

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 16, 2012

State Prosecution Support Staff

Charles A. Spahos
Executive Director

Chuck Olson
General Counsel

Joe Burford
State Prosecution Support Director

Laura Murphree
Capital Litigation Director

Gary Bergman
State Prosecutor

Clara Bucci
State Prosecutor

Fay Eshleman
State Prosecutor

Al Martinez
State Prosecutor

Todd Hayes
Traffic Safety Resource Prosecutor

THIS WEEK:

- **Speedy Trial; *Barker v. Wingo***
- **Cross-Examination; Motion for Mistrial**
- **Cross-Examination; Polygraph Examination**
- **Probation Revocation; Circumstantial Evidence**
- **DNA; Chain of Custody**
- **Vehicular Homicide; Jury Charges**

Speedy Trial; Barker v. Wingo

Crosson v. State, A12A1237 (11/13/12)

Appellant contends that her constitutional right to a speedy trial was violated when she was arrested in June 2010 for computer theft by deception and other charges, and her constitutional speedy trial motion was denied on November 11, 2011. A delay approaching one year is generally presumed to be presumptively prejudicial. The Court undertook the analysis under the mandates of *Barker v. Wingo*, 407 U.S. 514 (1972). This balancing test is triggered when the delay is presumptively prejudicial, and the court must consider (1) the length of delay; (2) reasons for delay; (3) defendant's assertion of the right to speedy trial; (4) the prejudice to the defendant. 2011. The Court determined that the 16-month delay experienced by appellant was uncommonly long and weighed against the State. Next, the Court was unable to assign a specific reason for the long delay, but attributed it equally to the inability of the State to correctly indict appellant and the delay occasioned by appellant's

filing numerous pro se motions. In addition, the Court found that her contention that the State delayed the process until "it could figure out how to charge her" was not supported in the record, and that the record did not support the contention that the State deliberately attempted to delay the trial.

Furthermore, the Court held that appellant's filing of statutory speedy trial motions, and the subsequent withdrawal and / or non-service of these motions contributed to the first six months of delay and "should not be charged heavily against the State." Finally, the Court found that she had not been prejudiced from the delay of the trial, determining that she suffered no undue anxiety or concern as to her incarceration. "Anxiety and concern are always present to some extent, and thus absent some unusual showing are not likely to be determinative in defendant's favor."

Cross-Examination; Motion for Mistrial

Gorman v. State, A12A1400 (11/15/12)

Appellants were convicted of burglary and filed a single notice of appeal from the order denying their motions for new trial, contending that the trial court erred in denying their motions for mistrial after a witness gave testimony that the court had previously ruled inadmissible.

The record showed that prior to trial, a *Jackson v. Denno* hearing was held and the officer who initiated the traffic stop that led to the arrest of the appellants was questioned by defense counsel concerning a statement made by a relative of the appellants'. The court ruled that the statement was inadmissible at trial because the relative, who was arrested with appellants, had not been advised of his *Miranda*

rights. At trial, on cross examination, defense counsel asked the officer a series of questions regarding the testimony given at the *Jackson v. Denno* hearing, and the officer answered with a description of the statements previously ruled inadmissible. Defense counsel then moved for a mistrial. The court denied the motion, finding that the defense had opened the door to the testimony.

Whether to grant a mistrial is a matter within the discretion of the trial court, and that discretion will not be interfered with on appeal unless it is apparent that a mistrial is essential to the preservation of the right to a fair trial. Although one may legitimately complain about illegal testimony which is not responsive to the question, one cannot take chances in propounding questions which may elicit damaging answers, otherwise inadmissible, and then demand a mistrial when such answer is given. The Court held that the defense counsel took chances by asking the officer questions about the contents of a report on the issue that had previously been ruled inadmissible, and that the trial court had not abused its discretion by denying the appellants' motion for mistrial.

Cross-Examination; Polygraph Examination

Parrott v. State, A12A1555 (11/15/12)

Appellant was convicted of child molestation. He argued that the trial court erred in permitting the State to inform the jury of a failed polygraph examination conducted by his expert witness. At trial, appellant did not contest the allegations of inappropriate touching but instead argued that he lacked criminal intent because the touching occurred "while he was asleep." Appellant's expert witness, a psychiatrist, performed several tests, including a polygraph, to gauge his sexual interests and whether he had parasomnia. Outside of the presence of the jury, defense counsel argued that the State could not address the issue of the failed polygraph because appellant had not stipulated to its admission and that the expert witness had not relied on the test to form his expert opinion.

Absent stipulation of parties, results identified as being from polygraph examinations are generally inadmissible, but may sometimes be admitted to explain conduct. The trial court ruled that in the interest of a thorough and

sifting cross-examination, the prosecutor could refer to the polygraph as the "other test," but could not refer to it as a polygraph. The scope of cross-examination lies within the sound discretion of the trial court, and a ruling on this issue will not be disturbed on appeal absent an abuse of that discretion. On cross-examination of the expert witness, the prosecutor asked about any "objective" tests to evaluate appellant's statements, with an affirmative response by the expert confirming that he had. Jurors were also told that appellant was willing to take a polygraph test. The Court held that the trial court's admission of the prosecution's line of questioning and closing statements were not an abuse of discretion, but also did not endorse the tactics of the prosecution.

