

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 3, 2009

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THIS WEEK:

- **Conspiracy; Statements**
- **Ineffective Assistance of Counsel**
- **Out-of-Time Appeal; Guilty Plea**
- **Search & Seizure**
- **Speedy Trial**
- **Criminal Contempt**
- **Sentencing; Vindictiveness**
- **Discovery; Chain of Custody**
- **Search & Seizure**
- **Limiting Instructions; Plain Error**
- **Ex Post Facto Laws; Evidence**
- **DUI; Discovery**
- **Prosecutorial Misconduct; Mistrial**

Conspiracy; Statements

Thorpe v. State, S09A0242

Appellant was convicted of murder and related charges after he and three co-conspirators killed the victim during an attempted robbery. Appellant argued that the trial court improperly applied the hearsay exception for statements of co-conspirators by permitting a witness to testify regarding a conversation he participated in the day after the crime, in which appellant and his co-defendants stated that appellant shot the female victim and a co-conspirator hit the male victim with the gun used in the attempted robbery. OCGA § 24-3-5 provides that “[a]fter the fact of conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all.” Appellant argued that the State was al-

lowed to introduce the statement without first establishing a prima facie case of conspiracy. However, the Court held that notwithstanding the language of the statute, such hearsay statements are admissible when the State at some point before the close of evidence establishes a prima facie case of conspiracy independent of the co-conspirator statement. Here, the State presented ample evidence that appellant and his three co-conspirators planned to commit a robbery that night.

Appellant also argued that the trial court erred by admitting into evidence the secretly-taped telephone conversation between appellant and a co-conspirator who turned state’s evidence in which appellant replied affirmatively to the co-conspirator’s statement that “if you wouldn’t have shot [the murder victim], we’d have been all right.” Appellant asserted that because the co-conspirator was acting as an agent of the State unbeknownst to appellant at the time of the conversation, the statement was involuntarily made and thus inadmissible under due process and under OCGA §§ 24-3-50 and 24-9-20. The Court held that whether a statement was voluntarily made is determined based on the totality of the circumstances. The mere fact that an incriminating statement was procured through artifice or deception does not render the statement involuntary as long as the means employed were not calculated to elicit an untrue statement. Here, “the elicitation of appellant’s unguarded response to a perceived confidante regarding the circumstances of the crimes in which they had both participated was clearly designed to procure an unfiltered, genuine statement from appellant.” Further, neither incentives nor threats were involved in appellant’s decision to converse with the co-conspirator. Therefore, no violation of OCGA § 24-3-50 occurred and the

admission of appellant's recorded statement was not clearly erroneous.

Ineffective Assistance of Counsel

Bennett v. State, A09A1311

Appellant was convicted of aggravated battery, aggravated assault, and cruelty to children based on an incident in which he beat his girlfriend's ex-husband with a pipe, but claimed self-defense. Appellant claimed his trial counsel was ineffective for not attempting to admit evidence of the violent reputation of the victim. In *Chandler v. State*, 261 Ga. 402, 407 (3) (1991), the Supreme Court of Georgia held that evidence of specific acts of violence by a victim against a third person may be admissible when the defendant claims justification. In order to admit evidence of the victim's violent acts against a third person, the defendant must, among other things, make a prima facie showing that in the incident being tried, the victim was the aggressor, the victim assaulted him, and he was honestly trying to defend himself. The same showing must be made in order for the defendant to introduce evidence of the victim's general reputation for violence. Defense counsel was aware of a prior act of violence by the victim, but erroneously concluded that it was inadmissible under *Chandler* because he believed that *Chandler* applied only to violent acts occurring prior to the acts being tried. However, the Court held, it has previously found that a victim's act of violence need not have occurred prior to the act being tried in order to be admissible under *Chandler*. Defense counsel's decision not to introduce the evidence was based solely on his misunderstanding of the law and constituted deficient performance. In addition, because justification was appellant's sole defense, evidence of the victim's prior assault with a gun on another ex-wife and the man leaving her residence were highly relevant to appellant's defense. It therefore could not be harmless error.

