Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING DECEMBER 9, 2011

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THIS WEEK:

Ineffective Assistance of Counsel

Cammer v. Walker, S11A1250 (11/21/11)

Appellant was convicted by a jury on charges of armed robbery, kidnapping with bodily injury, hijacking a motor vehicle, aggravated assault, and possession of a firearm during the commission of a felony. The record showed that he was 19 years old at the time of the crimes and that the trial court sentenced him to life in prison. Appellant contended in this habeas action that his trial counsel was ineffective in his consultation with him about a pretrial plea agreement. Specifically, he argued that his trial counsel performed deficiently in failing to consult with him alone and to adequately advise him, either alone or in his father's presence, regarding the consequences of going to trial.

The record showed that appellant never met alone with his counsel. The State offered 20 years, 10 to be served in prison. Appellant's three co-defendants accepted similar offers. Appellant allegedly wanted to take the plea deal, but his father thought he could get boot camp and told the attorney in appellant's presence that appellant would not take the deal. Appellant allegedly wanted to take the deal, but remained silent when his father stated this to his counsel.

The Court found that the record did not establish that trial counsel, by consulting jointly with appellant and appellant's father, failed to ensure that the decision to reject the State's plea agreement offer was appellant's. The record supported the habeas court's factual findings that trial counsel believed that he was consulting with appellant personally about the plea offer when he met with the two and that trial counsel took appellant's silence in the face of his father's insistence on appellant going to trial to mean that appellant did not want to accept the offer. Appellant admitted that he never told trial counsel that he wished to plead guilty. Under the circumstances, the Court concluded that trial counsel did not act in an unreasonable or professionally deficient manner in concluding that appellant had decided to let his father speak for him and wished to reject the State's

offer. Although trial counsel now believed that he should have handled his consultation with appellant differently, and appellant did not make the decision to go to trial, did not mean that his representation fell outside of the broad range of reasonable professional conduct. A claim of ineffective assistance of counsel is judged by whether counsel rendered reasonably effective assistance, not by a standard of errorless counsel or by hindsight.

Appellant also contended that his trial counsel's advice was deficient because he did not correct the misimpression that appellant would receive a sentence of boot camp, rather than life in prison, if convicted at trial, or explain that appellant lacked valid defenses to the charges against him. The Court found that although trial counsel's testimony about his advice conflicted with the appellant's testimony, the habeas court was entitled to believe trial counsel's testimony over that of appellant and his father. Thus, the habeas court was entitled to credit trial counsel's testimony that he never discussed the possibility of boot camp with them. The habeas court also reasonably found, based on trial counsel's testimony, that trial counsel discussed the weight of the evidence with them as well. Finally, the habeas court was authorized to conclude that trial counsel advised the appellant and his father of the possible sentences that could be imposed following a conviction at trial. Although he could not recall his specific advice on all of the charges, trial counsel testified that he was "sure" he advised them both of the range of sentences he would face if appellant went to trial.

Inconsistent Verdict Rule

Guajardo v. State, S11A0965 (11/21/11)

Appellant was convicted of felony murder, three counts of aggravated assault, and three counts of possession of a firearm during the commission of a crime. Appellant argued that the jury's guilty verdicts should be reversed as inconsistent with the acquittal on the malice murder charge. The Court noted that it long ago abolished the rule against inconsistent verdicts. Nevertheless, appellant argued that his case fell under the narrow exception to that rule recognized in *Turner v. State*, 283 Ga. 17 (2) (2008). Under that exception, reversal of an inconsistent verdict may occur in the rare instance where, instead of being left to speculate as to the jury's deliberations, the appellate record makes transparent the jury's rationale.

Here, early in its deliberations, the jury sent a note to the trial court asking whether it would be "possible to find defendant not guilty on Count I [malice murder] due to self-defense, but find guilty on other counts." After some discussion with both counsel, the court answered that it was possible. It then clarified by stating, "You should consider self-defense on all counts though and then you'd have to make a decision whether it applies to each count." Later, the jury asked for the written legal definition of malice murder. The trial court read the definition to the jury again, but did not provide it in writing. Following each recharge to the jury, the trial court asked if there were any exceptions and neither counsel for the State nor appellant's trial counsel made any exception or objection.

The Court disagreed with Appellant assertion that the jury's question regarding whether it was possible to find appellant not guilty on the malice murder count due to self-defense, but still find him guilty on other counts, exposed the jury's rationale for acquittal and its inconsistency with the guilty verdicts. Appellant's argument ignored the fact that the jury later sent another request to the trial court asking for a written legal definition of malice murder. Moreover, even if the jury had asked only the one question regarding the effect a finding of justification on one charge would have on its findings on the other charges, the question itself did not make the reasoning behind the jury's verdict transparent. The questions simply indicate that the jury was attempting to understand the law as fully as possible before reaching its verdict. Thus, this case did not fall within the narrow exception to the inconsistent verdict rule. The jury's questions to the trial court during its deliberations were not sufficient to make its reasoning transparent, and the Court stated it would not engage in speculation or unauthorized inquiry regarding its deliberations.

Right of Confrontation

Gandy v. State, S11A0807

Appellant was convicted of felony murder, armed robbery, burglary, and aggravated assault. The evidence showed that appellant, his co-indictee, Cloud and Peterson drove to the home of the victims. Once there, appellant and Cloud went inside; Peterson stayed in the car. During the burglary, both victims were shot and one died.

Appellant contended that the trial court erred by failing to grant a mistrial when Cloud identified Peterson in court at the request of the State, which appellant argued, resulted in Peterson testifying by his mere presence. Since Peterson subsequently asserted the Fifth Amendment, appellant argued that this identification violated his Sixth Amendment right to confront witnesses.

