

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 12, 2014

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THIS WEEK:

- **Constitutional Right to Speedy Trial**
- **Search & Seizure**
- **Judicial Commentary; Ineffective Assistance of Counsel**
- **Judicial Comments; O.C.G.A. § 17-8-57**

Constitutional Right to Speedy Trial

Milner v. State, A14A1224 (11/14/14)

Appellant was arrested in May of 2002 and indicted in December of 2002 for aggravated assault. In May of 2012, he filed a motion to dismiss his indictment on constitutional speedy trial grounds. The trial court, utilizing the criteria under *Barker v. Wingo*, denied his motion. The Court affirmed.

The Court found that the trial court correctly determined that the delay of 10 years was presumptively prejudicial and therefore triggered the four part balancing test of *Barker v. Wingo*. The Court determined the trial court did not abuse its discretion in only holding the State lightly accountable for the 10 year delay. In so holding, the Court found that a bright-line rule tied solely to the length of the delay, which appellant appeared to argue, runs contrary to the *Barker* analysis. As to the responsibility for the delay, the trial court did not abuse its discretion in weighing this only lightly against the State because there was no evidence of deliberate delay to hamper appellant's defense. The trial court also did not abuse its discretion in weighing the assertion of the right heavily against appellant. The trial court found that appellant

only filed his motion on the eve of trial and ten years after his arrest. In so holding, the Court found that the trial court erred in not considering any mitigation for this delay, but found the error harmless because the trial court "would have had no discretion to reach a different judgment" even if it had considered mitigation.

Finally, the Court found that appellant failed to show prejudice resulting from the delay. Specifically, appellant failed to show that he was subjected to any oppressive pretrial incarceration or that he suffered an unusual anxiety or concern beyond that which necessarily attends being under indictment. Further, the Court found, appellant's argument that his decrease in memory as a result of the strokes he suffered during the interim between arrest and trial was equally unavailing because he failed to show specific evidence of how his diminished memory impaired his ability to defend himself. In sum, therefore, the Court found that the balancing undertaken by the trial court was reasoned and reasonable and for that reason, it could not say that it amounted to an abuse of discretion in denying appellant's motion.

Search & Seizure

Williams v. State, A14A1202, (11/14/14)

Appellant was convicted of trafficking in cocaine. He argued that the trial court erred in denying his motion to suppress. The Court disagreed. The evidence showed that appellant, the sole occupant of a vehicle, was stopped for failing to maintain lane. He was driving a rental car that was rented in a female's name and appellant was not listed on the rental agreement. A second officer arrived

with a drug dog within two minutes of the stop and the dog alerted after a free-air search of the vehicle. The entire stop lasted between 5 and 7 minutes.

The Court stated that while the record showed that the officer's investigation of appellant's failure to maintain lane had concluded, the officer had not yet concluded his investigation into whether appellant was entitled to possess and drive the rental car. No evidence showed that the officer informed appellant he was free to leave and it is well-established that a traffic stop include sthe time necessary for the officer to check the status of pertinent documents, such as the driver's license, insurance and vehicle registration. With regard to rental cars, examination of the rental agreements and any ensuing investigation are considered part of the traffic stop. Therefore, the trial court did not abuse its discretion in finding that the officers did not unreasonably prolong the detention because the investigation of the investigation was not yet concluded and the total time of the traffic stop lasted 5 to 7 minutes.

Judicial Commentary; Ineffective Assistance of Counsel

Williams v. State, A14A1228, (11/17/14)

Appellant was convicted of first degree arson, first degree burglary, and first degree criminal damage to property. The evidence showed that appellant and co-defendant Davis broke into a church looking to steal from it and then set fire to it. A witness, Scott, told investigators that he overheard appellant and Davis bragging about "hitting the church and bringing it down by burning." Scott identified appellant as one of the men in still pictures officers took from the security video. During Scott's initial testimony at trial, he said that appellant was not involved in the conversation he reported to the police, but the State recalled Scott the next day, and he testified that he had lied about appellant not being involved because he was scared.

Appellant contended that his counsel rendered ineffective assistance in not objecting to two judicial comments made in violation of O.C.G.A. § 17-8-57. In the first instance, the following exchange was made between the court and Davis: "[Trial Court]: [The District Attorney] said he told you to tell the truth.

The only question I have for you is, is what you have said here today the truth? [Davis]: Yes, Sir." The Court found that questions asked to a witness as whether the witness is lying or being truthful clearly intimates the court's opinion regarding the credibility of the witness and is therefore patently improper. Accordingly, because the trial court violated O.C.G.A. § 17-8-57, the Court was required to reverse his convictions.

In the second instance, the Court involved itself into the direct and cross-examination of Scott regarding the timing and manner in which Scott made his identification of appellant as one of the two people shown in the still taken from the video surveillance. The Court found that the trial court's questioning of Scott, particularly the statement that "[r] egardless of when you identified them or how you identified them or whatever, at some point you recognized [appellant] who's sitting here in the courtroom and [Davis] as the people in those pictures[,] had the effect of completely disclaiming to the jury Scott's earlier testimony that he only provided an identification of one of the individuals in the picture as being appellant after he was given appellant's name. Accordingly, the Court concluded, this exchange by the trial court was also violative of O.C.G.A. § 17-8-57, requiring reversal.

Judicial Comments; O.C.G.A. § 17-8-57

Sallee v. State, A14A1439 (11/13/14)

Appellant, an attorney, was convicted of one count of insurance fraud (O.C.G.A. § 33-1-9). He contended that the trial court improperly commented on the evidence during his cross-examination in violation of O.C.G.A. § 17-8-57. The record showed that appellant took the stand in his own defense. During cross examination, the prosecutor questioned him about his duty as a lawyer to correct a misstatement made to a third party. The Court then interjected and the following exchange occurred: "COURT: The question was, do you have a duty to correct a misstatement when you find out there has been a misstatement? SALLEE: Not if it's a matter of public record. COURT: That's not an answer to the question. Will you answer the question?"

SALLEE: I cannot answer the question as posed. I have a duty— COURT: You're saying you don't have a duty to correct something that you know that it's wrong? SALLEE: No. That's not what I'm saying, your Honor. COURT: What are you saying? That's the question to you. You are a lawyer. You found out there has been a misstatement. Don't you as an attorney have a duty to correct the misstatement? SALLEE: I have a duty also to my client. I have a duty to my client. I did not feel that was a misstatement. I have a duty to my client. Zurich [the insurance company] at that time had agreed to make the claim. It was a public record. I did not feel that it was a misstatement at that time."

The Court found that the trial court attempted to clarify appellant's testimony as to whether he had a duty to correct a client's misstatement, and, in so doing, it did not express an opinion as to appellant's guilt or credibility. Moreover, the trial court cautioned the jury explicitly that "[b]y no ruling or comment which the [trial court] has made during the progress of the trial has the [trial court] intended to express any opinion upon the facts of this case, upon the credibility of the witnesses, upon the evidence, or upon the guilt or innocence of the defendant." Under these circumstances, the Court concluded, the trial court did not violate O.C.G.A. § 17-8-57.