Out-of-Time Appeal; Guilty Plea

Smith v. State, A09A1059

Appellant pled guilty but mentally ill to three counts of child molestation and two counts of aggravated child molestation. He

contended that the trial court erroneously denied him an out-of-time appeal. Appellant claimed that his guilty plea should have been set aside because the trial court failed to advise him as to the effect of the plea on his immigration status. However, the Court held, the effect of a guilty plea on a resident alien's immigration status is a "collateral consequence" of the plea, and a guilty plea will not be set aside because the defendant was not advised of such a possible collateral consequence. The Court also held that while the record did not contain a statement by a court official explicitly telling appellant that he had the right to not "incriminate" himself, to "confront witnesses" or to "remain[] silent," the State need not show that Uniform Superior Court Rule 33.8 was recited to the letter to rebut an attack on a guilty plea. If the record permits the conclusion that the accused has a full understanding of the concepts involved, the appellate courts will not invalidate a guilty plea for failure to use the precise language of those rights. Here, the Court concluded, appellant was adequately apprised of the rights he was waiving by pleading guilty but mentally ill, and he was not entitled to revoke his guilty plea.

Search & Seizure

Proctor v. State, A09A0766

Appellant was convicted of trafficking in cocaine and possession of MDMA. He argued that the trial court erred in denying his motion to suppress. The evidence showed that appellant was stopped after following another car too closely. The officer gave appellant his citation and his license and then asked for consent to search which appellant gave. Appellant contended his consent was invalid because it followed an unreasonably prolonged detention by the officer. The Court disagreed. If a driver is questioned and gives consent while he is being lawfully detained during a traffic stop, there is no Fourth Amendment violation. However, a seizure that is justified solely by the interest in issuing a warning or ticket to the driver can become unlawful if it is prolonged beyond the time reasonably required to complete that mission. Consent given pursuant to a request made after the motorist has been detained for an unreasonable time is not a valid consent and contraband found during a subsequent search is the "fruit of the poisonous tree." A reasonable time includes the time nec-

essary to verify the driver's license, insurance, registration, and to complete any paperwork connected with the citation or a written warning. A reasonable time also includes the time necessary to run a computer check to determine whether there are any outstanding arrest warrants for the driver or the passengers. Here, the Court found, the evidence showed that the officer sought appellant's consent to search his vehicle after giving his name to dispatch but before the result on the computer check had come back. Therefore, the officer's request for consent, which occurred during the pending computer check on appellant's name, did not result from an unduly prolonged detention and the consent obtained was valid.

Minor v. State, A09A1172

Appellant was convicted of manufacturing methamphetamine, criminal attempt to manufacture methamphetamine, possession of methamphetamine, tampering with evidence, and possession of marijuana. He argued that the trial court erred in denying his motion to suppress. The evidence showed that DFACS and a law enforcement officer went to appellant's house after receiving a report that appellant's minor children were being exposed to illegal drugs. The officer pulled into the driveway and behind a vehicle in which appellant was a passenger. Appellant got out of the car and approached the officers. He smelled of raw marijuana. The police officer asked to search the vehicle and the owner gave consent. The officer found marijuana seeds and stems. The officer then told appellant that he was not free to go and that they would not let him into his house before they obtained a warrant. Additional police officers arrived. Appellant had a fanny pack that he took out of the car. At one point during the wait for the warrant, appellant ran into the house, clutching his fanny pack and tried to lock the officers out. The officers subdued him and brought him back outside. After a two hour wait, the warrant was obtained. The officers found drugs and other paraphernalia in the fanny pack. The officers also discovered what appeared to be equipment for a meth lab under a tarp approximately 50 yards behind the house.

Appellant contended that the initial detention was not supported by articulable reasonable suspicion justifying the stop. The Court held that this was not a second, but

rather a first tier encounter and thus, the officers did not need articulable reasonable suspicion. Although the vehicle in which appellant was a passenger was about to leave his residence, it was not moving at the time that the officer pulled her vehicle into the driveway and parked behind it. Furthermore, appellant exited the vehicle and freely approached the officer and the DFCS investigator as they approached him, and there was no evidence that the officer restrained appellant's movements by physical force or show of authority.

