

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JULY 20, 2018

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**Todd Ashley**  
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and Crimes Against Children  
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State Prosecutor

**Austin Waldo**  
State Prosecutor

**Lee Williams**  
SAKI Prosecutor

## THIS WEEK:

- **Venue; Sufficiency of the Evidence**
- **DUI; Preservation of Evidence**
- **Statute of Limitations; Tolling Provisions**
- **Forfeiture Hearings; Continuances**
- **Motions to Withdraw Guilty Pleas; Jurisdiction**
- **Post-conviction DNA Testing; OCGA § 5-5-41 (c)**
- **Release from Requirements of Sexual Offender Registration; Remands after Appeal**

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### **Venue; Sufficiency of the Evidence**

*In re M. C., A18A0006 (5/24/18)*

The Walton County Juvenile Court adjudicated appellant delinquent for having committed the offenses of aggravated assault upon a peace officer, attempting to elude a police officer, obstruction of an officer, and reckless driving. The evidence showed that while an officer with the Loganville Police Department was on patrol, his “tag reader” alerted him to a passing stolen vehicle, driven by appellant. The officer pursued the vehicle as it accelerated and drove through a grass field and a parking lot, and then onto Highway 78. Additional officers joined the chase, during which appellant drove at speeds of up to 126 miles per hour. During the pursuit, which spanned at least six miles, appellant swerved and drove directly toward two of the police cars. Eventually, appellant crashed into a tree, and he and the other juvenile in the vehicle fled on foot. Officers chased and apprehended them at the scene.

Appellant argued that the evidence was

insufficient to support the verdict as to all counts because the State failed to establish venue in Walton County. The Court noted that the officer who initiated the chase testified that he first observed appellant while sitting in his patrol car on Highway 78, and he then began pursuing appellant in an attempt to catch up with him. The officer later turned on his patrol car's lights and sirens on Highway 78 in Walton County. The evidence shows that appellant did not stop the vehicle in response to the lights and sirens, and therefore, the juvenile court could have found venue proven beyond a reasonable doubt for the charge of attempting to elude a police officer.

However, the Court found, having thoroughly reviewed the record, including the video footage of the police chase, the State failed to prove venue beyond a reasonable doubt for the charges of reckless driving, aggravated assault on the two officers, and obstruction. Specifically, the State charged appellant with reckless driving by traveling at a high rate of speed and disregarding traffic control signals. The aggravated assault charges were premised on appellant's swerving and driving toward two officers. Lastly, the petition alleged that appellant ran after the crash despite being told to stop. The officer who initiated the chase testified that there was a distance of “six or seven” miles between his turning on his lights and sirens in Walton County, and appellant's eventual car crash. Thus, the offenses occurred at various points along this span of at least six miles, during which the officers “[l]eft the city limits.” Despite extensive testimony regarding the streets, highways and intersections on which all of these offenses occurred, the State failed to elicit any evidence that they occurred in Walton County.

Additionally, the Court found that it could not rely on the officers' employment as additional evidence regarding venue because the testifying officers were employees of the Loganville Police Department, and the record did not show that their jurisdiction was confined solely to Walton County. And, while under OCGA § 17-2-2 (e), “[i]f a crime is committed upon any . . . vehicle . . . traveling within this 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” (emphasis supplied), here, the witnesses explicitly testified as to the location of the reckless driving, the aggravated assaults, and the obstruction. Therefore, the State could have, but simply failed to, elicit that those locations were within Walton County. Consequently, the statute was inapplicable here.

Nevertheless, the State argued, dash camera video footage was entered into evidence and viewed by the juvenile court, and this allowed the juvenile court to observe where the acts occurred. But, the Court stated, the record did not show that the juvenile court took judicial notice of any “geographical facts,” so as to support a finding of venue, nor is it, as a reviewing court, free to resort to judicial notice to legitimize a judgment. Also, there was no evidence here establishing that the entirety of the police chase was within the confines of Walton County, and the State's argument was especially problematic because this chase spanned at least six miles. The Court also found baseless the State's contention that appellant never presented evidence that any part of the incident occurred in a county other than Walton County because it is not appellant's burden; the State's burden never shifts to the defendant to disprove venue. Accordingly, the Court concluded, the State failed to establish venue with regards to the two counts of aggravated assault upon a peace officer, reckless driving, and obstruction of an officer, and the delinquency adjudication as to these offenses was reversed.

