the usual case, the courts measure the delay from the time the accused is arrested or formally charged by accusation or indictment, whichever occurs first. But in a case like this one—a case in which the accused did not complain of the delay in bringing his case initially to trial, but he complains instead of the delay of a retrial of his case following a mistrial—the courts measure the delay from the time of the mistrial. A delay approaching one year is sufficient in most cases to raise a presumption of prejudice and to warrant a more searching inquiry. Here, following the mistrial in October 2005, nearly eight years passed before the case was restored to the trial calendar and the trial court eventually granted Alexander's motion in September 2013. Therefore, the Court found, the trial court properly found that this delay raised a presumption of prejudice and that a more searching inquiry was warranted.

The four factors to be considered under *Barker v. Wingo* are 1) the length of the delay; 2) the reason for the delay; 3) the assertion of the right to a speedy trial; and 4) prejudice to the defendant. As to the first factor, the Court found that the trial court did not err in finding the delay in retrying Alexander to be uncommonly long. As to the second factor, the trial court found that more than six years of the delay—the delay that followed the denial in July 2007 of the motion for a new trial for cruelty to children—was attributable to the negligent inaction of the State. The Court agreed with this finding.

As to the assertion of the right, the trial court found that Alexander did not assert his right to a speedy trial until his case was restored to the trial calendar, and thus, Alexander did not assert his right as promptly as he should have. The trial court also found, however, that his delay in asserting his right was mitigated by several circumstances, including that Alexander effectively was without counsel after his motion for new trial was denied, that Alexander was incarcerated until June 2009, and that Alexander had a limited education. Accordingly, the trial court weighed the failure of Alexander to assert his right more promptly against him, but only lightly. Again, the Court found that under the circumstances, this finding was not an abuse of discretion.

As to the last factor, prejudice, the trial court found little, if any, actual proof of prejudice. But, it nevertheless found that the presumptive prejudice was substantial, noting that "Alexander would be faced with allegations that are over nine years old," and that circumstance alone "practically impairs putting on a defense." Accordingly, the trial court weighed this factor against the State. The Court stated that especially considering the length of the delay in this case, the trial court did not err by concluding that Alexander suffered prejudice—even if only presumptive prejudice—as a result of the delay.

In balancing all these factors, the trial court found that Alexander was entitled to the relief he requested, and the Court found, this finding was not an abuse of discretion.

Substitution of Counsel; Continuances

Davis v. State, S14A0501 (5/5/14)

Appellant was convicted of malice murder and related crimes. He contended that the trial court erred in denying his motion for continuance after he substituted counsel on the third day of trial. The Court disagreed.

The record showed that after tensions arose between appellant and his appointed counsel, the trial court granted a motion for continuance in August 2011 to allow appellant to find and hire new counsel. Appellant never hired new counsel and his appointed attorney remained until trial. At the pre-trial hearing on December 1, 2011, appellant asked for another continuance, which was denied by the trial court because appellant already had ample opportunity to retain substitute counsel. The trial court further warned appellant that it was not going to allow him to disrupt his trial by trying to replace his attorney mid-proceedings. When the attorney eventually hired by appellant, showed up in court at the start of trial, the trial court warned the prospective retained counsel that it would not grant a continuance if he was hired. As promised, the trial court denied appellant's third request for continuance on the third day of trial after appellant hired the attorney and the retained counsel submitted his entry of appearance.

The Court stated that while every defendant has the right to hire counsel, the defendant must use reasonable diligence in obtaining retained counsel. A defendant may not use a request for change of counsel as a dilatory tactic. Thus, the Court concluded, the trial court did not abuse its discretion in denying appellant's motion for a continuance.

Jury Charges; Judicial Commentary

Wells v. State, S14A0491 (5/5/14)

Appellant was convicted of felony murder, aggravated assault and related charges stemming from the shooting death of the victim. He contended that in a charge to the jury, the trial court commented on the evidence in violation of O.C.G.A. § 17-8-57. The Court disagreed.

The record showed that the trial court charged the jury in part as follows: "The State must also prove as a material element of aggravated assault, as alleged in this case, that the assault was made with a deadly weapon. A firearm when used as such is a deadly weapon as a matter of law. Intent to kill is not an element of aggravated assault with a deadly weapon. A deadly weapon need not be introduced. It is not necessary for the State to admit into evidence *the deadly weapon used by the defendant* in order for the defendant to be found guilty of aggravated assault." (Emphasis supplied).

The Court noted that defense counsel did not object to the charge at trial and thus, to circumvent the "plain error" standard of appellate review for an alleged erroneous jury charge, appellant was attempting to bootstrap the issue into a § 17-8-57 violation. Referring to alleged violations of § 17-8-57 as a sort of "super-plain error" review, the Court stated that not only may they be raised on appeal without any objection at trial, but, if sustained, they automatically result in reversal without consideration of whether the error caused any actual prejudice.