Appellant also contended that the delay of two hours while waiting for the search warrant was an unlawful arrest. The Court held that the delay was not a brief detention under a Terry stop and was in fact an arrest of appellant. However, the arrest was lawful given the fact probable cause existed to arrest him because appellant smelled of marijuana and the officers found stems and seeds in the vehicle. Also, appellant's flight into the house justified the officers' entrance into the house under exigent circumstances and an arrest of appellant for obstruction of justice. The officers could have searched the fanny pack then and there as incident to the arrest for obstruction.

Finally, appellant argued that the affidavit for the warrant lacked probable cause. The Court held that premitting that issue, the evidence was admissible because the fanny pack could have been searched incident to arrest for obstruction and the only other place in which evidence was found was the shelter 50 yards from the house. This, the Court determined, was not within the curtilage and thus, no warrant to search it was necessary.

Kennedy v. State, A09A0430

Appellants were convicted of burglary. They challenged the admission of evidence of another burglary that was the basis of a similar transaction presented by the State. The evidence showed that during the early morning hours an officer received a call of a burglary at a gas station at an interstate exit. After checking that site, the officer knew from experience that burglars often hit other sites along the interstate. He therefore decided to check the next exit up for suspicious activity. He noticed a Suburban parked in the far dark corner of a Chevron station that had been closed for the night. The vehicle had its hood up and two men, the appellants, stated that their vehicle

was overheating. The officer thought this suspicious since there were two other stations at that exit that were open and the appellants were working on the vehicle in the dark. The appellants were unusually "jittery" and "nervous" and kept moving in and out of the vehicle. The officer became concerned for his safety because there "was two of them and one of [him]" and because at one point appellants split up and one got behind the officer. Also the vehicle had very tinted windows and the officer could not see inside although he did spot a bag in the back when one of the back doors was opened. When a backup officer arrived, he looked into the vehicle through an open door and saw a bag. He pulled the bag out and dumped its contents on the ground. The bag contained stolen cigarettes from the burglary.

The Court held that the search of an automobile's passenger compartment, limited to those areas in which a weapon may be placed or hidden, is permissible if the officer possesses a reasonable belief based on specific and articulable facts which, taken together with the rational inferences from those facts, reasonably warrant the officer in believing that the suspect is dangerous and the suspect may gain immediate control of weapons. In order to justify a search of a vehicle for weapons, some conduct on the part of the occupants such as furtive movements or other indications of danger to the officer must be shown, and the officer must have an objectively reasonable belief that the occupants of a vehicle are potentially dangerous. The trial court denied the motion, concluding that the appellants acted suspiciously, both in attempting to conceal the contents of the Suburban and in apparently moving to surround the officer. Moreover, because the officer had no plans to arrest appellants, he knew they would be returning to the Suburban, with the unknown and potentially dangerous item within. Therefore, under the applicable standard of review, the Court held that it could not "say that the evidence *demand*s a contrary finding."

Speedy Trial

Hayes v. State, A09A0403

Appellant and two co-defendants were indicted for aggravated assault, aggravated battery, and cruelty to children. She argued that the trial court erred in denying her motion to dismiss the indictment on constitu-

tional speedy trial grounds. The Court agreed, holding that the trial court lacked evidence on which to base certain of its findings and that it misapplied the relevant law. The record showed that Appellant was indicted in March, 2003. A week later, she was arrested. In Jan., 2004, having conducted no further investigation and having kept appellant incarcerated for ten months, the State dead-docketed the indictment against her and she was released from jail. Forty-two (42) months later, she was re-indicted with her two co-defendants in September, 2007. She asserted her constitutional speedy trial rights three months later in January, 2008. A hearing on the motion was not held until September, 2008.

Utilizing the *Barker – Doggett* balancing test, the Court first held that the trial court properly found that the delay in this case was sufficient to trigger an analysis of appellant's speedy trial claim, but thereafter erred by failing to accurately determine the 54 month length of the delay and by failing to weigh the length of that delay in conducting the *Barker – Doggett* analysis. The Court held that this delay must weigh heavily against the State because the State was unable to articulate any reason for the 54 month delay in bringing the case to trial, other than its own, intentional choices.