## **DUI; Preservation of Evidence**

*State v. Cain, A18A0750 (5/24/18)*

Cain was charged with DUI (less safe) and

DUI (per se). The court granted Cain's motion to dismiss the accusation based on its finding that the State violated Cain's due process rights under the United States and Georgia Constitutions when it acted in bad faith by intentionally failing to preserve evidence within its possession and control. Specifically, a video taken by a camera mounted in the arresting officer's patrol vehicle which showed the field sobriety tests the officer gave to Cain, the officer's arrest of Cain, and the officer's reading of Cain's implied consent rights. The State appealed.

The officer testified that he normally would have downloaded the video from the camera to a server located at the police department, and then downloaded the video from the server to a compact disc to be placed in the case file and preserved as evidence. This was not done in the present case, however, because a malfunction in the system prevented the officer from downloading the video from the camera to the server. The officer became aware of the malfunction about two days after the arrest and attempted to preserve the video by having it downloaded directly from the camera, but the system malfunction prevented the video from being pulled directly from the camera. Although the officer was aware that the camera would only preserve the video for about sixty days, no further attempt was made to obtain the video from the camera and eventually the video was lost.

The Court stated that there is no federal or state constitutional due process requirement that police maintain all material that might be of conceivable evidentiary significance. To determine if a defendant's due process rights have been violated where, as here, the lost evidence could have been exculpatory, but where it is not known that the evidence would have been exculpatory, a court must consider whether the evidence was constitutionally material and whether the police acted in bad faith. Evidence is constitutionally material when its exculpatory value is apparent before it was lost or destroyed and is of such a nature that a defendant would be unable to obtain other comparable evidence by other reasonably available means. Under this standard, evidence is not constitutionally material because it may be “potentially useful” to the defendant's defense — the key is the “apparent exculpatory value” of the evidence prior to its destruction or loss and “apparent” in this context has been defined as readily seen; visible; readily understood or

perceived; evident; obvious.

Applying this test, the Court found no evidence which could support the conclusion that the lost video contained constitutionally material evidence or that the police lost the evidence in bad faith. There was no evidence to support Cain's speculation that the lost video may have contained exculpatory evidence. In fact, all the evidence showed that, when the video was lost, the police had every reason to believe it contained evidence inculpatory of Cain. Neither Cain's speculation that the lost video could have been useful to his defense — nor the trial court's finding that the lost video contained “relevant” and “material” evidence — supported dismissal of the accusation. Thus, the Court concluded, because there was no evidence that Cain's due process rights were violated, the trial court's order dismissing the accusation was reversed.

## **Statute of Limitations; Tolling Provisions**

*Beavers v. State, A18A0086 (5/24/18)*

In 2015, the State indicted appellant for kidnapping, aggravated sodomy (two counts) and rape stemming from a single attack that occurred in 1994. The State alleged in its indictment that “[f]or each of the aforementioned counts of this Indictment to which the statute of limitations applies, [kidnapping, aggravated sodomy, and rape,] pursuant to OCGA § 17-3-1, the Grand Jurors aforesaid also find that deoxyribonucleic acid (DNA) evidence was used to establish the identity of the accused . . .; to wit: said accused was positively identified as having committed the aforementioned crimes by use of DNA results that were obtained on May 22, 2014.” The trial court rejected appellant's plea in bar that tolling provisions of OCGA § 17-3-1 (d) regarding identification using DNA was inapplicable. The Court of Appeals granted interlocutory review and reversed.

The Court found that the DNA-identification tolling provision did not apply in this case because the General Assembly expressly provided, in Section 2 of the Act that established the DNA-identification tolling provision, that the Act would “be effective on July 1, 2002, and apply to crimes which occur on or after July 1, 2002[.]” Thus, the State's reliance on OCGA § 17-3-1 (d) was therefore futile with regard to crimes that occurred before the

date specified in the 2002 Act.

