Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 9, 2015

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THIS WEEK:

- **Forfeitures; Time Limitations**
- **Pleas in Bar; Procedural Double Jeopardy**
- **Anatomical Drawings; Continuing Witness Rule**
- **Sentencing; Recidivists**
- **Search & Seizure**
- **Sentencing; Merger**
- **Mistrials; Failure to Object**
- **Out-of-time Appeals; Guilty Pleas**
- **Jury Instructions; Simple Assault**
- **Right to Counsel of Choice; Right to be Present at Trial**

Forfeitures; Time Limitations

State of Georgia v. Brooks, A15A1620 (9/3/15)

The State appealed from an order dismissing its forfeiture proceedings. The record showed that on February 4, 2014, the defendant property was seized for forfeiture. The State initiated forfeiture proceedings pursuant to O.C.G.A. § 16-13-49(n) on June 26, 2014, well after the time requirement specified in O.C.G.A. § 16-13-49(h)(2). The court granted Brooks' motion to dismiss.

The Court reversed. The Court held that despite the State's argument that it was not required to file its forfeiture proceeding within 60 days, it was required to do so under the plain language of O.C.G.A. § 16-13-49(h)(2). Nevertheless, even when an O.C.G.A. § 16-13-49(n) forfeiture proceeding is initiated beyond the 60-day period, the appropriate remedy is not dismissal of the State's complaint for forfeiture. If the State fails to initiate forfeiture proceedings against property seized for forfeiture by notice of pending forfeiture within the time limits specified in paragraphs (1) and (2) of O.C.G.A. § 16-13-49(h), the property must be released on the request of an owner or interest holder, pending further proceedings pursuant to this Code section, unless the property is being held as evidence. Thus, Brooks' sole remedy was to request and obtain the property but only pending further forfeiture proceedings. Therefore, Brooks was not entitled to have the forfeiture proceedings dismissed. Accordingly, the Court vacated the order of dismissal and remanded for further proceedings pursuant to O.C.G.A. § 16-13-49.

Pleas in Bar; Procedural Double Jeopardy

State v. Hill, A15A1004 (9/9/15)

The State appealed from the grant of Hill's plea in bar based on procedural double jeopardy. The facts, briefly stated, were that Hill was involved in an automobile collision and was charged with DUI, following too closely and expired tag. The charges were sent to recorder's court and because of a clerical error, the expired tag UTC was separated from the other charges. The DUI and following too closely charges were thereafter bound over to State Court and Hill was charged with all three violations by accusation. However, due to the clerical error, the expired tag remained in recorder's court. After Hill's counsel pled not guilty in state court, the case was set for jury trial. However, prior to trial, Hill appeared in recorder's court and entered a guilty plea to the expired tag charge. The recorder's court deputy clerk testified that no prosecutor or assistant district attorney handles cases on the traffic docket in recorder's court, and that the

district attorneys do not receive notice of cases on the traffic docket. Thereafter, Hill filed his plea in bar and the state court judge granted it.

The Court reversed. Under O.C.G.A. § 16-1-7(b), if several crimes 1) arising from the same conduct are 2) known to the proper prosecuting officer at the time of commencing the prosecution and are 3) within the jurisdiction of a single court, they must be prosecuted in a single prosecution. A second prosecution is barred under O.C.G.A. § 16-1-8(b)(1) if it is for crimes which should have been brought in the first prosecution under O.C.G.A. § 16-1-7(b). In order for this procedural aspect of double jeopardy to prohibit a prosecution, all three prongs must be satisfied. A defendant who asserts a plea in bar pursuant to O.C.G.A. §§ 16-1-7 and 16-1-8 bears the burden of affirmatively showing that the prosecuting attorney for the State *who handled the first prosecution* had actual knowledge of the facts supporting the charge allegedly subject to a plea in bar. And here, the Court held, the trial court erred in looking not to the first proceeding, but to the later prosecution in state court, to determine the knowledge of the prosecuting officer.