Appellant argued that by saying "the deadly weapon used by the defendant," the trial court improperly expressed its opinion that the gun was a "deadly weapon" and that appellant was the person who used it to

kill the victim. But, the Court found, this mischaracterized the trial court's statement, which was drawn verbatim from *Lattimer v. State*, 231 Ga.App. 594, 595 (1998), in which the Court of Appeals stated, "[i]t is not necessary for the State to admit into evidence the deadly weapon used by the defendant in order for the defendant to be found guilty of aggravated assault." In context, the Court concluded, it was clear that the court was referring to "the defendant" in the generic sense and not to appellant. It was also clear in context that "deadly weapon" was a reference to an element of the crime that the State had to prove, not a factual assertion by the court. Therefore, the trial court did not commit a violation of § 17-8-57.

Venue

Stockard v. State, A13A2176 (3/26/14)

Appellant was convicted of making a false statement (O.C.G.A. § 16-10-20). He contended that the evidence was insufficient because the State failed to prove venue. The evidence showed that two investigators went to the "DeKalb jail" to interview appellant. They picked him up at the sally port behind the jail and then drove around with him, apparently while conducting the interview. At some point during this time, appellant made the false statements for which he was convicted. Appellant was then returned to the jail.

Appellant argued that the State offered no proof that the DeKalb County Jail or the sally port are located in DeKalb County. He also argued that because part of the interview took place while investigators were driving him around and because there was no evidence as to whether they remained in DeKalb County as they drove, the false statement may have been made in another venue.

The Court noted that the State may be able to show circumstantially that the DeKalb County Jail is in DeKalb County. Thus, the Court stated, "We cannot say that a factfinder's inference that the DeKalb jail is in DeKalb County is unreasonable." However, even if the interview began in DeKalb County, the Court found, it could not be known what county appellant was in when he made the false statements. The audio recording of the interview indicated that appellant made his initial false statement between 8 and 10 minutes after the recording began, and told the investigators the truth as to his whereabouts between 16 and 37 minutes after the recording began. But, there was no way to tell from the audio recording where the vehicle was when appellant made the false statements.

Nevertheless, the State argued, under O.C.G.A. § 17-2-2(e), if a crime is committed in a car traveling within the state, and "it cannot readily be determined in which county the crime was committed, the crime shall be considered as having been committed in any county in which the crime could have been committed through which the . . . vehicle . . . has traveled." Also, O.C.G.A. § 17-2-2(h) provides that where "it cannot be determined in what county a crime was committed" there is proper venue "in any county in which the evidence shows beyond a reasonable doubt that it might have been committed." But, the Court found, this Code section offers "a mechanism" by which the constitutional mandate that criminal trials be held in the county where the crime was committed can be carried out when the place in which the crime is committed cannot be determined with certainty. Here, because the State made no attempt to elicit evidence as to where the crime occurred, the Court was unable to say that the county in which the crime committed "cannot be determined" or "cannot readily be determined." Thus, the investigators may well have known which county or counties appellant was in when he made the false statements, but they were never asked to identify any locale. The evidence therefore did not establish that it would have been difficult to determine where the crime was committed, or, necessarily, that the crime could have been committed in more than one county. The State simply failed to present any evidence about counties except that the interview began at the sally port of the DeKalb County Jail. And, absent any attempt by the State to question the investigators on this issue, there was no way to know what could have been determined as to venue.

Finally, the Court stated, because the reversal was based solely on a determination of insufficient evidence of venue, the State was not barred by the Double Jeopardy Clause from retrying appellant, so long as venue is properly established on retrial.

Search & Seizure

Williams v. State, A14A0417 (4/30/14)

Appellant was charged with felony possession of marijuana. The trial court denied his motion to suppress, but granted a certificate of immediate review. The Court of Appeals granted the interlocutory appeal.

The evidence showed that law enforcement officers had noticed a heavy amount of foot traffic in and out of Apartment J in a particular apartment complex. On a pretext of receiving a 911 call, an officer went to the door and knocked. When the door was opened, the officer smelled a strong odor of marijuana coming from the apartment. The office then left, but only after being informed that the 911 call did not come from that apartment.

The officers then set up surveillance on the apartment and determined that they would "basically" stop everyone who was observed going into and out of Apartment J. Appellant was a passenger in a vehicle that arrived an hour after the surveillance began. He was seen going into Apartment J with a backpack, staying inside for less than 5 minutes, leaving the apartment with his backpack, and re-entering the vehicle which brought him there. The vehicle was subsequently stopped after it left the apartment complex. The officers who made the stop smelled marijuana emanating from the vehicle. A subsequent search of the vehicle based on the smell of the marijuana, revealed marijuana found in the backpack which appellant was subsequently charged with possessing.

