

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 2, 2015

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Todd Ashley
Deputy Director

Chuck Olson
General Counsel

Lalaine Briones
State Prosecution Support Director

Sheila Ross
Director of Capital Litigation

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

Todd Hayes
Sr. Traffic Safety Resource Prosecutor

Joseph L. Stone
Traffic Safety Resource Prosecutor

Gary Bergman
State Prosecutor

Kenneth Hutcherson
State Prosecutor

Robert W. Smith, Jr.
State Prosecutor

Austin Waldo
State Prosecutor

THIS WEEK:

- **State's Right to Prosecute**
- **Search & Seizure**
- **Speedy Trial; *Barker v. Wingo***
- **Jury Instructions; Sexual Battery**
- **Juveniles; *Alford Pleas***

State's Right to Prosecute

State v. Santiago, A15A1283 (8/28/15)

The State appealed from the dismissal of its indictment. The record showed that Santiago was indicted for false imprisonment (O.C.G.A. § 16-5-41 (a)) and family violence battery. Pursuant to a plea agreement, Santiago pled guilty to false imprisonment in exchange for a dismissal of the battery count. During the sentencing phase of the hearing, the trial court questioned Santiago and his wife, and discovered that Santiago beat his wife after learning that she was having an affair. Shortly after the incident, the couple reconciled, and they were together at the time of the plea hearing. The trial court asked the prosecutor whether the State still wanted to prosecute the case, and the prosecutor responded in the affirmative. The court then asked Santiago and his wife whether they “get in bed together and get it on?” When they responded that they did, the trial court stated that “[t]his is beginning to get a little ridiculous,” and asked Santiago, “Would this conviction be something that you think she would be holding over your head to make you do what she says?” Santiago responded, “Yes.” Defense counsel then asked the trial court to consider misdemeanor treatment, and the

prosecutor objected. The trial court then sua sponte dismissed the case without elaboration.

The Court reversed, finding that it “strongly agree[d]” with the State’s position that the trial court erred. Thus, the Court stated, it was the prosecutor’s decision whether to prosecute the case in light of evidence that Santiago and his wife had reconciled. While the trial court may have disagreed with that decision, the record revealed no legal basis for the trial court to take away the State’s right to prosecute Santiago. In fact, the Court stated, “Not only do we find a lack of legal basis for dismissing the case, we consider the trial court’s questions to Santiago and his wife about her adultery, their sex life, and whether she would hold a conviction over his head highly inappropriate and irrelevant.” Therefore, the Court concluded, by dismissing the case without any legal basis and over the State’s objection, the trial court impermissibly abridged the State’s right to prosecute Santiago.

Search & Seizure

Myers v. State, A15A1388 (9/2/15)

Appellant was charged with misdemeanor possession of marijuana. She contended that the trial court erred in denying her motion to suppress. The evidence showed that an officer noticed a vehicle sitting in front of a house that had no cars in the driveway. The officer also observed that this vehicle contained two occupants and its windows were fogged. The officer parked nearby and approached the vehicle on foot, noticing that the windows were still foggy. He also detected the odor of marijuana and saw that the passenger was beginning to exit the vehicle. The officer

instructed the passenger to sit back down in the vehicle, which the passenger did. The officer then made contact with the driver, appellant, at her window and detected an even more overwhelming odor of marijuana when she rolled down the window. He also observed a hollowed out tobacco wrapper on the ground outside of the driver's door. And when he confronted the occupants about the odor, they denied having marijuana. Thereafter, the officer asked appellant and the passenger to exit the vehicle separately, conducted a pat down of the passenger, and located marijuana and drug paraphernalia on the passenger. He then conducted a pat down of appellant and, although he did not find anything on her, he discovered marijuana in a container on her side of the vehicle during a subsequent search.