The Court found this case to be controlled by *Davis v. State*, 255 Ga. 598, 604 (7) (1986). In *Davis*, the primary defense of was that the defendant's girlfriend, not he, committed the murder. In response, the State brought the girlfriend into the courtroom to be identified in front of the jury because the prosecutor felt that she was too small to have the physical power to murder the victim by choking. The Court found that since the girlfriend's size was part of the State's case, letting the jury see her did not constitute error. The *Davis* Court further held that, because the girlfriend asserted her Fifth Amendment privilege and refused to answer any relevant questions, the defendant's Sixth Amendment right to confront witnesses could not have been violated.

Similarly, the Court found, during cross-examination, defense counsel pressed Cloud about Peterson's alleged role in the murder and repeatedly attempted to implicate Peterson as the actual shooter, arguing that appellant was being framed. Defense counsel also questioned Cloud regarding any physical similarities between appellant and Peterson, attempting to show that the victims could have mistaken Peterson for appellant as the masked gunman. In order to rebut this theory, the State had Cloud identify Peterson in court so that the jurors themselves could ascertain whether Appellant and Peterson were similar in appearance. Moreover, defense counsel called Peterson as a witness and, before Peterson asserted his Fifth Amendment right against self-incrimination, he admitted that at one point he was formally charged as a co-defendant in the case. Therefore, pretermitting whether the identification of Peterson by Cloud rendered Peterson a witness against him within the meaning of the Sixth Amendment, any such right was defeated by Peterson's determination to assert the Fifth Amendment and refuse to answer any relevant questions.

Right to Conflict-Free Counsel

Lytle v. State, S11A1226 (11/21/11)

Appellant was found guilty of felony murder and several other related offenses. He contended that he was unfairly denied his right to conflict-free counsel. The evidence showed that appellant and four co-indictees shot and killed two people during an armed robbery.

Appellant argued that because he and two of his co-indictees were assigned attorneys from the same public defender's office, and because a single investigator working for that same public defender's office investigated his case and the cases of all of the other co-indictees, appellant's attorney operated under a conflict of interest. The Court held that, as an initial matter, counsel from the same public defender's office are not automatically disqualified from representing multiple defendants charged with offenses arising from the same conduct. And, the mere possibility of conflict is insufficient to impugn a criminal conviction. Rather, a defendant must show that an actual conflict exists, meaning that there is a substantial risk that the lawyer's representation of him would be materially and adversely affected by the lawyer's own interests or by the lawyer's duties to another current client, a former client, or a third person.

Here, the Court found, there was no evidence that an actual conflict existed for appellant's attorney. Appellant was tried alone, and his counsel only represented him, which ensured that no conflict could have arisen based on his attorney's representation of multiple defendants. Furthermore, appellant's counsel testified at the motion for new trial hearing that he did not share any information about appellant's case with the other public defenders, nor did the public defenders who represented two of the other co-indictees share any information with him about their cases. Moreover, the investigator used by the public defender's office merely interviewed the State's witnesses to find out what they knew, and the information gathered by the investigator actually assisted appellant's counsel in planning his individual case. The investigator did not convey any information to appellant's counsel that could have created any conflict of interest. Therefore, appellant's speculation that a conflict of interest necessarily arose simply because a single investigator was used and because multiple co-indictees were represented by the same public defender's office was insufficient as a matter of law to show that an actual conflict existed.

Probation Revocation; First Offender Act

Kaylor v. State, A11A0879 (11/16/11)

Appellant appealed from the revocation of his probation and adjudication of guilt. The record showed that appellant pled guilty to two counts of child molestation and was sentenced under the First Offender Act to fifteen years to serve four years in confinement and the balance on probation. In 2010, after appellant was released from confinement and while on probation, the trial court revoked his probation, adjudicated him guilty of the offenses, and sentenced him to twenty years to serve 15 years in confinement, followed by five years' probation, as to one count and a consecutive probation term of twenty years as to the second count.

Appellant argued that he was automatically discharged under the First Offender Act when he was released from confinement. OCGA § 42-8-62 (a) provides that "[u]pon fulfillment of the terms of probation, upon release by the court prior to the termination of the period thereof, or upon the release from confinement, the defendant shall be discharged without an adjudication of guilt . . . and the defendant shall not be considered to have a criminal conviction." The Court held that a defendant is automatically discharged upon the successful completion of the terms of his sentence. In this case, however, appellant did not complete his sentence because he had not finished his term of probation. Where, as here, a defendant has been sentenced to probation, the trial court retains jurisdiction throughout the period of the probation, and it may revoke his first offender status, enter an adjudication of guilt, and resentence the defendant on the underlying offense based on his violations of probation. Moreover, the trial court is empowered to revoke any or all of the probated sentence, rescind any part of, or the entire sentence, or modify or change the probated sentence under OCGA § 42-8-34 (g). Because appellant was still serving his probated sentence, the trial court had the authority to revoke his first offender status and enter an adjudication of guilt for his violations of probation.

Appellant also argued that the trial court lacked the authority to increase the sentence imposed in 2002 because he was sentenced to confinement pursuant to OCGA § 42-8-60 (a) (2). The Court disagreed.

Because appellant was serving the probationary period of his sentence, he was subject to OCGA § 42-8-60 (b). When a first offender probationer violates the terms of his probation and the trial court enters an adjudication of guilt, the court may impose any sentence permitted by law for the offense the probationer has been found guilty of committing. A trial court is authorized to increase the first offender sentence provided that (1) the accused was informed of that eventuality at the time the initial sentence was pronounced and (2) any time served prior to an adjudication of guilt must be credited to any new sentence. Here, the Court determined both conditions were met.

Finally, the Court found that appellant's argument that the trial court should have expressly calculated the time for which he was to receive credit, was without merit because the Department of Corrections, not the trial court, is responsible for computing a defendant's credit for time served.

