

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 13, 2012

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THIS WEEK:

- Habeas Corpus; Right to Counsel
- Habeas Corpus, Venue
- Speedy Trial; *Barker v. Wingo*
- Guilty Pleas; Ineffective Assistance of Counsel
- Out-Of-Time Appeals
- Impeachment; First Offender Status
- Severance; Mutual Combat
- Brady Evidence; Impeachment
- Closing Arguments; Prosecutorial Misconduct
- Probation Revocation
- Custodial Statements; *Miranda*
- Search & Seizure

Habeas Corpus; Right to Counsel

Fullwood v. State, S11A1725 (1/9/12)

Appellant entered a plea of guilty to VGCSA and was sentenced to ten years on probation under the provisions of the First Offender Act. Appellant filed a habeas petition challenging his plea of guilty and argued the habeas court erred in holding that he knowingly and voluntarily waived his right to counsel at the plea hearing. The habeas court concluded the sentencing court properly assessed appellant's mental state and cognitive abilities and found no substantial deficiencies indicating he did not possess the necessary desire to enter a guilty plea under the First Offender Act.

Appellant argued he did not understand the nature of self-representation and the

nature of the charges against him. Although appellant did in fact sign the pre-printed generalized waiver and acknowledgment about understanding the right to counsel, the Court declined to hold that this constituted a valid waiver of counsel. The trial court must inform the accused of the nature of the charges against him, his right to be counseled regarding his plea, and of the range of allowable punishments. The Court also found that the record further reflected the sentencing court undoubtedly failed to fully inform appellant of his right to counsel during his plea. The Court held the failure to fully inform appellant of these rights constituted reversible error by the trial court.

Habeas Corpus, Venue

Duncan v. Frazier, S11A1409 (1/9/12)

Appellant was granted a certificate of probable cause to appeal the habeas court's denial of his motion to transfer venue. In June of 2007, appellant, proceeding pro se, filed his petition in Hancock County where he was being held. Nearly six months after filing, appellant was transferred to Macon State Prison and appellant sought the transfer of his habeas petition to Macon County, where the prison was located.

The habeas court denied his transfer motion, finding that jurisdiction had attached at the time the habeas petition was filed and that transferring the case after the court had already heard evidence would cause unnecessary delay. Appellant contended the denial was improper. The Court held that the decision on a motion to transfer a case to another venue is a matter within the sound discretion of the trial court, and absent an abuse of that discretion, the trial court's decision must be affirmed. Here, the Court found no abuse of discretion since appellant presented no evidence that the denial

would “frustrate” his opportunity to obtain habeas relief.

Speedy Trial; *Barker v. Wingo*

Wilkie v. State, S11A1463 (1/9/12)

Appellant appealed from the denial of his motion for discharge and acquittal and plea in bar based on an alleged violation of his constitutional right to a speedy trial. Appellant was indicted for malice murder, felony murder, and aggravated assault on September 22, 2009 and was arrested on a grand jury warrant on September 30, 2009. Appellant was denied bail on October 5, 2009 and was denied his motion to reconsider bail on October 22, 2009. On April 29, 2010 appellant pled not guilty to the charges and on January 18, 2011 filed his motion for discharge and acquittal and plea in bar, which the trial court denied. The trial court found that in considering the four factors of *Barker v. Wingo*, appellant’s constitutional rights were not violated.

The Court found that the five and a half year delay between arrest and denial of the motion for discharge and acquittal was presumptively prejudicial and required a full analysis of the *Barker* factors. First, the Court found that the length of the delay was properly weighted against the State. As for the reasons for the delay, appellant argued that the State was not actively investigating the case the entire time preceding return of the indictment. However, the testimony at the hearing supported the trial court’s finding that this “case was difficult, complex, and not just any ordinary street crime.” The years prior to indictment were used for investigation and notwithstanding an intentional delay by the State, this factor was properly weighed lightly against the State.

The Court found that the trial court properly weighed the assertion of the right factor against appellant. The fact that appellant did not file a statutory speedy trial request, and did not raise a constitutional speedy trial issue in a reasonable time (sixteen month after indictment) weighed against appellant.