Probation Revocation; Circumstantial Evidence

White v. State, A12A0920 (11/16/12)

Appellant was serving probation for drug and firearm convictions when the trial court revoked his probation, concluding that he had committed new drug possession crimes. At the revocation hearing, the State called one witness, the officer who had been working as a narcotics officer who testified that appellant was frequently at a lawnmower shop where another man was arrested for possession of narcotics. The man arrested testified that appellant had nothing to do with the narcotics found at the scene, "[be]cause he wouldn't have come around me had he known I was fooling with drugs." The officer testified that no one indicated that appellant worked at the shop, but there was evidence that appellant frequented the shop and sometimes stored beverages in the shop's refrigerator. The trial court revoked appellant's probation. Appellant argued that the evidence was insufficient to establish that he was in possession of the drugs.

The Court stated that where there is no evidence that the defendant was in actual possession of contraband, the State must present evidence showing the defendant's constructive possession. Possession of drugs may be constructive, but spatial proximity alone is insufficient to prove constructive possession of the drugs. A probationer's mere presence in the area where drugs are found will not justify a revocation based on possession of drugs, even under the more relaxed preponderance of the evidence standard; the State must show some

connection between the probationer and the drugs other than spatial proximity. Finally, when the State's constructive possession case is based wholly on circumstantial evidence, the law requires that the proved facts shall not only be consistent with the hypothesis of guilt, but shall exclude every other reasonable hypothesis save that of the guilt of the accused.

The Court held that the circumstantial evidence was insufficient to show constructive possession. Appellant did not own or lease any portion of the property, and there was no evidence that any controlled substance was found in appellant's truck, on his person, or that he was under the influence of any such drug. There was also no evidence as to when appellant was in the shop prior to the discovery of the drugs. The Court held that the trial court had abused its discretion in revoking appellant's probation and reversed.

DNA; Chain of Custody

Mickens v. State, A12A1190 (11/16/12)

Appellant appealed the denial of his motion for new trial from his conviction of aggravated assault and rape, contending that the State failed to establish a proper chain of custody for the evidence. The evidence showed that after being attacked by an unknown assailant, the victim went to a hospital where a rape examination kit was used to take cervical and vaginal swabs. The DNA profile of the sperm cells found was submitted to state and national law enforcement databases. The DNA from the rape exam kit matched DNA from 2007 entered into a database in Columbus, Ohio. A search warrant allowed a Georgia detective to collect swabs from appellant's mouth which, upon GBI analysis, matched the DNA collected from the victim's rape kit. Appellant argued that the State failed to establish a proper chain of custody for the forensic evidence from the rape kit and his mouth swab.

The Court held that the State did establish a proper chain of custody by offering the testimony of the detective who personally collected the mouth swabs, and stored them in a secure box with proper identifying marks. A GBI forensic biologist also testified and confirmed that the swabs had been placed in the GBI lockbox and properly sealed, although they lacked proper initials. The Court held that the testimony at trial was sufficient to establish the chain of custody because the State need

only show with reasonable certainty that the substance tested is the same as that seized, with no tampering or substitution.

Vehicular Homicide; Jury Charges

Otuwa v. State, A12A1382 (11/16/12)

Appellant was convicted of first-degree vehicular homicide, DUI, and reckless driving. The evidence showed that while driving 93 mph in a 45 mph zone, appellant's vehicle left the road and crashed, killing two of appellant's passengers. He was charged with two counts each of first-degree vehicular homicide by less-safe DUI, by per-se DUI, and by reckless driving. He argued that the trial court erred when it denied his request to charge the jury on the lesser included offense of second-degree vehicular homicide by speeding as to each of the six counts of first-degree vehicular homicide against him. The trial court ruled that it would include the second-degree vehicular homicide by speeding as a lesser offense only as to the reckless-driving first-degree vehicular homicide counts. Appellant was convicted on all counts.

Appellant argued that this lesser offense charge should have applied to the four other counts of first-degree vehicular homicide. The Court stated that if a jury finds a defendant guilty of vehicular homicide and that either DUI or reckless driving - two of the statutory bases that support a first-degree vehicular homicide charge - was the cause of the vehicular homicide, then it follows that the defendant must be guilty of first degree, and not second degree, vehicular homicide. Here, the jury did just that by finding appellant guilty of not only vehicular homicide but also reckless driving (not speeding) and less-safe DUI. Accordingly, the jury's verdict of first-degree vehicular homicide was proper. Moreover, the Court found, the jury was given the option, which it refused to select, of returning a guilty verdict on second-degree vehicular homicide as a lesser included offense based on testimony supporting a conclusion that appellant's rate of speed was not high enough to authorize a finding of reckless driving but sufficient to authorize a finding of speeding. Taken as a whole, the trial court's charge authorized the jury to reach the conclusion that appellant was guilty of DUI and, at the same time, that speeding rather than DUI was the sole proximate cause

of the collision and of the victims' deaths such that he was guilty of second- rather than first-degree vehicular homicide. The charge was therefore proper.