Thus, the Court found, Hill failed to meet his burden of demonstrating that a prosecuting officer in the recorder's court, where he entered his guilty plea, had actual knowledge of all the pending charges. Specifically, the name of the district attorney did not appear on the uniform traffic citation, or on the records of the recorder's court. Moreover, Hill failed to establish the identity of the prosecuting officer, if any, at his guilty plea in recorder's court, and the court's deputy clerk testified that no prosecutor is assigned to the traffic docket on which Hill's expired tag charge was mistakenly entered. Nor did Hill establish that any prosecuting officer in recorder's court was aware of all the pending charges. He therefore failed to demonstrate actual knowledge of all the pending charges on the part of the proper prosecuting officer. Accordingly, the Court held, the trial court erred in granting Hill's plea in bar.

Anatomical Drawings; Continuing Witness Rule

Ruffin v. State, A15A1109 (9/9/15)

Appellant was convicted of rape, statutory rape, incest, aggravated child molestation, aggravated sexual battery, and two counts of child molestation. He contended that the trial court violated the continuing witness rule by allowing an anatomical diagram to go out with the jury over his objection. The Court disagreed.

First, the Court found that appellant did not properly object to the diagram going out to the jury. Next, the Court found that despite the trial court's statement that it would allow the exhibit to go out, nothing in the record demonstrated that it was with the jury during deliberations and it was appellant's burden to so demonstrate.

Finally, the Court found, even assuming the issue was properly before the Court, it was without merit. The continuing witness objection usually concerns testimonial documentary evidence, such as affidavits, depositions, or interrogatories. However, the objection has also been applied to unsworn, written dying declarations and written confessions or statements of criminal defendants, on the grounds that such statements are the equivalent of depositions. But, our courts have repeatedly held that anatomical charts or drawings used by witnesses during their testimony are not the functional equivalent of a deposition, but rather, are demonstrative evidence that serve only to illustrate testimony given by the witnesses. Furthermore, the fact that the witness wrote on the anatomical drawing does not change this result.

Nevertheless, appellant argued, the witness was so thorough and complete in her testimony that no illustrative diagram was necessary. But, the Court stated, admissibility, not necessity, is the question and an expert witness may use a diagram to illustrate testimony. Here, the diagram illustrated the physical location at which the witness found damage to the victim's hymen; such evidence was neither superfluous nor bolstering, but simply illustrative. The trial court therefore did not err in allowing the anatomical diagram to go out with the jury.

Sentencing; Recidivists

Barney v. State, A15A1528 (9/15/15)

Appellant was convicted of two counts of burglary. He argued that the trial court erred in concluding that the sentence originally imposed for the burglary convictions was void and, thus, that the trial court was without jurisdiction to grant the State's motion for re-sentencing. The Court disagreed.

The record showed that appellant had three prior felony convictions. After his convictions here, the trial court sentenced him as a recidivist to ten years as to the first burglary count and twenty years on the second burglary count, with five to serve in prison consecutive to the first count and fifteen to serve on probation. Almost a year later, the trial court held a re-sentencing hearing where the State argued that the original sentence was illegal and void because, as a recidivist with three prior convictions, appellant should have been given the maximum sentence of 20 years without probation on each count, as required by O.C.G.A. § 17-10-7(a) and (c). The trial court apparently agreed and re-sentenced appellant to twenty years to serve on each count to run concurrently with each other.

Appellant contended that under O.C.G.A. § 17-10-7(a), the trial court had the discretion to suspend or probate any portion of his sentence and, thus, that the original sentence was not void and could not be amended. The Court agreed that the trial court's initial sentence was void because it failed to comply with O.C.G.A. § 17-10-7(a) and (c). Under O.C.G.A. § 17-10-7(a), the trial court was required to impose a twenty year sentence for each burglary count, the longest sentence prescribed in the burglary statute, O.C.G.A. § 16-7-1(b). This it did not do, as the trial court sentenced appellant merely to 10 years on Count 1. Accordingly, the trial court did not err in concluding that appellant's original sentence was void and in amending the sentence to comply with O.C.G.A. § 17-10-7(a) and (c).