Second, the reasons and responsibility for the delay also weighed heavily against the State. The trial court found that the delay in this case resulted from the State's negligence. The Court, however, held that the trial court erred in finding that the reasons for the delay were "administrative" and "benign," and that the conduct was negligent rather than intentional. Thus, although the trial court found that this factor should weigh only slightly against the State, the Court found that the State made an intentional decision to dead-docket, rather than dismiss the case and therefore, this factor should weigh heavily against the State.

The trial court further erred in finding that the timeliness of the assertion of a constitutional right to a speedy trial weighed against the appellant. The Court found that appellant did not have to file a statutory speedy trial demand and that all that was expected of her was that she assert her constitutional speedy trial rights "in due course." Here, the factor could not be weighted against her because after she was re-indicted, she was appointed new counsel. That counsel asserted her rights within three to four months of her second indictment.

Finally, the Court held that the trial court erred in finding that the fourth factor, prejudice, weighed against appellant because she did not present any evidence of actual prejudice to her defense resulting from the pre-trial delay. Instead, the Court held that the delay was six months shy of five years which the Court has held is presumptively prejudicial under this factor. But, given that the other three factors weighed against the State, the prejudice could be presumed in this case.

Criminal Contempt

Hayes v. State, A09A0198

Appellant pled guilty to DUI per se under a negotiated sentence. The record showed that after the morning plea, appellant's counsel left and appellant went to meet with a probation officer. Someone in the probation office smelled alcohol on his breath and reported it to the prosecutor who notified the court. Appellant was given an alco-sensor test which was positive. At approximately 12:30 p.m. he was given an Intoxilyzer test which registered .035. The trial court set aside his plea because he feared that the appellant was under the influence at the time he entered his plea. The court also held him in contempt for appearing in court with alcohol on his breath. Appellant contended that the trial court erred in setting aside his plea and holding him in contempt.

The Court held that the trial court was within its discretion in setting aside the plea. In a criminal case, a trial court has the inherent power to modify, suspend, or vacate a judgment through the end of the term in which the judgment is rendered so long as it is for a "meritorious purpose." Here, the trial court properly acted within its discretion by vacating the plea and sentence to support the "meritorious purpose" of ensuring that the plea was made voluntarily and intelligently.

Appellant also argued that the trial court erred in finding him in contempt. The Court agreed. First, it noted that the procedures employed by a court in making a finding of contempt depend upon whether the acts alleged to constitute the contempt are committed in the court's presence or are committed out of the court's presence. The former is direct contempt and the latter is indirect contempt. Summary adjudication is appropriate in cases of direct contempt but not for indirect contempt. For indirect contempt, due process entitles the

person to more normal adversary procedures. Here, the actions were committed in the court's presence even if the court was not aware of it at the time it occurred. Thus, the act of appearing in front of the judge in an inebriated condition was subject to direct contempt.

However, the Court held, the contempt was criminal, not civil. Civil contempt imposes conditional punishment as a means of coercing future compliance with a prior court order whereas criminal contempt imposes unconditional punishment for prior acts of contumacious behavior. Criminal contempt must be proven beyond a reasonable doubt. The record here contained only the judge's statement that some unidentified probation officer reported smelling alcohol on appellant's person, that he had failed an alco-sensor test and the prosecutor's statement that the Intoxilyzer printout showed that he registered .035. This was insufficient proof to establish the direct criminal contempt beyond a reasonable doubt.

Sentencing; Vindictiveness

Hawes v. State, A09A1168

Appellant originally pled guilty to enticing a minor for indecent purposes, statutory rape, and contributing to the delinquency of a minor. The trial court sentenced him to 5 years. He then was allowed to withdraw his plea following a successful habeas petition. A jury then convicted him of the three crimes and the court sentenced him to 15 years. He contended that the sentence was unconstitutionally vindictive. The Court held that it is not error for a trial judge to impose a greater sentence upon a defendant after he has heard the evidence at trial than he might have imposed in conjunction with a guilty plea. Here, the trial judge concluded that an enhanced sentence was warranted because of material differences between the facts presented during the negotiated plea hearing and the trial. Specifically, the trial judge noted that the court did not hear the specific evidence or testimony from the victim or witnesses regarding the nature of the crimes when it accepted the plea. Thus, sufficient justification existed to warrant the increase in appellant's sentence.