Jury Array; Sixth Amendment

Greene v. State, A11A1067 (11/17/11)

Appellant was convicted of DUI. He argued that the trial court erred in denying his Sixth Amendment fair cross-section claim to the jury array. The record showed that appellant submitted a pre-trial written challenge to the jury array in which he maintained that the current jury list from which his array was drawn, of which 13.8 percent was African-American, was not a true representation of the voting-aged African-American population in the county. Appellant contended that the composition of the jury list should reflect the more current population of African-Americans in the county of 31percent, as found by the U. S. Census Bureau's 2008 American Community Survey ("ACS"), rather than the 13.9 percent reflected in the 2000 census. The trial court proceeded with jury selection, but released the jury without swearing it in. The court thereafter conducted an evidentiary hearing on the array challenge, and after denying the challenge, appellant was convicted after trial.

To make a prima facie claim of a fair cross-section violation, a defendant must show (1) that the group alleged to be excluded is a "distinctive" group in the community; (2) that the representation of this group on the trial jury list is not fair and reasonable in relation to the number of such persons in the community; and (3) that this under-representation is due to systematic exclusion of the group in the jury selection process. A fair cross-section claim is almost identical to a claim raised directly under the equal protection clause of the Fourteenth Amendment, with the one prominent exception being that the claimant need not demonstrate any intent to under-represent a cognizable group. However, a prima facie showing of a fair cross-section violation can be rebutted if the State can demonstrate that attainment of a fair cross-section is incompatible with a significant state interest.

The trial court found that appellant made out a prima facie case, but the State, citing the Unified Appeal Procedure ("UAP"), demonstrated a significant State interest to rebut the prima facie case by showing that it was justified in using the Decennial Census as part of the State's significant interest in obtaining comprehensiveness and objectivity in the jury array construction. Nevertheless, appellant argued that the trial court erred in finding that the State had rebutted his prima facie case because the UAP does not apply to misdemeanor cases.

Citing *Williams v. State*, 287 Ga. 735, 737-738 (2) (2010), the Court held that while the UAP does not apply to misdemeanor cases, there was no possible rationale for concluding that the State's use of the Decennial Census to provide a "comprehensive and objective standard" to promote adequate representation would prove acceptable in capital cases, but not so in misdemeanor cases. Since *Williams* found that the "balancing of cognizable groups to match the most recent Decennial Census is justified by a sufficiently-significant state interest," the Court stated it was bound by such determination because in this case that method was utilized. Accordingly, the trial court did not err in denying appellant's fair cross-section challenge to the jury array.

Search & Seizure; Merger

Ahmad v. State, A11A1174 (11/18/11)

Appellant was convicted of trafficking in methamphetamine; trafficking in 3, 4 methylenedioxymethamphetamine (ecstasy); and other offenses. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant was arrested for driving with a suspended license. The officer also determined that the vehicle was uninsured. Therefore, despite the fact that the vehicle was parked in a parking lot, the officer had the vehicle impounded. During the inventory of the vehicle, the drugs were found.

Appellant argued that it was not reasonably necessary to impound his vehicle because it was parked on private property and that the policy of the sheriff's office to impound all uninsured vehicles regardless of the attendant circumstances was unreasonable as a matter of law. The Court found that justification for an inventory search is premised upon the validity of the impoundment of the vehicle. A police officer is authorized to make an inventory of the contents of a vehicle that has been impounded The ultimate test for the validity of the police's conduct in impounding a vehicle is whether, under the circumstances then confronting the police, their conduct was reasonable within the meaning of the Fourth Amendment. Also, a police seizure and inventory is not dependent for its validity upon the absolute necessity for the police to take charge of property to preserve it. They are permitted to take charge of property under broader circumstances than that. Inventory searches have two purposes: (1) protect the vehicle and the property in it, and (2) safeguard the police or other officers from claims of lost possessions. The decisive evidentiary issue in cases involving inventory searches is the existence of reasonableness rather than the existence of exigent circumstances. Moreover, an automobile need not be an impediment to traffic before it can be lawfully impounded.

Here, the Court found, nobody could have legally driven appellant's vehicle from the location of arrest because it was uninsured. When given an opportunity, appellant expressed no preference regarding towing companies and allowed the arresting officer to make the towing arrangements. Therefore, it was necessary for the police to exercise at least temporary dominion over the vehicle. Under the circumstances, it was reasonable for the police to impound the vehicle and inventory its contents to protect appellant's property and to protect against claims of lost or stolen property while the vehicle was in the possession of the police or its contractors. Furthermore, the Court held, the legislature having recognized that uninsured vehicles pose a threat to the public safety and health, it could not be said that where a person is arrested for a crime directly related to the operation of his vehicle, the policy of the sheriff's office to impound the arrestee's uninsured vehicle is unreasonable as a matter of law.

Appellant also contended that the trial court erred in sentencing him separately for trafficking in methamphetamine and trafficking in ecstasy because both crimes were supported by identical evidence. Specifically, he argued that because the same 29.01 grams of substance tested positive for methamphetamine and for ecstasy, both crimes required the same facts or proof. The Court found that appellant was correct that the same 29.01 grams of substance which tested positive for methamphetamine also tested positive for ecstasy. Therefore both controlled substances shared in the same mixture and thus the trafficking crimes were accomplished by the same conduct of the accused. However, merger was not required on that basis. Utilizing the required evidence test for determining when one offense is included in another, the Court found that because trafficking in methamphetamine required possession of methamphetamine (a schedule II controlled substance) and trafficking in ecstasy required possession of 3, 4 methylenedioxymethamphetamine (a schedule I controlled substance), two discrete portions of the mixture were used to prove two distinct offenses. Therefore, each crime required proof of a fact which the other did not because there was no evidence that chemical compounds or elements were shared between the drugs. Accordingly, the two counts did not merge and the trial court did not err in sentencing him separately for the two crimes.