Finally, the Court addressed the prejudice prong of the test. Appellant argued that the trial court should not have weighed the prejudice factor against him, as he was denied bond in 2009 and suffered a broken leg while in prison, and the crime scene was destroyed

by fire seven and a half months after the 2009 arrest. The Court found that he was released on bond for nearly four years and had not proved either that his injury during incarceration was not treated properly or that he suffered unusual fear and anxiety in jail. As for the third part of appellant’s argument, the Court found appellant failed to investigate the crime scene for seven and one-half months after return of the indictment and that all crime scene photos and reports were made available to appellant. The Court found appellant provided no cogent testimony regarding how he may have been harmed by this destruction. In considering the four factors of the *Barker* analysis, the Court held appellant’s constitutional right to speedy trial was not violated.

Guilty Pleas; Ineffective Assistance of Counsel

Vasquez v. State, S11A1862 (1/9/12)

Appellant shot and killed his pregnant girlfriend. The State originally sought the death penalty. Thereafter, appellant pled guilty to life without parole. A month later, he moved to withdraw his plea, contending ineffective assistance of counsel. Specifically, he argued that his counsel told him that at 62 years of age he could be eligible to get out on parole, but did not tell him “that in order to be eligible I would have to be completely disabled” and “would have to be suffering a progressive debilitating or terminal illness.” At the motion hearing, his trial counsel testified that she gave appellant a copy of Article IV, Section II, Paragraph II (e) of the Georgia Constitution of 1983, which provides that “the State Board of Pardons and Paroles shall have the authority . . . to issue a medical reprieve to an entirely incapacitated person suffering a progressively debilitating terminal illness or parole any person who is age 62 or older.” Counsel also explained that she advised appellant that he would be ineligible for parole for at least 110 years if he were convicted of all charges; that appellant asked the difference between that outcome and taking the plea of life without parole; and that she told appellant that the difference was whether there would be a trial.

The trial court held that appellant “fully understood the terms of the negotiated agreement,” including that “he would be sentenced to life without the possibility of parole.” The trial court also found that appellant’s plea

counsel “appropriately recommended that the defendant plead guilty, and accept a life sentence without the possibility of parole,” due to the grief that a trial would cause the victims’ families and the “emotion and strain” it would cause appellant. The Court held that because the trial court’s factual findings were supported by the record, the denial of the motion was affirmed.

Out-Of-Time Appeals

Brown v. State, S11A1469 (1/9/12)

Appellant entered a negotiated plea of guilty to murder and possession of a firearm by a convicted felon. Seventeen years later, he filed a motion for an out-of-time appeal which the trial court denied without a hearing.

The Court stated that a defendant has no unqualified right to file a direct appeal from a judgment of conviction and sentence entered on a guilty plea, and 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. Appellant contended that he was entitled to an out-of-time appeal because the indictment was void. Specifically, he argued that the date of offense as to Count II was altered. However, the Court found, the prosecutor’s handwritten date change in Count II of the indictment prior to its presentation to the grand jury did not render the indictment void and because appellant’s challenges to the indictment could be decided against him on the existing record, it was not an abuse of discretion to deny the motion for out-of-time appeal on this ground.

Appellant also claimed that he was entitled to an out-of-time direct appeal because the trial court failed to swear him in prior to his guilty plea. The Court held the trial court did not abuse its discretion in denying an appeal on this issue because it could be decided on the existing record. Moreover, the Court held, even assuming an obligation to place a criminal defendant under oath before accepting a plea, a review of the plea hearing transcript established that no objection to appellant’s unsworn testimony was made at the time the testimony was given. Appellant, therefore, waived any objection he may have had to the court’s failure to place him under oath.

Finally, the Court held, the trial court was not required to hold an evidentiary hearing on the issues raised.

Impeachment; First Offender Status

Sanders v. State, S11A1406 (1/9/12)

Appellant was convicted of murder in the drive-by shooting of the victim. He argued that the trial court erred by restricting his cross-examination of Baker, who was the only witness to identify him as the gunman. Specifically, he argued that he was entitled to impeach Baker with his first offender plea in Fulton County to show bias and a motive to testify favorably for the State.