Discovery; Chain of Custody

Scott v. State, A09A0608

Appellant was convicted of trafficking

in cocaine. He contended that the trial court erred in denying his motion for a continuance or a mistrial after the State disclosed the identity of a chain of custody witness at trial. The evidence showed that during the cross-examination of the arresting officer, the issue of chain of custody was raised. The State thereafter learned that another officer had transported the drugs to the crime lab and informed defense counsel and the court. The trial court allowed the newly identified witness to testify but gave the appellant an opportunity to question the witness beforehand.

The Court held that where there has been a discovery violation concerning the identity of a witness, a trial court has the discretion to 1) order the State to permit an interview of the witness; 2) grant a continuance; 3) upon a showing of prejudice and bad faith, prohibit the State from presenting the witness not disclosed; or 4) enter such other order as it deems just under the circumstances. Since the State did not know of the witness prior to trial and there was no evidence of bad faith by the State, the trial court did not abuse its discretion in this case.

Limiting Instructions; Plain Error

Mullins v. State, A09A0382

Appellant was convicted of terroristic threats against his wife. He contended that the trial court erred in not giving sua sponte limiting instructions after certain testimony and that the failure to do so was plain error. The transcript showed that the investigating officer testified about the victim's bleeding, swollen lip and swollen face and his observations of a chair and a six foot plant lying on the floor at the scene. When the prosecutor asked the officer if his observations of the victim's injuries were consistent or inconsistent with the victim's statements, he replied that they were "consistent." The State then inquired whether the victim's statements were consistent or inconsistent with her statement about the disarray in the room. Trial counsel objected, arguing bolstering, and the trial court sustained the objection on the grounds of asked and answered. The Court held that a witness' credibility may not be bolstered by "the opinion of another, even an expert, as to whether the witness is telling the truth. Credibility of a witness is a matter solely within the

province of the jury. But, it is not improper bolstering for a witness to express an opinion as to whether objective evidence in the case is consistent with the victim's story. Inasmuch as the officer's responses merely indicated whether the victim's statements were consistent with his observations of her injuries and the disarray in the room, his testimony did not constitute improper bolstering or a comment on the victim's veracity. Therefore, the trial court did not err in failing to give a sua sponte limiting instruction following the alleged bolstering.

Appellant also argued that the trial court erred in failing to give a sua sponte limiting instruction following testimony about prior difficulties between the victim and him. The transcript showed that when the State asked the victim's daughter why the victim went to the hospital, she replied, "because [appellant] beat her half to death just like he's done before." Thereafter, defense counsel asked the daughter whether the victim wore dark sunglasses because of eye problems. The daughter responded that her mother had eye problems because of a prior incident where the appellant strangled her mother and broke blood vessels in her eye causing permanent damage. Appellant did not object to any of this testimony. The Court held that absent an objection and request for a limiting instruction, the trial court did not err in failing to give a sua sponte limiting instruction at the time the evidence was admitted. "While the better practice would have been to give such instruction at the time the evidence was admitted had a request been made, the trial court gave the jury an instruction on prior difficulties evidence in its jury charge." Moreover, plain error occurs only in exception circumstances such that the error is so clearly erroneous as to result in a likelihood of a grave miscarriage of justice or which seriously affects the fairness, integrity or public reputation of a judicial proceeding. The circumstances of this case did not amount to plain error.

Ex Post Facto Laws; Evidence

Duke v. State, A09A0721

Appellant was convicted under OCGA § 16-6-1 of three counts of forcible rape of his daughter. He argued that the trial court erred in denying his plea in bar because the statute of limitations had run. The record showed that

the rapes occurred between January 1, 1992 and April 30, 1994, when the victim was then between 13 and 15 years of age. She kept silent about it until 2007. Appellant was indicted in January of 2008. Appellant argued that the applicable statute of limitations should have been the 7 years under OCGA § 17-3-11 as it existed prior to 1996.