Search & Seizure

Manzione v. State, A11A0970 (11/16/11)

Appellant was convicted of 20 counts of sexual exploitation of children after law enforcement officers executed a search warrant and seized from his home computer various images depicting young children engaged in sexually explicit conduct. He contended that the trial court erred in denying his motion to suppress. The evidence showed that Yahoo! Inc. noticed that four child pornography images

were uploaded to one of its discussion boards. Yahoo! utilized an internet database called "WHOIS" to establish that Charter Communications was the internet service provider supplying online access to the originating computer, and further discovered that the subject computer was located in Athens, Georgia. In accordance with the mandates set forth in 42 U.S.C. § 13032 (b) (1), the custodian of records at Yahoo! reported the offensive images and its subsequent findings —including the IP address for the originating computer —to the National Center for Missing and Exploited Children ("NCMEC"), a national clearinghouse for information about children believed to be missing or sexually exploited. As also required by 42 U.S.C. § 13032 (b) (1), NCMEC placed Yahoo!'s report and supporting documentation, including copies of the offending images, onto a compact disc and forwarded it, unedited, to the GBI. The GBI subsequently obtained the search warrant of appellant's home.

Appellant argued that the GBI agent's affidavit was legally insufficient to establish probable cause. Specifically, he argued that the agent's affidavit was premised upon inadmissible hearsay and that NCMEC was an unreliable source, requiring the agent to independently identify and verify the credibility of the Yahoo! employee who discovered and reported the images prior to seeking a warrant. In support of his argument, he relied on a disclaimer purportedly contained on one of the documents forwarded to the agent, which stated that "NCMEC neither investigates nor vouches for the accuracy of the information reported" to it.

The Court found that in the challenged affidavit, the agent averred that on October 25, 2005, NCMEC notified the GBI that the custodian of records at Yahoo! Inc. reported the discovery of graphical images containing child pornography posted to a Yahoo! Group and that NCMEC "confirm[ed] the existence" of the child pornography; that Yahoo! Groups allows people with similar interests to communicate with each other and to post pictures for others to view; and that Yahoo! monitors the postings for images that appear to be child pornography and, when discovered, reports such activity to the NCMEC. The affidavit also noted that the offensive postings originated from a particular IP address, which it described as "the numeric address of a computer on the Internet"; that providers of internet services maintain logs to identify which customer account is assigned to a particular IP address at a particular moment in time; and that "NCMEC indicate[d] that WHOIS . . . revealed the [subject] IP address to be operating out of Athens, Georgia" with Charter Communications functioning as the internet service provider. Finally, the affidavit detailed that the agent obtained a court order requiring Charter Communications to produce the subscriber information for the account associated with the IP address on the date and time that the images were uploaded; that Charter Communications identified appellant as the account subscriber and provided his home address and additional identifying information associated with the account; and that the agent confirmed appellant's identity and address, and conducted drive-by surveillance of his residence. The agent admitted that although she was provided the name and contact information of the Yahoo! employee who saw and reported the subject images, at no time did she communicate with that individual. The agent further admitted that she was unaware of whether anyone at the GBI confirmed the information obtained through the WHOIS database.

The Court found that while the agent could have done a more thorough job investigating the information received by the GBI, she was entitled to presume the reliability of the Yahoo! report as transmitted through NCMEC without independently verifying the credibility of the Yahoo! employee who initially viewed the offensive images. And, crediting that report and otherwise considering the totality of the circumstances, the agent's affidavit provided the issuing judge a substantial basis for concluding that probable cause existed sufficient to issue the search warrant for appellant's residence.

Appellant further argued that the affidavit was misleading in that it created a false impression that NCMEC investigated and verified the allegations Yahoo! reported. Specifically, appellant focused on the agent's averment that NCMEC "confirm[ed] the existence" of the child pornography posted on Yahoo! Groups and further argued that the agent misrepresented that NCMEC, as opposed to Yahoo!, conducted the WHOIS search. The Court found that the affidavit, although not precisely worded, was not misleading so as to taint the information it provided or to mislead the issuing judge into mistakenly believing that probable cause existed when it actually did not. Rather, it was apparent that, in context, the affidavit relayed the Yahoo! report as it had been received by the GBI (i.e., through NCMEC), which was acting in the role that it was congressionally mandated to perform. But even assuming that the affidavit was misleading (thus omitting any language implying an independent investigation by NCMEC), and instead inserting language making it abundantly clear that no investigation had ever been conducted, the Court concluded that it did not change the result in the case.

Thus, the Yahoo! employee who originally viewed the offensive images was afforded a presumption of reliability and no independent investigation into that individual's credibility was necessary. Therefore, even if the agent had included in the affidavit an explicit disclaimer that NCMEC had not confirmed the veracity of that individual, it would not have resulted in a lack of probable cause to issue the search warrant. Accordingly, the trial court did not err in denying appellant's motion to suppress.

DUI; Miranda

Rowell v. State, A11A1231 (11/15/11)

Appellant was convicted of DUI. She contended that she was improperly coerced into taking an alco-sensor test without the benefit of a *Miranda* warning. Specifically, appellant argued that the officer's actions in administering the test constituted improper coercion and/or transformed her detention into a custodial situation for purposes of *Miranda*. The record showed that the officer administered the alco-sensor test after he determined that appellant had failed an HGN and one-leg-stand test. When appellant blew into the alco-sensor device, the officer urged her repeatedly to "blow, blow, blow." After her initial attempts failed to achieve a useable reading, the officer told her on two occasions that he would take her to jail if she did not properly blow into the device. The officer testified that appellant was not performing the test as instructed, and he was intending to inform her that if she did not perform it correctly, he would take her to jail to perform the state-administered chemical test.

The Court found that the trial court could have properly interpreted the officer's repeated commands to "blow, blow, blow" as instructing her as to the length of her breath and not as an attempt to force her to submit to the test. However, the Court stated, the officer's

"statements that he would take [appellant] to jail if she did not properly perform the test [were] more troubling."