The Court held that the successful completion of probation as a first offender is not to be considered a criminal conviction and cannot be used to impeach a witness on general credibility grounds. Because first offender status is not considered an adjudication of guilt, a witness also may not be impeached on general credibility grounds with a first offender sentence that is currently being served. However, when the impeachment is to show bias, the Confrontation Clause of the Sixth Amendment permits a defendant in a criminal case to cross-examine witnesses about their first offender status. The Sixth Amendment right of confrontation is not absolute, and trial courts retain broad discretion to impose reasonable limits on cross-examination to avoid harassment, prejudice, confusion, repetition, or irrelevant evidence.

Here, Baker pled guilty to burglary in Fulton County as a first offender in October 2008 and later pled guilty to burglary in Clayton County as a first offender in February 2009. Appellant argued that he should be permitted to impeach Baker on both pleas. The trial court rejected the argument that the cross-examination related to the Fulton County plea was intended to show bias and ruled that appellant could not cross-examine Baker concerning the Fulton County plea for purposes of general impeachment. Based on OCGA 42-8-60 (b), which states that a person cannot plead guilty under the First Offender Act more than once, the trial court concluded that the second plea in Clayton County was not permitted under the law and appellant could use it to impeach the witness.

The Court found that the trial court did not abuse its discretion in prohibiting appellant from impeaching Baker with the Fulton County plea. Appellant did not make a proffer explaining why Baker would want to curry

favor with the prosecutor or the benefit he hoped to gain from his testimony. Instead, he argued that the witness was biased and had a motive to testify favorably based on two unsupported assumptions: (1) Baker's second plea in Clayton County meant his first offender status in Fulton County would be revoked and (2) the Fulton County District Attorney's Office would be responsible for seeking the revocation. But, appellant presented no evidence that either the State intended to seek revocation of Baker's first offender status in Fulton or Clayton County; Baker was aware that his probation in Fulton County could be revoked based on his Clayton County plea; or the district attorney's office intended to make any recommendation in connection with a possible revocation. Under OCGA § 42-8-38 (a), the probation supervisor has the responsibility to prosecute any revocation, not the district attorney. Thus, the Court found, appellant needed to present facts in addition to the existence of the two first offender pleas to support his efforts to impeach the witness for bias. Without some evidence showing the connection between Baker's first offender status and his desire to shade his testimony to curry favor with the State, the trial court did not abuse its discretion in prohibiting the cross-examination about the Fulton County plea.

Severance; Mutual Combat

Carruth v. State, S11A1886 (1/9/12)

Appellant was convicted of malice murder and other related offenses in connection with the stabbing death of Mosby, and aggravated stalking of Loretta Potter. The evidence showed that appellant had an ongoing relationship with Potter. At some point during that relationship, he pled under the First Offender Act to domestic violence against Potter. As part of his probation, he was ordered to "have no contact" with her. Appellant thereafter disobeyed that order by coming to Potter's place of employment, a convenience store. Mosby and Tanya, Potter's sister, came to her aid at the store. When Mosby and the sister went back to the sister's house, appellant ambushed them, attacking Mosby and stabbing him to death.

Appellant contended that the trial court erred in refusing to sever the count of the indictment charging aggravated stalking of Potter from the counts relating to the murder of Mosby. In support of his severance claim,

he argued that while the first offender plea was admissible to prove the predicate to the charge of aggravated stalking in that he allegedly violated a condition of probation, it was inadmissible with regard to the murder counts of the indictment. The Court found, however, that the trial court properly exercised its discretion in denying the severance motion. A defendant has a right to severance where the offenses are joined solely on the ground that they are of the same or similar character because of the great risk of prejudice from a joint disposition of unrelated charges. But, where the joinder is based upon the same conduct or on a series of acts connected together or constituting parts of a single scheme or plan, severance lies within the sound discretion of the trial judge since the facts in each case are likely to be unique.