Nevertheless, the State contended, Section 2's effective date conflicted with language in the preamble to the Act identifying as the purpose of the Act "to provide that a prosecution for serious violent offenses may be commenced at any time under certain circumstances[.] The Court disagreed. That the offenses at issue have occurred "on or after July 1, 2002" was plainly one of the "certain circumstances" expressly specified in the Act. At any rate, the preamble to an act, where the provisions of the preamble are not included in the body of the act, is no part of the act and cannot control the plain meaning of the body of the act. Here, the plain meaning of the body of the 2002 Act, which specifies by date the crimes to which the new tolling provision shall apply, is controlling. Thus, the DNA-identification tolling provision did not apply in this case.

The State also argued that the statutory periods of limitation were tolled under the person-unknown tolling provision, OCGA § 17-3-2 (2), because "it was not until the DNA match in 2014 that [appellant] was positively confirmed to be the perpetrator." The Court noted that the record showed that the State raised the person-unknown tolling provision in connection with an earlier, later abandoned, indictment, but did not include it as a basis for tolling in the subject indictment. Under controlling authority, moreover, the person who committed a crime is not "unknown" within the terms of OCGA § 17-3-2 (2) simply because his identity has not been positively confirmed by forensic evidence. Rather, the person-unknown tolling exception applies only where "there is *no identified suspect* among the universe of all potential suspects." (Emphasis added.). And here, the evidence showed that the State had actual knowledge of the defendant's identity as a suspect for the crimes shortly after they were committed because appellant was identified as the primary suspect in the immediate aftermath of the attack in 1994. Thus, the person-unknown tolling provision does not apply in this case.

Accordingly, the Court concluded, the State failed to carry the burden of showing that a crime occurred within the applicable periods of limitation, and therefore, the trial court erred when it denied appellant's plea in bar.

## **Forfeiture Hearings; Continuances**

*Rounsaville v. State of Georgia, A18A0656 (5/24/18)*

The State brought an in personam action against appellant and another person seeking the forfeiture of almost \$100,000.00 in cash, six firearms and other personalty. The facts, briefly stated, show that the hearing was originally scheduled for April 24, within 60 days of service of the complaint. At defense counsel's request, the judge held a conference call on April 20 and agreed to continue the case. However, the parties reached no agreement concerning an alternate date. On June 1, the prosecutor contacted the judge's assistant, asking when the judge would next be in the county for bench trial days. The assistant responded that the judge would be available on June 21 and July 5. Thereafter, the prosecutor emailed defense counsel asking if he would be available on July 5. Defense counsel replied in the affirmative, but the prosecutor did not schedule the trial for that day. Instead, on June 5, the judge signed defense counsel's proposed continuance order. In the blank space counsel left open for the trial date, either the judge or the prosecutor wrote "10/11/17." After the written continuance order was finally entered on July 17, the prosecutor emailed defense counsel and told him that the October 11 date was the next time the judge would be in the county for a non-jury day.

On July 28, the State moved for a continuance for good cause, arguing, among other things, that it had not received the results of drug testing on the suspected methamphetamine seized from appellant's residence. On August 1, appellant moved to dismiss the forfeiture complaint for, among other things, the State's failure to meet the statutory 60-day deadline for conducting a bench trial. After an August 2 hearing on these motions, the court entered an order denying appellant's motion to dismiss and granting the State's motion for a continuance. The Court granted an interlocutory appeal.

The Court noted that OCGA § 9-16-13 sets forth the procedure for in personam forfeitures in Georgia. Among other things, the statute provides that, if the defendant files an answer within 30 days after being served with the complaint, then "a bench trial shall

be held within 60 days after the last claimant was served with the complaint; provided, however, that such trial may be continued by the court for good cause shown." OCGA § 9-16-13 (f). Appellant contended that the State failed to meet the statutory 60-day deadline for conducting a bench trial and that the court, therefore, erred in denying his motion to dismiss. The Court agreed.