An investigating officer is not required to advise a suspect that his performance of field sobriety tests is voluntary but, an officer cannot improperly compel a suspect into submitting to the tests. In fact, courts should specifically look for an absence of any threat of criminal sanction or any show of force in determining whether field sobriety test evidence is admissible. Citing *Leiske v. State*, 255 Ga. App. 615 (2002), the Court stated that it was possible to interpret the officer's statements as a threat of criminal sanction for failing to properly perform the test. Nevertheless, the Court concluded that it did not believe that the officer was required to read appellant a *Miranda* warning under the circumstances of this case. Where a police officer indicates that a defendant is going to jail regardless of his performance on the field sobriety tests, an officer must read the *Miranda* warning. Here, the officer gave appellant "an option of sorts: perform the test properly or go to jail." Thus a reasonable person in appellant's position would have believed that she was not yet under arrest and that her detention still could be only temporary. Moreover, the officer did not make these statements until appellant had already consented to and begun performing the test. There was no indication that her initial consent was made under any threat of force or criminal sanction or that she wanted to refuse the test. It was only when she failed to achieve a useable reading that the officer indicated that he would take her to jail if she did not perform the test correctly. Under these circumstances, no *Miranda* warning was required and the officer's statements could not be interpreted as coercing her into submitting to the test.

But, the Court concluded, even if the statements could be construed as improperly coercing appellant into continuing to perform the test, the Court found the admission of the test results was harmless error because sufficient evidence existed to establish probable cause for appellant's arrest without that evidence.

Plea Bargains; Judicial Intervention

In the Interest of S. F., A11A1247 (11/17/11)

Appellant, a 14-year-old, was adjudicated delinquent after admitting to acts which, if committed by an adult, would constitute the crimes of assault and robbery. Appellant contended that the juvenile court "directly involved [itself] in the so-called plea negotiation," and threatened him with a longer term of confinement if he proceeded with adjudication rather than entering an admission.

The Court stated that judicial participation in plea negotiations is prohibited as a constitutional matter when it is so great as to render a guilty plea involuntary. A guilty plea must be knowingly and voluntarily entered. Making a knowing and voluntary plea requires an understanding of the nature of the charge, the rights being waived, and the consequences of the plea. Due to the "force and majesty of the judiciary," a trial court's participation in the plea negotiation may skew the defendant's decision-making and render the plea involuntary because a defendant may disregard proper considerations and waive rights based solely on the trial court's stated inclination as to sentence.

Here, trial counsel announced twice that appellant was ready to proceed with the bench trial, after which the juvenile court stated: "The judge's indication that he would plea to three years, which [his co-defendant] got, would be similar to a plea offer as opposed to anything else." The Court found that because the juvenile court presented appellant with a "plea offer" of three years of confinement if he made an admission rather than proceeding with the adjudication, the court inappropriately participated in the "plea negotiation." But, the court's participation was not so great as to make appellant's admission involuntary. First, following his indication that he wished to make an admission, the juvenile court engaged appellant in the standard colloquy to determine if he made the admission knowingly and voluntarily. After appellant stated that he understood the rights he was waiving, he again informed the court that he wished to proceed with an admission.

Second, the juvenile court did not make any threats of a longer term of confinement if appellant chose to go to trial, nor did it offer him any benefit for making an admission. The juvenile court explained at the beginning of the hearing that it was inclined to give appellant the same three-year term of confinement that his co-defendant received, and then suggested that it would accept a "plea offer" of "three years" if appellant gave an admission. Following the court's acceptance of his admission, the court ordered him to serve 30 months in confinement, rather than the three years it originally stated it was inclined to impose. Under these circumstances, the juvenile court's participation in the "plea negotiations" was not such that it rendered appellant's admission involuntary in the absence of evidence that appellant disregarded proper considerations and waived rights based solely on the trial court's stated inclination as to sentence.

Possession of a Destructive Device; OCGA § 16-7-88

Mason v. State, A11A1545 (11/18/11)

Appellant was convicted of two counts of aggravated assault, two counts of possession of a destructive device with the intent to intimidate, and one count of making a terroristic threat. The evidence showed that appellant had a homemade device that was constructed from a piece of three-quarter inch metal pipe twelve to eighteen inches in length, a cap that screwed on to one end of the pipe, and a bolt that penetrated the end cap to serve as a detonator or firing pin. Appellant loaded a shotgun shell into the device. He pointed the open end of the device at the female victim's head and threatened to kill her if she did not pay him. He then pulled the male victim around to the side of a house and pointed the weapon at his face, saying, "I should kill you."

He argued that the device he allegedly pointed at the victims was not a destructive device within the terms of OCGA § 16-7-88 (a) and, therefore, his conviction under that Code section could not stand. Pursuant to OCGA § 16-7-88 (a), it is unlawful for any person to "possess[], transport[], or receive[] . . . any destructive device or explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or to destroy any public building[.]" For this and other offenses codified in OCGA § § 16-7-80 through 16-7-97, OCGA § 16-7-80 (4) defines a "[d]estructive device" in pertinent part as "[a]ny type of weapon by whatever name known which will or may be readily converted to expel a projectile by the action of an explosive or other propellant, through a barrel which has a bore diameter of more than one-half inch in diameter; *provided, however, that such term shall not include a pistol, rifle, or shotgun suitable for sporting or personal*

safety purposes or ammunition; a device which is neither designed or redesigned for use as a weapon; a device which, although originally designed for use as a weapon, is redesigned for use as a signaling, pyrotechnic, line throwing, safety, or similar device; or surplus military ordnance sold, loaned, or given by authority of the appropriate official of the United States Department of Defense[.]" (Emphasis added).