Appellant contended that *she* was illegally detained after the officer illegally detained the *passenger* by ordering the passenger back into the vehicle without reasonable articulable suspicion of criminal activity. The Court disagreed. First, the Court found that the trial court correctly determined that the officer's initial approach to the vehicle was a first tier encounter, not requiring reasonable suspicion. Second, the Court found, the officer had reasonable articulable suspicion to briefly detain both appellant and the passenger. Specifically, the Court found, the officer observed a vehicle with two occupants parked in a residential area at 3:30 a.m., its windows obscured by fog. Then, as the officer approached the vehicle to make inquiry of the occupants, he detected the odor of marijuana. In fact, the officer testified that he first detected the odor as he approached the vehicle, which was simultaneous with the passenger's attempt to exit the vehicle, and that the odor was why he "would have her stay." The detection of the odor of marijuana provided the officer with reasonable articulable suspicion to briefly detain both appellant and the passenger to conduct an investigation into the matter. As a result, the trial court properly denied appellant's motion to suppress.

Speedy Trial; *Barker v. Wingo* *Leopold v. State, A15A0783 (9/8/15)*

Appellant was convicted of possession of marijuana with intent to distribute. He contended that the trial court erred in denying his motion for new trial based on a violation

of his constitutional right to a speedy trial. The evidence, briefly stated, showed that appellant and Blackford were arrested on September 13, 2006 after a controlled delivery of a UPS package containing marijuana. After they were indicted in January 2007, Blackford posted bond and fled the state. The State sought to put off the trial until Blackford was found. In April, 2009, Blackford was arrested in New York. He was granted immunity and appellant was tried on September 28, 2009 with Blackford testifying against him. Only after his conviction did appellant claim a violation of his constitutional rights.

The Court found that because the three year delay was presumptively prejudicial, appellant's claim required an analysis under *Barker v. Wingo*. Here, the trial court correctly found that the length of delay ought to be weighed against the State because of the uncommon length of time between arrest and jury trial. As to the reason for the delay, the trial court did not abuse its discretion in finding that the delay was, at worst, negligence on behalf of the State rather than bad faith, and thus "relatively benign," and weighing against the State. In so holding, the Court rejected appellant's claim that the delay was a deliberate attempt to hamper the defense, noting that the State's reason for delay – to locate a missing witness – is a valid reason as found by the U. S. Supreme Court in *Barker v. Wingo*.

As to the assertion of the right, the Court found that the trial court properly weighed this factor heavily against appellant because he waited until almost two years *after* trial to make his assertion. The record also showed that appellant filed a statutory demand for speedy trial pursuant to O.C.G.A. § 17-7-170 on February 12, 2007. However, on July 3, 2007, he withdrew the demand after he was released on bond.

Finally, as to prejudice, the record showed that appellant was later arrested for an unrelated probation violation, and as a result, was held in jail from December 18, 2008 until the start of his trial. Appellant argued that the delay in this case caused him to lose the possibility of serving this sentence concurrently with the nine months he served on his sentence for the probation violation. The Court disagreed with the trial court's finding that this caused him no prejudice because with respect to a defendant incarcerated on other charges, a delay in bringing such a person to trial may be

prejudicial because the defendant may forego the opportunity to receive a sentence that is at least partially concurrent with the one he is serving. Nevertheless, the Court found no impairment to appellant's defense. The record showed that he was able to present evidence in support of his defense; he did not argue that the delay prevented him from obtaining any evidence or testimony; and his only contention was that the delay strengthened the State's case to his detriment, which was without merit.

In balancing the factors, the Court found that although the State may have been negligent in failing to bring appellant to trial in a timely fashion and the trial court failed to consider the potential prejudice stemming from the loss of the opportunity to have partial concurrent sentences, those relatively benign considerations were outweighed by the fact that appellant waited until two years after his trial to assert his right to a speedy trial and he failed to show that his defense was impaired by the delay. Accordingly, the trial court did not abuse its discretion denying the constitutional claim.

Jury Instructions; Sexual Battery

Henderson v. State, A15A0886 (9/3/15)

Appellant was convicted of aggravated child molestation and sexual battery as a lesser included offense of aggravated sexual battery. The State alleged in its indictment that appellant committed aggravated sexual battery by inserting his finger into the vagina of the victim. At trial, the victim testified that appellant put his finger "right in here," pointing to her genital area. However, the victim testified, appellant did not penetrate her vagina with his finger. The Court therefore gave an instruction on sexual battery as a lesser included offense. Shortly after the charge of the court, the jury asked the following question: "Does the charge of aggravated sexual battery and/or sexual battery have to be a finger in accordance with the indictment?" After discussion with both counsel, the court charged the jury that aggravated sexual battery must be proven "in the manner charged in the indictment," that is, the evidence must show that the defendant intentionally penetrated the victim's sexual organ with the specified foreign object, his finger. Thereafter, the court

charged the jury that sexual battery must be proven in accordance with the statutory definition he had just given them. That instruction did not inform the jury that the touching had to be in the manner charged in the indictment. Defense counsel asserted no exceptions to the recharge.