OCGA § 9-16-13 (f) requires that a forfeiture trial "shall" be held within 60 days of the date the defendant is served with the complaint, which, in this case, was May 9, 2017. This 60-day requirement is mandatory, not permissive, because the purpose of the statute is to ensure a speedy resolution of contested forfeiture cases in the courts, as well as a speedy resolution of property rights. The trial court may grant a continuance for good cause, but even if a continuance is granted for good cause thereby causing the State to miss the original 60-day deadline, the outermost limits of a continuance would be another 60-day period before either the matter is heard or another continuance is granted. The result of a failure to conduct a hearing within 60 days, or to obtain a good-cause continuance, is a dismissal of the State's complaint.

And here, the Court found, appellant agreed to a July 5 trial date that was within the second 60-day period. Through no fault of his own, the State set the trial date well outside of that period. Nothing in the record indicated that appellant consented to re-scheduling the trial outside the 60-day period or engaged in any conduct that would have constituted a waiver of these statutory requirements. Consequently, the court's order denying appellant's motion to dismiss and granting the State's motion for a continuance was reversed.

## **Motions to Withdraw Guilty Pleas; Jurisdiction**

*Clifton v. State, A18A0746 (5/30/18)*

One week before the end of the term, appellant, with assistance of appointed counsel, entered a non-negotiated guilty plea to VGC-SA, escape and theft by taking. Immediately upon hearing his sentence of thirty years to serve, appellant asked the court for permission to withdraw his guilty plea until he could hire a lawyer to assist him. Appellant's appointed counsel refused to move on appellant's behalf to withdraw the plea, stating, "I just don't do

frivolous litigation.” The trial court verbally denied the motion and advised appellant that he could hire an attorney to assist him in an appeal after the entry of judgment. The judgment was entered the same day. Six weeks later, appellant filed a pro se motion to withdraw his guilty plea. At the motion hearing, appellant requested the appointment of counsel. The court denied the request and subsequently, denied the motion.

In a 2-1 decision, the Court dismissed the appeal. First, the Court held that it did not have jurisdiction to hear the appeal because appellant was still represented by counsel when he filed his motion to withdraw his guilty plea and his notice of appeal following the denial of his motion. The Court stated that the record was devoid of any order permitting the withdrawal of appellant's plea counsel, nor did the record show any appearance by new post-judgment counsel to replace plea counsel. Unless interrupted by entry of an order allowing counsel to withdraw or compliance with the requirements for substitution of counsel, a defense counsel's duty toward the client extends for at least thirty days after the entry of judgment, when a notice of appeal may be filed, and (if longer) through the end of the term at which the trial court enters a judgment of conviction and sentence on a guilty plea, during which time the trial court retains authority to change its prior orders and judgments either on motion or sua sponte for the purpose of promoting justice. Thus, because appellant's notice of appeal was a legal nullity, his appeal was dismissed.

Second, the Court noted that a motion to withdraw a plea of guilty must be filed in the term of court in which the defendant is sentenced, and after the expiration of that term, the trial court lacks jurisdiction to allow the withdrawal of the plea. And here, the Court found, appellant's motion was untimely, which was not surprising given the limited window of opportunity (about one week) and his counsel's refusal to assist, such as by filing a timely, place-holding written motion to allow time for new counsel to be substituted. Thus, the trial court lacked jurisdiction to consider the motion.

Nevertheless, in so holding, the Court state that its ruling does not preclude the filing of a petition for a writ of habeas corpus in the jurisdiction in which appellant is incarcerated. “We cannot evaluate whether [appellant] can

support an argument that his guilty plea was not knowing and voluntary, but it is troubling that the trial court acquiesced in plea counsel's departure from the duties of legal representation the instant that [appellant]'s unfettered right to withdraw his guilty plea ended (that is, when punishment was pronounced from the bench, despite [appellant]'s continuing right to counsel (appointed counsel, if indigent) and [appellant]'s immediately expressed desire to move to withdraw his plea.” And, the Court found, pretermittting whether appellant's motion to withdraw had merit, counsel's lack of participation was the reason the Court was required to dismiss this appeal. Under the circumstances, however, appellant's only available remedy is through a habeas corpus proceeding.