Appellant argued that the inclusion of the emphasized language meant that the State must prove that the device in question "could not be used in the same manner as a common pistol, rifle, or shotgun[.]" As a result, he contended, even though his device was homemade or improvised, and not manufactured by a known gun manufacturer, this exclusion applied to his device and, therefore, his possession of the device with the intent to intimidate the victims did not violate OCGA § 16-7-88 (a). The Court disagreed. The Court stated that if it were to accept appellant's position that, because he pointed his device "at the victims in the same manner a person could point a store-bought pistol, rifle, or shotgun," his device was functionally indistinguishable from a pistol, rifle, or shotgun suitable for sporting or personal safety purposes and was thus excluded from the definition of a destructive device, then the exception would swallow the rule. "Such a construction of the statute is illogical and untenable."

Jury Instructions; Recent Unexplained Possession

Ward v. State, A11A0782 (11/16/11)

Appellant was convicted of theft by taking a motor vehicle. He contended that the court's instruction to the jury regarding an inference arising from his recent possession of the stolen truck was unconstitutional because it used an improper presumption to shift the burden of proof to him. A divided Court agreed and reversed his conviction.

The trial court instructed the jury as follows: "The recent unexplained or inadequately explained possession of stolen property by a Defendant creates an inference or presumption of fact sufficient to convict. This is true without direct proof or other circumstantial evidence that the Defendant committed the theft. However, recent possession of stolen goods will not automatically support a conviction of theft; you as jurors honestly seeking the truth still must judge the case on the totality of the circumstances under the reasonable-doubt standard that I have previously charged you. That is, recent possession is to be viewed as probative evidence of the crime and reviewed along with all of the evidence in the case to determine whether the State has proved the Defendant's guilt beyond a reasonable doubt."

The Court held that the first sentence of this instruction was cast in commanding language. It told the jury that proof of certain facts created an inference or presumption sufficient to convict appellant, not that such proof may be sufficient to give rise to an inference that he committed theft by taking. This commanding language was buttressed by the following sentence that the inference or presumption is created without any evidence that appellant committed the theft. As a result, there was a reasonable likelihood that the jury viewed the first two sentences of the instruction as setting forth a mandatory presumption. The first sentence's instruction that the presumption was created if the recent possession of stolen property was "unexplained or inadequately explained" provided a means for rebutting the presumption (evidence of an adequate explanation for the recent possession). Nevertheless, a mandatory rebuttable presumption improperly relieves the State of the affirmative burden of persuasion on the presumed element by instructing the jury that it must find the presumed element unless the defendant persuades the jury not to make such a finding. The first sentence of the instruction, which was reinforced by the second sentence, created an unconstitutional burden-shifting presumption.

Moreover, the jury charge taken as a whole failed to explain the proper allocation of burdens with sufficient clarity that any ambiguity in the particular language challenged could not have been understood by a reasonable juror as shifting the burden of persuasion. General instructions as to the prosecution's burden and the defendant's presumption of innocence did not dissipate the error in the first sentence of the challenged instruction. Later sentences in the challenged instruction, which stated that recent possession of stolen goods would not automatically support a conviction of theft and that the jurors were required to apply the reasonable doubt standard to the totality of circumstances, arguably conflicted with the instruction on the presumption in the first sentence. Finally, the last sentences did not dissipate the error in the first sentence of the instruction, nor did they make clear that it was within the jury's discretion whether to draw an inference from proof of recent possession of stolen property.

Jury Charges; Judicial Comment

Adams v. State, A11A1266 (11/15/11)

Appellant was convicted of criminal attempt to entice a child for indecent purposes and making a false statement in a matter within the jurisdiction of a sheriff's office (OCGA § 16-10-20). He contended that the trial court's jury instructions violated his due process rights because they allowed him to be convicted of criminal attempt to entice a child for an indecent purpose in a manner not alleged in the indictment. The indictment alleged that appellant "did perform an act which constitutes a substantial step toward the commission of solicitation of Savannah Patterson, someone believed by the accused to be under the age of 16 years, to Unicoi Park, White County, Georgia, to wit: said accused did engage in a sexually explicit online chat with Savannah Patterson and drove to the arranged meeting place for the purpose of committing *Aggravated Child Molestation*…" (Emphasis supplied). In its instructions to the jury, the trial court used the words "child molestation" instead of "aggravated child molestation."

The Court found no error. A criminal defendant's right to due process may be endangered when an indictment charges the defendant with committing a crime in a specific manner and the trial court's jury instruction defines the crime as an act which may be committed in a manner other than the manner alleged in the indictment. The giving of a jury instruction which deviates from the indictment violates due process where there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed to limit its consideration to the manner specified in the indictment. Here, there was evidence to support a conviction based on the unalleged manner of committing the crime. While instructing the jury, however, that a crime can be committed in a manner different from that charged in the indictment can constitute reversible error, a reversal is not mandated where, as here, the charge as a whole limits the jury's consideration to the specific

manner of committing the crime alleged in the indictment. Thus, the Court found, here, the trial court read the indictment to the jury, instructed the jury that the State had the burden of proving every material allegation in the indictment beyond a reasonable doubt, and sent the indictment out with the jury during its deliberations. And, after defining the crimes alleged, the trial court instructed the jury that it would be authorized to find appellant guilty if it believed beyond a reasonable doubt that he committed the crimes "as set forth in the indictment." Therefore, the Court concluded, these instructions cured any complained of problem with the charge of attempting to entice a child.