Appellant contended that the trial court erred because there was no lawful justification for stopping the vehicle in which he was a passenger. The Court agreed and reversed. Citing *Hughes v. State*, 269 Ga. 258, 259-260 (1) (1988), and *State v. Hopper*, 293 Ga.App. 220 (2008), the Court found that the vehicle was stopped only because appellant's conduct appeared to fit a pattern of behavior of individuals who were going quickly in and out of a location where police knew drugs were present and suspected drugs were being sold. The arresting officer testified that "basically . . . whoever is observed going into Apartment J and leaving" was being stopped, and that appellant was stopped solely for this reason. Furthermore, although the officer testified that other "stops and/or arrests" had been

made that day of individuals engaging in this conduct, the officer gave no indication that all, or indeed any, of those stops yielded arrests for contraband. Nor did the officer have any knowledge about appellant or any previous drug-related activity on his part. Thus, it was appellant's conformity to a general pattern of behavior, and not a particularized suspicion, that led to the stop. But, the Court found, Georgia case law is clear that, absent some *particularized* suspicion of wrongdoing, merely acting in a way that fits a known "pattern" of criminal activity does not justify an investigatory stop. Accordingly, the Court held, the investigative stop in this case was not based on a particularized and objective suspicion that appellant was engaged in criminal activity and therefore, the evidence found during the search should have been suppressed.

Guilty Pleas; Boykin Rights

Dillard v. State, A14A0278 (5/1/14)

Appellant appealed from the trial court's denial of his motion to withdraw his guilty plea to voluntary manslaughter. Specifically, he contended that the plea was not freely and voluntarily made because the trial court failed to inform him of the constitutional right to confront his accusers. The Court disagreed.

In *Boykin v. Alabama*, the Supreme Court held that when a defendant pleads guilty, he must be adequately advised of his rights (1) against self-incrimination, (2) to trial by jury, and (3) to confront his accusers. Here, the Court found, while the record showed indisputably that the trial court did not inform appellant of the right to confront his accusers on the record during the plea hearing, it did contain the "sworn statement of defendant," which clearly informed appellant of that right, and appellant signed the form to affirm his understanding and that he had conferred with his attorney regarding it. Further, in response to inquiry by the trial court, appellant acknowledged on the record that he understood the substance of the form and had reviewed it with his attorney. And because nothing in *Boykin* requires the use of any precisely-defined language or "magic words" during a guilty plea proceeding, the form's inclusion of the "right to confront the witnesses against" appellant adequately conveyed, in a manner reasonably intelligible to him, the core principles of the right to confront his accusers. Accordingly, the Court concluded, despite the trial court's failure to include the right to confront his accusers in its colloquy with appellant, there was clear evidence demonstrating that he was apprised of the three *Boykin* rights.

Sentencing; Merger

Petro v. State, A14A0039 (5/1/14)

Appellant was convicted on two counts of aggravated assault, two counts of terroristic threats, two counts of possession of a knife during the commission of a crime, and one count of family violence battery based on an altercation he had with his girlfriend and her ex-boyfriend. He contended that his convictions for terroristic threats should have merged into his convictions for aggravated assault for sentencing purposes.

The Court stated that Georgia law bars conviction for a crime that arises from the same criminal conduct included as a matter of fact or as a matter of law in another crime for which the defendant has been convicted. When the same act or transaction constitutes a violation of two distinct criminal statutes, the Court applies the "required evidence" test adopted *in Drinkard v. Walker*, 281 Ga. 211 (2006), to determine whether one crime is included in the other pursuant to O.C.G.A. § 16-1-6(1). Under this test, to prove the two counts of aggravated assault, the State had to show that appellant committed an assault upon his girlfriend and her ex-boyfriend with the knife, an object, which when used offensively against another, is likely to result in serious bodily injury. To prove the two counts of terroristic threats, the State had to show that appellant threatened to murder his girlfriend and her ex-boyfriend, with the purpose of terrorizing them. Thus, the crimes of aggravated assault required proof of an assault with a knife upon the girlfriend and ex-boyfriend, while the crimes of terroristic threats required proof that appellant threatened to murder them. As such, the crimes of aggravated assault and terroristic threats required the State to prove at least one fact different from the other and no merger occurred.

Nevertheless, appellant argued, the indictment in this case alleged in its entirety that appellant committed aggravated assault with a butcher knife "by moving toward [his girlfriend and her ex-boyfriend] while brandishing said knife *and threatening to kill* [them]." (Emphasis supplied.) Appellant contended that, given the specific way in which the indictment alleged that the aggravated assaults were committed and had to be proven at trial, the terroristic threats were lesser included offenses and thus merged into the aggravated assaults as a matter of fact. The Court disagreed.

In applying the *Drinkard* test, the Court must consider the crimes as indicted and not every possible manner of committing a particular crime. But, the Court found, this rule did not change the result in this case. Thus, because the aggravated assault statute requires proof of only one act, inclusion in the indictment of more than one such act is mere surplusage, which is unnecessary to constitute the offense, and need not be proved, and may be disregarded. Here, evidence of appellant "moving toward [his girlfriend and her ex-boyfriend] while brandishing [the] knife" as alleged in the indictment was sufficient to sustain his convictions for aggravated assault, separate and distinct from any verbal threat made by him to kill the victims. Therefore, the Court found, the language in the aggravated assault counts of the indictment referring to a "threat to kill" the girlfriend and ex-boyfriend constituted an unnecessary specification of a legally unnecessary fact, and was "mere surplusage" that was not required for proving those offenses. As such, the State was not required to prove a "threat to kill" the girlfriend and ex-boyfriend to establish both the offenses of aggravated assault and terroristic threats, and so the crimes of terroristic threats were not mere lesser included offenses of the crimes of aggravated assault in this case.