The Court disagreed. The statute of limitations for rape was amended to 15 years in 1996. OCGA § 17-3-1. The legislature also provided a tolling provision set forth in OCGA § 17-3-2.1: The limitations period within which a prosecution of the rape of a victim under 16 years of age must be commenced "shall not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement agency . . . whichever occurs earlier." The Court held that a penal statute enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution. Here, the trial court correctly concluded that the State had 15 years from the victim's 16th birthday on January 12, 1995, or until January 12, 2010 to prosecute the case. Since the indictment in this case was filed on January 8, 2008, the prosecution of appellant's case was within the statute of limitations and did not violate the prohibition against ex post facto laws.

Appellant also contended that the trial court erred in failing to admit letters written by the victim to him and family photographs into evidence. Appellant sought to introduce the evidence to show the happy relationship he had with the victim. The Court held that "[t]he fact that [appellant] allegedly had a positive relationship with the victim is irrelevant to whether [appellant] committed the rapes and has little or no probative value." Moreover, appellant was allowed to thoroughly examine the victim and elicit testimony that she had a good relationship with appellant such that she loved him, shared holidays, and attended family activities with him.

DUI; Discovery

Mathis v. State, A09A0962

Appellant was convicted of two counts of DUI and other charges. He argued that the trial court erred by not granting his motion to discover from the State the Intoxilyzer 5000 computer software program or "source code"

so he would know what calculations and presumptions are programmed into the devices. He also argued that the trial court erred in not allowing a retired City of Atlanta police officer to testify that the Intoxilyzer 5000 test results are generally unreliable. The Court held that pretermitted whether the Intoxilyzer 5000 source code comes within the ambit of items which can be subpoenaed from the State, before discovery will be ordered the defendant must make a prima facie showing that the requested evidence is within the possession, custody, or control of the State. Since appellant made no such showing, he failed to meet his burden. The trial court therefore did not abuse its discretion by denying his motion.

The Court also held that the trial court did abuse its discretion regarding appellant's alleged expert on the intox machine. First, the retired officer may have had extensive experience operating the machine, but there was no evidence that he was an expert in the area of the reliability of the Intoxilyzer 5000. Second, the witness' experiences with similar machines over the years would not prove that the machine used in this case gave an inaccurate reading for appellant. Here, the officer who conducted the test on appellant testified that the machine was working properly at the time of his test. Therefore, the evidence was not relevant.

Prosecutorial Misconduct; Mistrial

Kim v. State, A09A1466

Appellant was convicted of trafficking in methamphetamine. He argued that the State committed prosecutorial misconduct by improperly eliciting inadmissible character evidence and the trial court erred in denying his motion for a continuance or for a mistrial. The record shows that in a pretrial motion-in-limine hearing the prosecutor promised not to raise appellant's alleged membership in a gang. The prosecutor asked no questions regarding the issue during his direct examination of the accomplice. However, during cross-examination, appellant got his accomplice to admit that the accomplice was a member of the Asian Crip gang. Following up on this line of inquiry during re-direct, the prosecutor asked, "[w]hen [defense counsel] asked you, you said you are a member of the Asian Crip gang?" to which the accomplice responded, "Yes, sir, and [ap-

pellant] is too.” The court sustained appellant’s objection to this testimony but denied his motion for mistrial, finding that the accomplice’s response to the question, “while responsive in part, carried over further and included more information than that solicited by [the prosecutor].” The court then twice instructed the jury to disregard the nonresponsive testimony regarding appellant’s alleged connection with some group or organization.

The Court held that the trial court properly found that the prosecutor did not solicit the comment by the accomplice and that therefore there was no prosecutorial misconduct. Moreover, a nonresponsive answer that impacts negatively on a defendant’s character does not improperly place the defendant’s character in issue. But, the Court held, even if it did, the decision to give curative instructions to the jury rather than grant a motion for mistrial following the introduction of bad character evidence is within the discretion of the trial court and is not error.

The Court also held that the once a trial court has issued a curative instruction, failure by the defendant to timely renew his motion for mistrial waives any error in the denial of that motion. The renewal must occur immediately. It is not timely if it comes at the close of all the evidence, at the close of the State’s evidence, or following the completion of the witness’s testimony and that of a subsequent witness. Here, appellant waited until after the close of all the evidence and the charge conference before renewing his motion for mistrial. Therefore, he waived the issue.