However, the Court stated, although O.C.G.A. § 17-10-7(c) prohibits parole, it does not dispense with the trial court's discretion to probate or suspend part of a sentence under O.C.G.A. § 17-10-7(a). Therefore, to the extent that appellant argued that the trial court erred by failing to exercise its discretion to probate or suspend part of his sentence, if it so chooses, the Court agreed. Unless affirmative evidence shows otherwise, the trial court is presumed to have exercised its discretion in imposing a sentence. But here, the Court noted, at the re-sentencing hearing, neither the trial court nor the State acknowledged that the trial court was vested with the discretion to probate or suspend a

portion of appellant's sentence. Further, the trial court agreed that it was going to impose the "least terrible [sentence] the [c]ourt can," and sentenced appellant to twenty years without parole as to each burglary count, to be served concurrently. Thus, there was evidence that the trial court was confused as to its discretion to suspend or probate a portion of appellant's sentence. The trial court's failure to exercise its discretion was error, which the Court could not find to be harmless under these circumstances. Accordingly, the Court vacated appellant's sentences and remanded for resentencing. In so doing, the Court stated that the trial court has the authority to reimpose the sentence of 20 years to serve on each count, but must show on the record that it exercised its discretion in doing so.

Search & Seizure

State v. Quarterman, A15A1237 (9/15/15)

Quarterman was charged with VGCSA, felony obstruction, and numerous other crimes relating to a traffic stop. The trial court granted his motion to suppress and the State appealed. The evidence showed that Quarterman was a passenger in a vehicle that an officer attempted to stop for speeding. When the vehicle failed to stop, two additional officers responded to assist. The vehicle continued to flee and the officers chased it until the pursuing officer performed a "pit maneuver," forcing the vehicle to stop. The driver and the two passengers then ran away. A pursuing officer was able to catch Quarterman after chasing him for about 200 yards, at which point he "grabbed him by the arm to take him to the ground." According to the officer, Quarterman then turned around, struck him in the face, and began fighting him. Other officers arrived to assist and Quarterman was restrained and arrested. Cocaine and a gun were discovered incident to arrest.

The State first argued that the trial court erred in ruling that the officer's initial interaction with Quarterman was a first-tier encounter, from which Quarterman had the right to leave. The Court agreed. The Court stated that a citizen's ability to walk away from or otherwise avoid a police officer is the touchstone of a first-tier encounter, and that even running from police during a first-tier encounter is wholly permissible. But here, Quarterman's flight, coupled with the circumstances of the stop, provided the officer with at least a reasonable articulable suspicion to warrant further investigation. That such further investigation necessarily entailed a foot chase was due only to Quarterman's refusal to halt at the officer's authorized request.

Next, the State argued that the trial court erred in concluding that a third tier encounter occurred when the officer grabbed Quarterman, at which point the officer lacked probable cause to make an arrest. The Court again agreed. The Court found that the officer's act of grabbing Quarterman's arm was a second-tier encounter, an attempted brief detention to investigate the suspicion of illegal activity. When Quarterman violently fought the officer during the attempted detention, he escalated the encounter to a third-tier encounter and gave the officer probable cause to arrest him for obstruction. Accordingly, the trial court erred by granting Quarterman's motion to suppress the evidence discovered as a result of his arrest.

Sentencing; Merger

Jones v. State, A15A1011 (9/15/15)

Appellant was convicted of three counts of aggravated child molestation, two counts of aggravated sexual battery, three counts of incest, two counts of child molestation, and one count of statutory rape. Appellant contended that the State presented insufficient evidence to prove that he committed incest within the specific date ranges alleged in the indictment. The Court disagreed that the date range was a material averment of the indictment, but, for other reasons, it concluded that the trial court erred in sentencing him on both Count 5 and Count 6.