Here, the aggravated stalking offense took place at the convenience store and was ongoing at the time that Tanya and Mosby came to Potter's aid by delivering evidence of the no contact order (the predicate for aggravating stalking). The ambush and murder occurred just minutes later when the two returned home; therefore, the acts were connected as a single scheme or plan. In addition, evidence of appellant's turbulent relationship with Potter and his stalking of her were relevant to explain appellant's animosity for Tanya and Mosby and his motive for the fatal attack. Thus, evidence of the stalking offense would have been admissible in a separate murder trial. Therefore, the trial court did not abuse its discretion in refusing to sever the counts.

Appellant also contended that the trial court erred in refusing to give his requested charge on mutual combat. However, since appellant did not object to the charge as given, the Court held that the standard of review on appeal is plain error. Mutual combat occurs when there is combat between two persons as a result of a sudden quarrel or such circumstances as indicate a purpose, willingness, and intent on the part of both to engage mutually in a fight. Appellant testified in his own defense that Mosby approached him and initiated an unprovoked fist fight; Mosby then produced a knife from under his jacket; appellant got possession of the knife and stabbed Mosby repeatedly. Tanya testified that appellant ambushed and attacked Mosby. In neither scenario, the Court found, was there evidence of intent to engage in a mutual fight, or "combat by agreement." OCGA 16-3-21 (b)

(3). Since a charge on mutual combat was not adjusted to the evidence, the alleged legal error was neither clear nor obvious. Accordingly, the omission in the charge did not constitute plain error under OCGA § 17-8-58 (b).

Brady Evidence; Impeachment

Young v. State, S11A1296 (1/9/12)

Appellant was convicted of felony murder and other offenses in connection with the death of his cousin. The evidence showed that appellant was standing in the driveway of their home when he shot the victim in the head. He then blamed it on a drive-by. The firearm used to kill the victim was subsequently found under the house.

Appellant contended the State violated *Brady* because it failed to disclose a 19-page management report detailing the findings of a private consulting company hired by the Mayor to investigate the operations of the city police department. Appellant claimed the report showed that the lead investigator, who found the murder weapon and testified at trial, had a reputation for falsifying reports and lying under oath. Appellant argued that the report could have been used to impeach the investigator about his recovery of the murder weapon.

The Court held that to prevail on a *Brady* claim, appellant must demonstrate that the prosecution wilfully or inadvertently suppressed evidence favorable to the accused, either because it is exculpatory or impeaching. However, the Constitution is not violated every time the government fails or chooses not to disclose evidence that might prove helpful to the defense. *Brady* comes into play only when the suppressed evidence is material, i.e., only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different. A “reasonable probability” is a probability sufficient to undermine confidence in the outcome. Here, the Court found, the management report was not material because it was neither exculpatory nor impeaching. The report never identified any cases by name, and never named any of the interviewees. It contained no specific information from identifiable sources which appellant could present to a jury. “Simply put, the report does not raise a reasonable probability

that, had it been disclosed, the outcome of the trial would have been different.” Because the report was hearsay and inadmissible, and appellant failed to show how its disclosure would have led to admissible evidence, it did not constitute *Brady* material.

Appellant also argued that he was denied the right of confrontation. The evidence showed that Officer Nollinger, who was the first to arrive at the scene, subsequently joined a police force in South Carolina where he was indicted for official misconduct and his South Carolina POST certification was revoked. At the time of trial, Nollinger was facing a disciplinary hearing in Georgia to determine if his Georgia POST certification should have been revoked also. Appellant contended that, inasmuch as Nollinger may have felt pressured to testify favorably for the State in order to gain concessions from the South Carolina prosecutor or to keep his Georgia POST certification, the trial court should have permitted him to cross-examine Nollinger about any possible bias.

The Court held that the Confrontation Clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defense might wish. Accordingly, trial courts retain wide latitude insofar as the Confrontation Clause is concerned to impose reasonable limits on cross-examination based on concerns about, among other things, harassment, prejudice, confusion of the issues, the witness’ safety, or interrogation that is repetitive or only marginally relevant.