### **Post-conviction DNA Testing; OCGA § 5-5-41 (c)**

*White v. State, A18A0214 (5/30/18)*

Appellant was convicted in 1996 for aggravated assault, burglary, and kidnapping. In 2015, he sought to re-open his case pursuant to OCGA § 5-5-41 (c), which provides those convicted of felony offenses with the ability to request DNA testing of evidence if, among a number of other factors, the identity of the perpetrator of the offense was at issue at trial. Specifically, appellant sought to test workout pants worn by the victim during the incident giving rise to this case and which had been stored for nearly 20 years in a warehouse with no temperature or humidity control. The trial court denied the motion after an evidentiary hearing. The court found that there was a substantial likelihood that the biological specimens, namely epithelial skin cells presumed to be located on the pants, had been materially altered by the effects of light, heat, and humidity, such that the requested testing would no longer meet the standards set forth in OCGA § 5-5-41 (c). The trial court thus ruled that appellant had failed to establish the factors set forth in OCGA § 5-5-41 (c) (7) (A) and (B).

The Court found that because this was the first opportunity for it to review a trial court's ruling under OCGA § 5-5-41 (c) (7) (A) and (B), it must first determine the appropriate legal standard to be applied by the trial court in its consideration of the petitioner's motion under those provisions as well as the Court's standard of review. The Court noted that the language of OCGA § 5-5-41 (c) (7)

provides that the trial court “shall grant the motion for DNA testing” so long as each of the seven factors listed in that subsection have been “established” by the petitioner (emphasis supplied). Although “establishing” a fact is not necessarily the same as “proving” it, a trial judge will necessarily be called upon to resolve factual issues in determining whether the petitioner has “established” each of the seven criteria set forth in OCGA § 5-5-41 (c) (7). Assuming that the criteria have been met, the trial court must also determine whether there is a reasonable probability that the DNA evidence sought by the petitioner, had it been available at his or her trial, would have resulted in a different outcome. Thus, the Court stated, the test is similar to the two pronged test for ineffective assistance of counsel claims established in *Strickland v. Washington*. And thus, the appellate court's standard of review would be similar: highly deferential to the trial court's factual determinations and independent review of the trial court's legal conclusions based on the facts.

Here, the Court noted, the trial court ruled that that there was a substantial likelihood that the biological specimens, namely epithelial skin cells presumed to be located on the pants, had been materially altered by the effects of light, heat, and humidity, such that the requested testing would no longer meet the standards set forth in OCGA § 5-5-41 (c). The trial court thus ruled that appellant failed to establish the factors set forth in OCGA § 5-5-41 (c) (7) (A) and (B) and denied his petition for DNA testing. However, the Court found, the trial court's findings regarding the degradation of the biological material on the pants were inapposite to the set of legal conclusions OCGA § 5-5-41 (c) directs it to draw. It was not up to the trial court to determine from the testimony presented whether sufficient DNA, if any, was transferred to the spandex pants during the attack on the victim or whether it had deteriorated. Rather, the proper question was whether the pants were in a condition that would allow for the requested test to be conducted. Although the witnesses were doubtful that the pants might still contain testable biological material, they could not categorically deny that testable and usable DNA would be found when the pants were subjected to the GBI's testing protocol.

Moreover, that any DNA transferred to the pants during the struggle between the

victim and the perpetrator may have degraded over time, been altered, or become unusable does not speak to whether the evidence — the pants — were available for testing and had been subject to a chain of custody. Under the DNA statute, the evidence to be tested is not the same as the DNA potentially contained therein, as the statute draws a clear distinction between the two. This is a critical statutory distinction that the trial court's consideration of appellant's motion failed to make.