The indictment charged appellant with three counts of incest: Count 5 for engaging in sexual intercourse with his niece between February 1, 2010, and December 30, 2010, Count 6 for engaging in sexual intercourse with his niece between December 31, 2010, and February 12, 2011, and Count 7 for engaging in sodomy with his niece between May 10, 2010, and December 20, 2010. The acts alleged in Counts 5 and 6 were the same, and both counts averred that the exact dates of the offenses were unknown to the grand jury but that each act was "separate and distinct from the act alleged" in the other count. The trial court charged the jury that the indictment did not state that the date of the offense was a material element of the crime, and that it was sufficient that the State show that the offense occurred within the seven years before the indictment was filed regardless of the date listed on the indictment. The Court noted that neither party objected to the charge.

The Court stated that if the counts in an indictment are identical except for the dates alleged, and the dates were not made essential averments, only one conviction can stand. This rule applies in prosecutions for multiple sexual assaults against child victims despite the impracticality of treating the dates specified in indictments as material averments. And the mere fact that a different date is charged in each count will not of itself make the indictment into a special one where the averment as to date is not particularized. The Court distinguished those cases in which the State made time an essential averment by alleging the same conduct on different dates in multiple counts, because the trial courts in those cases apparently did not specifically charge the jury that the dates were *not* material averments of the crimes, as the trial court did in this case. Thus, the Court opined, the State must make an election when it charges a defendant with multiple counts of the same crime: if the State makes the dates material averments and introduces sufficient evidence to prove the dates, it may obtain multiple convictions; if the State does not make the dates material averments, then it has a much broader time frame within which to prove the crimes were committed, but it is limited to a single conviction.

Here, the Court concluded, the dates alleged in Counts 5 and 6 were not made material averments of the indictment, and therefore appellant could be sentenced on only one of the two counts. The Court therefore vacated the sentences on those counts and remanded for resentencing.

Mistrials; Failure to Object

State v. Stockhoff, A15A1569 (9/16/15)

Appellant was indicted for violating the theft of trade secrets statute and for computer theft. The record, briefly stated, showed that before voir dire, the judge was told Stockhoff's ex-wife was the sister-in-law of the judge's brother. The judge stated that

he did not know the defendant and did not know of this relationship to his family. The parties stated that this was not a problem and voir was conducted and concluded. During opening arguments and specifically, during the defense's opening, it became apparent to the judge that his sister-in-law's family was going to be brought into the case. He abruptly excused the jury and then stated to counsel, "Okay, at this time I'm going to declare a mistrial in this case and I recuse myself off this case. Okay. Thank y'all." Nevertheless, a lengthy discussion was then had between the prosecutor, defense counsel and the judge concerning whether to declare a mistrial. At the conclusion of the discussion, the judge declared the mistrial. Thereafter, the substitute judge granted Stockhoff's plea in bar, finding that there was no manifest necessity for declaring the mistrial and that the trial judge erred in not considering alternatives to declaring a mistrial. The State appealed and the Court reversed.

The State argued that the trial court erred in granting the plea in bar because Stockhoff failed to object to the mistrial. Stockhoff argued that he was "faced with a fait accompli when [the trial judge] stated, 'Okay, at this time I'm going to declare a mistrial in this case and I recuse myself off this case.'" Stockhoff contended that once the trial judge uttered those words, he was prohibited from acting "upon the merits of the matter"; "there was no opportunity for Defendant to object to such done deed"; and that therefore, "Stockhoff's objection, if one was required, would have been a nullity." The Court disagreed.