Appellant contended that the charge on sexual battery was overly broad and that giving it constituted plain error. He argued that the court was required to charge the jury that it could find him guilty of the lesser included offense of sexual battery only if it found that he had committed the offense as alleged in the indictment, that is, by using his finger. The Court agreed.

Here, the Court found, the jury's question revealed that it was particularly interested in whether it could find appellant guilty of sexual battery even if it concluded that he had not used his finger to touch the victim's sexual organ. The court's recharge essentially answered that question in the affirmative. Given that the facts showed that appellant had touched the victim's sexual organ with his mouth as well as with his finger, there existed a reasonable probability that the jury may have convicted him of committing the offense in a manner not specified in the indictment. Thus, both the court's charge and recharge on sexual battery were erroneous given the court's failure to limit the charge to the manner of touching alleged in the indictment. This error was an obvious defect rather than a merely arguable defect. Additionally, the Court found that the erroneous charge affected appellant's substantial rights and likely contributed to the outcome of the case, given that it authorized the jury to convict him of sexual battery in a manner that was not alleged in the indictment. Finally, because the erroneous charge seriously affected the fairness of appellant's trial with respect to the lesser included offense of sexual battery, the Court exercised its discretion to reverse his conviction on that charge.

Nevertheless, it should be noted that Judge Dillard concurred in the judgment only, so the issue presented is not binding precedent pursuant to Court of Appeals Rule 33 (a).

Juveniles; Alford Pleas

In The Interest of B. C., A15A1050 (9/3/15)

The State filed a petition alleging that then 13-year-old appellant committed the delinquent

acts of aggravated sodomy, aggravated child molestation and child molestation. At the adjudicatory hearing, appellant informed the juvenile court that, pursuant to plea negotiations with the State, he intended to enter an *Alford* plea to the child molestation charge in exchange for dismissal of the remaining charges. The trial court denied appellant's request, finding that O.C.G.A. § 15-11-580, which the legislature enacted in 2013 as part of the new Juvenile Code, does not authorize the entry of an *Alford* plea in juvenile court. The Court granted appellant's application for interlocutory review. The State agreed with appellant on appeal.

The Court stated that the plain language of O.C.G.A. § 15-11-580 provides that a child may admit the allegations in a delinquency petition, and nothing in the statute prohibits admissions made pursuant to an *Alford* plea, as long as there is a factual basis for the child's delinquency adjudication. Accordingly, the Court presumed that the General Assembly enacted O.C.G.A. § 15-11-580 with the knowledge and understanding that *Alford* pleas have historically been accepted in Georgia's juvenile courts. Moreover, the provisions of O.C.G.A. § 15-11-580 are similar to the arraignment provisions set forth in the adult Criminal Code, which provide that the adult shall be required to answer whether he is guilty or not guilty of the charged offense and if he pleads not guilty or stands mute then the clerk shall record a plea of not guilty. As with O.C.G.A. § 15-11-580, the adult arraignment statutes make no express reference to the well-established practice of accepting *Alford* pleas in Georgia's state and superior courts.

Finally, the Court stated, any doubt regarding whether the General Assembly intended to allow *Alford* pleas in juvenile court must be resolved in favor of the General Assembly's express statement that the Juvenile Code is intended to provide treatment and rehabilitation for juvenile offenders and "shall be *liberally construed* to reflect that the paramount child welfare policy of this state is to determine and ensure the best interests of its children." (Emphasis in original.) O.C.G.A. § 15-11-1. Therefore, since the General Assembly has not expressly prohibited the entry of *Alford* pleas in juvenile court, and the juvenile court was required to construe O.C.G.A. § 15-11-580 liberally to ensure appellant's best interests, the juvenile court erred in narrowly interpreting that statute

to preclude the entry of an *Alford* plea. In so holding, the Court noted that both the State and appellant believed that an *Alford* plea was in appellant's best interest.