Finally, the Court found, the portions of the DNA statute analyzed by the trial court require the petitioner to make only a threshold factual showing of the listed factors, namely that the evidence to be tested is available and that it has been subject to a chain of custody. The statute does not permit the trial court to speculate as to the viability of any DNA potentially located on the evidence in question. To permit such speculation to factor into whether the petitioner should be afforded the right to test the evidence for DNA in the first instance violates the clear directive of the General Assembly and, as a practical matter, would likely exclude DNA testing of all but the most recently and pristinely stored physical evidence. That violates both the spirit and the letter of OCGA § 5-5-41 (c).

Thus, the Court concluded, because the trial court misapplied the law, it vacated the order denying appellant's motion and remanded the matter to the trial court for further proceedings consistent with its opinion. In light of the legal standards announced and the relatively undeveloped state of the law at the time the trial court considered appellant's motion, the trial court may, in the interests of justice, elect to hold a new hearing on this matter so that appellant and the State may present evidence and arguments both as to the factors set forth in OCGA § 5-5-41 (c) (7) and as to whether there is a reasonable probability that the verdict in appellant's trial would have been different if the results of his requested DNA testing had been available at the time.

### **Release from Requirements of Sexual Offender Registration; Remands after Appeal**

*Royster v. State of Georgia, A18A0467 (5/31/18)*

In 2015, appellant petitioned for release from the requirement that he be registered as

a sex offender that resulted from a 1993 conviction. A person who petitions to be released from the requirement that he be registered as a sex offender must show that he has “completed all prison, parole, supervised release, and probation for the offense which required registration,” OCGA § 42-1-19 (a) (4), and that he meets six other criteria set out in OCGA § 17-10-6.2 (c) (1) (A) through (F). The trial court denied his petition and he appealed. Although the trial court had not specified in denying appellant's petition which criterion or criteria he had failed to satisfy, the Court inferred that the trial court agreed with the State that he was ineligible because the victim had been physically restrained during the commission of the offenses. *Royster v. State of Georgia*, Case No. A16A1711 (March 1, 2017). The Court determined that the only evidence specifically cited by the State to demonstrate that the victim had been physically restrained did not relate to the aggravated molestation charges that resulted in conviction and required sex offender registration; rather, the evidence of physical restraint was directly related to child molestation charges on which the jury had found appellant not guilty. The Court therefore held that the doctrine of collateral estoppel prevented the trial court from considering evidence related to offenses for which appellant had been acquitted. Accordingly, the Court vacated the order and remanded the case for the trial court to determine whether appellant had otherwise satisfied the statutory requirements for eligibility.

On remand, the trial court entered an order summarily denying appellant's petition without specifying any statutory factor he failed to satisfy or otherwise making any findings of fact or conclusions of law. The Court granted appellant's second application for discretionary review. Appellant framed the issue as follows: “can a trial court deny a motion on one specific ground and then, after getting reversed on appeal, deny the motion again but for a wholly different reason?” Under the circumstances in this case, the Court found that the answer is “yes.”

The Court noted that it is plain that a petitioner's failure to satisfy *even one* of the required conditions is disqualifying. Consequently, if the trial court finds any ground for disqualification, it is authorized to deny the petition. In that circumstance, there is no statutory requirement that the trial court make

a determination as to the remaining eligibility factors. And here, the first order denying appellant's petition *did not* indicate that the trial court found that he was precluded from the relief he sought solely because the court thought there was physical restraint. Furthermore, the Court noted, in the previous appeal, it emphasized that, on remand, the trial court would need to determine whether appellant satisfied the statutory requirements necessary for being released from the sex-offender registry.

Moreover, the trial court is vested with the discretion to deny a petition even if a petitioner satisfies every one of the statutory eligibility factors, based on the trial court's assessment of the risk of the petitioner committing future dangerous sexual offenses, a determination the trial court would not have reached in ruling on appellant's petition the first time. The trial court was thus authorized, after denying appellant's petition on one specific ground and being reversed on appeal, to deny the petition a second time for a wholly different reason so long as it followed the Court's directive not to consider evidence of physical restraint related to the jury's not-guilty findings, which it apparently did so.