The Court found that the trial judge had declared a mistrial outside the presence of the jury and before the jury was released; and the declaration of mistrial was followed by extensive discussion by counsel and the judge, who said he was "willing to talk about it." During the discussion, there was ample opportunity for Stockhoff to object to the judge's declaration of a mistrial. At no point, from the time the judge announced that he was declaring a mistrial, to the time the judge released the jury, did defense counsel object to the declaration of a mistrial. After the trial judge informed the attorneys that he could not "sit on" the case, defense counsel replied, "Okay. All right. That's fine, Judge," later indicating that he did "understand" the judge's reasoning for declaring a mistrial and recusing himself from the case, and stating that he "trust[ed] the Court's judgment." Furthermore, it was defense counsel who asked the judge whether he was "just going to release the jury," and when the judge replied "I am," counsel did not object; he merely responded, "Okay. Thank you, Judge." Indeed, the Court found, the record did not reflect that prior to the filing of the plea of former jeopardy, counsel had ever objected to the court's declaration of a mistrial or recusal from the case.

The Court stated that consent to the grant of a mistrial can be express or implied. Although Stockhoff did not expressly consent to a mistrial, he impliedly consented by failing to object timely to the mistrial declaration. And, the Court found, it was obvious that the trial court labored under the impression that the defendant had in fact so agreed. Therefore, the newly-assigned judge erred in barring further prosecution of Stockhoff. In so holding, the Court stated that it need not address whether there was a manifest necessity for declaring a mistrial, or whether the trial court failed to consider any alternative to declaring a mistrial.

Out-of-time Appeals; Guilty Pleas

Raheem v. State, A15A1318, A15A1319, A15A1320 (9/16/15)

In 1991, appellant pled guilty to motor-vehicle theft and hit-and-run. The next year, he pled guilty to burglary, and in 1985, to armed robbery. Decades later, in 2013, appellant filed pro se motions for an out-of-time appeal from all of these convictions. The trial court denied all three motions in a single order and the cases were consolidated for appeal.

The Court stated that a criminal defendant has no unqualified right to file a direct appeal from a judgment of conviction and sentence entered on a guilty plea. Instead, an appeal will lie from a judgment entered on a guilty plea only if the issue on appeal can be resolved by facts appearing in the record. But, if the Court can determine that the state of the record is such that the criminal defendant had the right to file a direct appeal from his guilty plea, it will then consider whether the record, nevertheless, shows that those issues must be resolved against him. If the record evidence is such that the issues in question cannot be resolved dispositively against the criminal defendant, the Court must then consider whether the defendant's right to appeal was frustrated by the ineffective assistance of counsel.

Appellant argued that the trial court erred in denying his motion for an out-of-time appeal from his 1981 and 1982 convictions because he was not informed of certain constitutional rights required under *Boykin v. Alabama* before pleading guilty and because his trial counsel was ineffective for failing to inform him of his limited right to appeal. The Court agreed with the trial court that the record showed that appellant was advised of his right to a jury trial, but not of his right against compulsory self-incrimination or his right to confront his accusers. Thus, as to these two cases, the record showed a valid issue for appeal that could not be resolved dispositively against him.

Therefore, the Court considered whether appellant's right to appeal in these two cases was frustrated by ineffective assistance of counsel. The Court noted that the trial court made no findings with regard to whether appellant's failure to file a timely appeal from his 1981 or 1982 convictions was his own fault or solely the result of his counsel's failure to advise him of his right to appeal. Instead, the court found that appellant was not prejudiced because there was no evidence that the outcome of the proceedings would have been different if he had proceeded to trial rather than pleading guilty. But, the Court stated, a showing of prejudice in this context requires a defendant to show that there is a reasonable probability that, but for counsel's deficient performance, the *appeal* would have been successful. "And this makes perfect sense because it would be impossible for a trial court to determine the likely outcome of a trial that never occurred or to evaluate evidence that was never presented." Thus, the Court reversed the trial court's denial of appellant's motion to file an out-of-time appeal as to those convictions, and remanded the case with direction that the court conduct the requisite inquiry and make findings regarding who ultimately bore the responsibility for appellant's failure to file a timely appeal.

As to his 1985 armed-robbery conviction, appellant argued that the trial court erred in denying his motion for an out-of-time appeal because he was not informed of the specific elements of the offense during his

plea proceedings. He also contended that his trial counsel was ineffective for failing to inform him of his appellate rights. The Court disagreed.