Appellant also contended that the trial court violated OCGA § 17-8-57during defense counsel's cross-examination of the officer posing as Savannah Patterson, the minor female child victim, regarding appellant's representation to her that he lived in Florida when he actually lived in Stone Mountain. Defense counsel asserted that the officer stated in her warrant for appellant that he "knowingly and wilfully falsifie[d], conceal[ed] or cover[ed] up by any trick, scheme, or device a material fact, [or] ma[de] a false, fictitious, or fraudulent statement or representation." Counsel then asked the officer if appellant's statement that he lived in Florida "was . . . a material fact?" The trial court then asked trial counsel, "[D] o you want me to charge the jury as to the entirety of that charge or as indicted? Your client is only indicted with one small sliver of such. Your questioning of her lays out the entirety of the statute…"

The Court stated that OCGA § 16-10-20 provides three ways in which the crime of giving a false statement may be committed: (1) by falsifying or concealing a material fact; (2) by making a false statement or representation; or (3) by knowingly making or using a false writing." In the indictment, the State charged that appellant "did knowingly and willfully make a false statement," not that he concealed or falsified a material fact. Thus, the Court found, the trial court was attempting to explain to defense counsel that he was expanding the indictment by asking the officer about a separate manner of violating the statute and that if counsel insisted on doing so, the court would enlarge the jury charges and admit any evidence to support that manner of committing the crime. Thus, the Court concluded that OCGA § 17-8-57 was not violated because the complained of comments by the trial court demonstrated an authorized attempt to control the conduct of the trial and to guide the defense attorney to ensure a fair trial and the orderly administration of justice. The comments were limited in scope, did not involve appellant's guilt or innocence, and did not express an opinion on what had or had not been proved.

Bruton; Right to Counsel of Choice

Laye v. State, A11A1456 (11/15/11)

Appellant was convicted of armed robbery arising from an incident that led to the indictment of nine individuals for murder, aggravated assault and other crimes. He was tried with Ackey, a co-defendant. One of his other co-defendants, Coleman, testified for the State.

Appellant contended the trial court committed reversible error under *Bruton v. United States*, 391 U. S. 123 (1968), when it failed to give a limiting instruction regarding the admission of Ackey's custodial statement. Ackey did not testify at trial, and appellant argued the statement violated his right to confrontation and improperly corroborated Coleman's testimony about his participation in the crime, especially because the trial court failed to give a limiting instruction to the jury.

Here, Ackey's statement identified by name eight of the nine individuals accused with the crimes and referred to the ninth person as the "fourth person" in his car, as well as one of "all three of the other boys," as "he," as "them," and the "others." Because the jury was well aware who all the defendants were and which car they were in, it would be clear to the jury that the only unnamed person in Ackey's statement was appellant. And in the final line of the statement, Ackey even mentioned picking up appellant's cousin. The Court found that the clear implication of Ackey's statement was that appellant was the fourth person in the car; that all those in the car knew in advance that two other named co-defendants planned to rob someone; that appellant and the two named co-defendants got out of the car and went halfway to the scene of the crime; that they could see the shooting; that the same three ran back to the car after the shooting; and that "someone," which could only be a co-defendant or appellant, had a gun when he got back in the car.

The Court stated that there is a constitutional problem with statements that, despite redaction, obviously refer directly to someone, often obviously the defendant, and which involve inferences that a jury ordinarily could make immediately, even were the confession the very first item introduced at trial. Thus, the admission of Ackey's statement was therefore erroneous and because appellant's right to confrontation was violated, he was entitled to a new trial unless the error was harmless. In reviewing the evidence, the Court found that the error was indeed harmless and therefore, no new trial was ordered.

Appellant also contended that his constitutional right to counsel of choice was violated. The record showed that appellant was initially represented by a private attorney appointed by the regional office of the Georgia Public Defender Standards Council (the "Council"). On January 30, 2007 (a little over six months after the crimes), the trial court signed an order substituting counsel for five of the defendants, including appellant and co-defendant Buchanan; the order had been prepared by the Council and it was signed ex parte by the judge. Appellant's new counsel filed an entry of appearance the next day. Nevertheless, on March 28, 2007, the Council filed a motion —largely redundant of the earlier order —to substitute trial counsel for four of the same five defendants, including appellant's counsel but not Buchanan's, as if the earlier order had not been effective. The motion asserted the ground that the Council did not have sufficient funds to pay for private counsel for these defendants. The motion indicated that current counsel had been advised and had agreed to the substitution and that the defendants had not objected. One day later, the motion was granted, and the four defendants were assigned public defenders from around the state.

The Court stated that a defendant who does not require appointed counsel has the right to choose who will represent him. For indigent defendants, however, that right is circumscribed: the right to counsel of choice does not extend to defendants who require counsel to be appointed for them. Nevertheless, when an indigent defendant's choice of counsel is supported by objective considerations favoring the appointment of the preferred counsel, and there are no countervailing considerations of comparable weight, it is an abuse of the trial court's discretion not to honor the request.

Even so, an indigent defendant's preference for certain counsel may be waived by action or declaration.

The Court concluded that appellant failed to show reversible error for several reasons. First, he waived any objection to a change in counsel. His contention that the trial court gave him no opportunity to object is belied by the fact that another defendant did object and thereby retained his original counsel. No explanation had been given for why appellant's counsel could not also have objected. Second, there was a countervailing consideration presented to the court: that the Council was unable to pay for private attorneys and therefore a public defender was necessary. The trial court did not abuse its discretion by considering this factor. Finally, appellant failed to show that his trial counsel provided reversible ineffective assistance of counsel. Despite two alleged errors showing ineffectiveness, the Court determined that it was apparent that his trial counsel adequately represented him. For example, appellant was acquitted on all other counts save armed robbery, despite Coleman's testimony that he had a gun, pointed it at the victim, and shot it.