In this case, the record reflected that appellant was advised of all three *Boykin* rights. A transcript also reflected that appellant confirmed that his attorney had "explained the charges" against him and that they had discussed the case "thoroughly." Moreover, the trial court in the plea proceeding certified that appellant made these representations in open court and that he had been fully advised of the charges against him. Under these particular circumstances, the Court found that it could presume that, in thoroughly explaining the charged offense, appellant's counsel advised him of the nature of his offense in sufficient detail to render his plea knowing and voluntary.

Thus, the Court found, even if appellant could show that his failure to file a timely appeal was due to his trial counsel's failure to advise him of his appellate rights, such a failure would not amount to ineffective assistance of counsel because it was apparent from the record that the issue he sought to raise in an out-of-time appeal was completely without merit. In fact, an attorney's failure to file an appeal frivolously attacking the indisputable facts proved by the record cannot be deemed ineffectiveness. Therefore, the trial court did not err in denying appellant's motion for an out-of-time appeal as to his 1985 armed-robbery conviction.

Jury Instructions; Simple Assault

Driskell v. State, A15A1443 (9/23/15)

Appellant was convicted of simple assault. The indictment charged him with committing the assault pursuant to the language in O.C.G.A. § 16-5-20(a)(2) for committing "an act which placed ... [the victim] in reasonable apprehension of immediately receiving a violent injury." The trial court, however, charged the jury as follows: "I charge you that the offense of simple assault is complete if there is a demonstration of violence coupled with apparent present ability to inflict injury so as to cause a person, against whom it is directed, reasonably to fear that he will receive a violent injury unless he retreats to secure his safety." Appellant argued that this charge was erroneous.

The Court noted that since appellant did not object to the charge, its review was limited to that of whether the charge amounted to plain error. The Court noted that the trial court gave the standard charge from the Suggested Pattern Jury Instructions, "§ 2.20.11. Assault, Simple; Reasonable Fear" which includes the complained-of sentence. The instruction cites to *Reeves v. State*, 128 Ga.App. 750, 752 (2) (1973), and *Reeves* in turn cites to *Thomas v. State*, 99 Ga. 38, 44 (1896). In 1896, assault was defined only as "an attempt to commit a violent injury on the person of another," currently O.C.G.A. § 16-5-20(a)(1). It was not until the Georgia Code was revised in 1968 that the second method of committing simple assault was added. Thus, a portion of the charge was erroneous.

Nevertheless, the Court found, the instruction failed to satisfy the remaining three prongs of the plain error standard. First, the error in the instruction was not obvious. A closer look at the rule from *Thomas* reveals that while it employs language applicable to subsection (a)(1), it also includes language consistent with the reasonable apprehension method of committing simple assault in subsection (a)(2): "so as to cause a person, against whom it is directed, reasonably to fear that he will receive a violent injury." Therefore, subsection (a)(2) codified a portion of the rule from *Thomas*. So a portion of the court's instruction was in fact applicable to subsection (a)(2) as charged here. Moreover, the Court found, the instruction did not likely affected the outcome of the proceedings, and the error did not seriously affects the fairness, integrity or public reputation of judicial proceedings. Accordingly, there was no reversible error in the court's instruction.

Right to Counsel of Choice; Right to be Present at Trial

LaGron v. State, A15A0911 (9/28/15)

Appellant was convicted of statutory rape, aggravated child molestation, child molestation and aggravated sexual battery. The record showed that appellant's request to have his appointed counsel replaced with alternate counsel was refused at the beginning of trial. Thereafter, he refused to come to court for the first three days of trial. On the fourth and fifth days of trial, he attended and testified on his own behalf.

He first contended that the trial court erred by refusing to appoint him new counsel. The record showed that when the case was called for trial, appellant rose in open court and expressed his dissatisfaction with his appointed counsel and his desire for new representation. Appellant claimed that his trial counsel had refused to interview the State's witnesses; had denied his request to let him watch the recording of the victim's forensic interview and hear the audio recording of his telephone conversation with the detective; refused to subpoena a potential defense witness; and had failed to retain an expert to review the forensic interview. After listening to appellant and his appointed counsel, the trial court denied appellant's request for new counsel, but ordered that he would be afforded an opportunity to watch the recording of the victim's forensic interview and listen to the audio recording of his telephone conversation with the detective during a recess before the trial commenced. In denying appellant's request for new counsel, the trial court credited appointed counsel's explanations and found that he had made "sufficient efforts on behalf of his client and ha[d] made understandable tactical decisions" to which the court would give deference. The trial court further concluded that appellant had the benefit of an appointed attorney who was "trained and experienced in the law" and that his "strong advice" was for appellant to take advantage of his counsel's training and experience.

Following a recess during which appellant listened to the victim's forensic interview and his telephone conversation with the detective, the trial court further noted that appellant had been arrested in January 2013 but had not expressed any desire for new counsel until approximately 19 months later, on the morning of trial, and had presented no evidence that would justify delaying the proceedings so that new counsel could be obtained. Consequently, the trial court made the additional finding that his request for new counsel was done "for the purpose of delaying the proceedings."

In light of this record, the Court found that the trial court did not err in denying appellant's request to discharge his appointed counsel and obtain new representation. The trial court was entitled to disbelieve appellant and instead rely on his appointed

counsel's explanation of what had transpired between them and what preparation he had done on the case. Consequently, the trial court was authorized to find that appellant had failed to demonstrate that his appointed counsel was unable or unwilling to effectively represent him. Moreover, given the timing of his request, the trial court was authorized to find that appellant was simply attempting to use the discharge of his appointed counsel and employment of new counsel as a dilatory tactic. The trial court also was entitled to find that any dissatisfaction that appellant had with his appointed counsel was outweighed by the countervailing considerations that counsel had been working on the case for approximately 19 months and that removing him from the case would further delay a trial that had already been continued once before. And, at least some of appellant's concerns with his appointed counsel were mitigated by the trial court's decision to afford him an opportunity to watch the victim's forensic interview and listen to his recorded telephone conversation with the detective before the trial commenced.

Appellant also contended that the trial court violated his constitutional right to be present by starting the trial in his absence. Specifically, because he refused to enter the courtroom before the jury had been empaneled and sworn, waiver principles did not apply, and the trial court thus could not start the trial. The Court disagreed.

The Court noted that it is true that if a criminal defendant free on bond or on his own recognizance fails to appear at the start of trial, the trial court cannot try the defendant in absentia; instead, the trial court must delay the start of trial and rely on other sanctions such as bench warrants and bond forfeitures. Waiver principles do not apply in that context, and if the trial court conducts the trial in the absence of the defendant, the court violates the defendant's constitutional right to be present, entitling him to a new trial.

But, the Court found, this case was clearly distinguishable. This was not a case where a defendant out on bond or his own recognizance failed to appear at the trial proceedings when they commenced and then was tried and convicted in absentia. Rather, appellant was in state custody and made a conscious choice to attend some but not all of his trial, threatening to violently resist if the sheriff's deputies attempted to compel his attendance in the courtroom and thereby disrupt the court proceedings.

Thus, the Court concluded, where a criminal defendant who is in state custody — after being made aware of his right to be present and that the trial will proceed forward in his absence — refuses to attend the start of his trial without causing a disruption, the trial court has the discretion to conclude that the defendant has waived his right to be present for the proceedings and begin the trial in his absence. And the Court stated, "a trial court should not be required to have a resistant defendant forcibly transported into the courtroom in front of shocked jurors so that he can quickly waive his right to be present and then be removed, simply so that it can be said that the defendant was 'present' at the start of trial." Accordingly, the Court found that the trial court committed no error here.