Commenting on Right to Remain Silent

Harrelson v. State, A11A1208 (11/18/11)

Appellant was convicted of hijacking a motor vehicle, armed robbery, aggravated assault and possession of a knife during the commission of a crime. He argued that the trial court erroneously denied his motion for a new trial because in closing argument, the prosecutor improperly commented on his post-arrest right to silence. The Court stated that a prosecutor is prohibited from commenting on a criminal defendant's post-arrest silence, even when the defendant takes the stand in his own defense. Here, the evidence showed that defense counsel repeatedly brought out at trial the fact that no statement from appellant existed because appellant had a constitutional right to not talk with the police and he exercised that right. The first time was during cross-examination of a detective, and the second time was upon re-cross-examination of the same detective. Moreover, three different times during closing argument, defense counsel brought out the fact that no statement from appellant existed and that he chose to not talk with the police. The prosecutor, in closing argument, then stated that appellant had a right to not talk to the police, and she asked whether talking to the police was the first thing an innocent person does when they see the police. The Court said that typically, questioning about and commenting upon a defendant's silence or failure to come forward is more prejudicial than probative. However, because appellant raised the issue regarding his failure to come forward, the prosecutor was legitimately authorized to address it in closing argument. Thus, there was no error.

Voir Dire; McCollum Challenge

Douglas v. State, A11A1784 (11/15/11)

Appellant was convicted of aggravated assault, possession of a firearm during the commission of a crime, and false imprisonment. He contended the trial court erred in reseating a juror that he had used a peremptory strike to remove. Specifically, he argued that the trial court erred when it granted the State's *McCollum* motion to re-seat Juror No. 12 on the jury panel. The record showed that after appellant and his co-defendants, who are black, used six of eight peremptory strikes against white members of the venire, the State made a motion asserting that the defense had exercised its strikes in a racially discriminatory manner. The judge agreed with the State's position with respect to Juror No. 12 and ordered that the juror be reseated on the panel.

In *McCollum*, the United States Supreme Court held that the equal protection clause prohibits the accused from engaging in purposeful discrimination on the basis of race in the exercise of peremptory strikes. A *McCollum* challenge triggers a three-step process: (1) the State must make out a prima facie case of racial discrimination; (2) if established, the burden of production shifts to the defendant to come forward with a race-neutral explanation; and (3) if a race-neutral explanation is tendered, the trial court must decide whether the State has proved purposeful racial discrimination. The ultimate burden of persuasion regarding racial motivation rests with, and never shifts from, the opponent of the strike.

The record showed that the court asked the defense to give race-neutral explanations for its strikes. With respect to Juror No. 12, appellant's trial counsel stated that he struck the juror because

"he indicated that he knows Judge Benefield. And as a result of that, he's familiar with the . . . power-elite structure in the county, [by] knowing judges. And our concern is that he will give weight and credence to [the trial court's] rulings against Mr. Douglas and the other defendants in this case, if an objection is overruled and [the juror] may hold that against Mr. Douglas. Also, [the juror] indicated that there was a time when he was called for jury selection and the case stopped . . . because the defendant entered a plea. And so, we're concerned he may be cynical, as a result of that experience, the process."

After hearing these reasons, as well as the reasons articulated for striking the other jurors, the trial court heard the State's argument. The State pointed out that Juror No. 12 said that he had served as a juror in Judge Benefield's courtroom, not that he knew the judge personally. The State also argued that the reasoning articulated by the defense was pretextual.

The trial court found that the juror "never said anything about knowing Judge Benefield at all." Rather, the court found that Juror No. 12 "said that he had served on a prior jury and [when he was asked for the name of the judge] . . . he just happened to recall that Judge Benefield was the trial judge." The trial court also found that many jurors on the panel testified that they had served on prior juries "and there was no inquiry about who [the presiding] judge was, whether [the presiding] judge was white or black, whether [the presiding] judge was part of the power structure or not." The court also noted that appellant's belief that Juror No. 12 might be cynical toward the justice system was not a sufficient basis for removing the juror because, "[t]ime after time, jurors are brought up and then stand in the hallway and then they are told, well, the defendant plead[ed] guilty, y'all go back downstairs. That happens all the time." The court found defense counsel's explanation insufficient and reseated Juror No.12.

The Court found that implicit in the trial court's stated reasons for reseating Juror No. 12 was a determination that counsel's explanation lacked credibility. Applying the deferential standard of review, the Court concluded that the trial court did not clearly err in reseating Juror No. 12 upon deciding that the State had met its burden of showing that counsel had acted with discriminatory intent in striking that juror.

Hearsay; Explaining Police Conduct

Alvarez v. State, A11A1104 (11/15/11)

Appellant was convicted of one count of felony obstruction of an officer and two counts of the lesser included offense of misdemeanor obstruction of an officer. The evidence showed that the police responded to the home to investigate a crime after speaking to Sosa, a bloody, injured man, who was found walking on the street, and that the police had reason to suspect that someone at a residence, where Sosa claimed he was beaten, was armed with a gun. Once at the scene, the police encountered appellant in the back of the house. Appellant did not show his hands despite repeated commands to do so and continued to advance toward the officers. Appellant and three officers then fought and eventually, appellant was subdued and arrested.

Appellant argued that the trial court erred by admitting the "implicit hearsay" testimony of the police officers regarding Sosa's statements. The Court found that the testimony to which appellant objected was not inadmissible hearsay. An out-of-court statement is considered hearsay only if it is offered to prove the truth of what is contained therein. Pursuant to OCGA § 24-3-2, "[w]hen, in a legal investigation, information, conversations, letters and replies, and similar evidence are facts to explain conduct and ascertain motives, they shall be admitted in evidence not as hearsay but as original evidence." Although only in rare instances will the conduct of an investigating officer need to be explained, "this [wa]s such a case." The testimony at issue was offered not to prove that appellant had been beaten up by a man who indicated that he had a weapon, but instead to establish a basis for the officers' actions. In establishing that appellant obstructed the officers, the State was required to prove that they were acting in the lawful discharge of their official duties at the time of the obstruction. Thus, the State needed the officers to testify about their encounter with Sosa and their belief that a person at his residence was armed with a gun. Accordingly, the testimony was admissible as original evidence to explain that the officers were lawfully discharging their official duties.