In denying defendant’s motion to explore Nollinger’s bias, the trial court informed appellant it would revisit the issue if appellant were to present evidence other than the pending criminal charge against Nollinger. However, appellant failed to demonstrate that Nollinger’s testimony was influenced in any way by the charge pending against him in South Carolina. In fact, the South Carolina prosecutor testified that Nollinger did not seek any concessions for his cooperation and that she had no interest whatsoever in Nollinger’s trial testimony. Moreover, Nollinger’s testimony was consistent with his police report, the dashboard videotape he made at the scene, and the testimony of other officers. Thus, the Court determined, it would be highly speculative to suggest a

connection between Nollinger’s testimony and the troubles stemming from the South Carolina prosecution, and therefore, the trial court did not abuse its discretion in limiting appellant’s cross-examination of Nollinger.

Closing Arguments; Prosecutorial Misconduct

Jeffers v. State, S11A1364 (1/9/12)

Appellant was convicted of malice murder. He argued that the trial court erred by allowing the prosecutor to state, during closing arguments, that appellant had “flipped a bird” at someone in the courtroom during the course of the trial. Appellant claimed that the argument was improper because there was no showing that he actually made the obscene gesture, and because the comment impugned his character.

First, the Court noted, there was no contemporaneous objection to the argument; therefore, the issue was waived for purposes of appeal. Nevertheless, appellant argued, the trial court sua sponte should have prevented the jury from considering the remark under OCGA §17-8-75 which provides “[w]here counsel . . . make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same.” However, the Court found, appellant offered no evidence at the hearing on the motion for new trial; his counsel on motion for new trial argued that the gesture did not take place, while the assistant district attorney who tried the case argued to the contrary.

The Court noted that the burden is always on the appellant in asserting error to show it affirmatively by the record. Appellant offered no evidence that the gesture was incorrectly attributed to him. Furthermore, a prosecutor is permitted to comment on a defendant’s courtroom demeanor in closing argument. Accordingly, the Court held that it must apply the presumption of regularity and hold that the trial court discharged its duties properly.

Probation Revocation

Gray v. State A11A2083; A11A2084; A11A2085 (12/29/11)

The Court granted discretionary review after appellant’s probation was revoked in three cases. The trial court found that appel-

lant possessed marijuana and failed to complete a drug program. The evidence showed that a narcotics officer conducted a controlled purchase of marijuana and cocaine at a trailer. The following day, a team of officers served a no-knock search warrant on the property. The front door was open, and appellant was sitting in a chair “just in front of the door.” When questioned, he told the officers that he did not live there, that he had come to retrieve his video game console from the occupants because they had been evicted, and that he was waiting for them to return from moving some of the contents of the trailer. During the search of the trailer, officers found a black bag inside a bedroom closet and inside that bag, a sandwich bag containing 1.9 ounces of marijuana. In the kitchen, officers found a bag with suspected marijuana residue, scales, and razor blades on the counter. At the probation revocation hearing, the narcotics officer acknowledged that the only evidence that appellant possessed the marijuana was his presence at the trailer and that “he had property at the house.”

The Court reversed, finding that even under the more lenient standard applicable to a probation revocation, the evidence was insufficient. Here, the State showed only that appellant was at the open front door of a trailer and that a sandwich bag of marijuana was found in a closed container inside a closet in a bedroom. The evidence showed that other individuals had access to the trailer, including a man who sold drugs to the confidential informant. While the State contended that appellant’s “claimed ownership of some of the personal property found at the residence” supported a finding of constructive possession, the Court held that under the evidence presented, that claim did not demonstrate appellant’s residence at the trailer to the exclusion of any other reasonable hypothesis.

Moreover, the Court stated, ordinarily, property supporting an inference of residence for the purposes of constructive possession consists of clothing, banking or business records, or other personal items customarily kept in ones living quarters. “A video game console, while possibly ‘worth a great deal of amount of money’ as the State contended, is not, without more, a personal item of this kind.” Thus, since the evidence did not exclude the reasonable hypothesis that appellant had loaned the video game console

to the occupants of the trailer, had learned of their eviction, and was waiting for their return so that he could retrieve his property, the evidence was insufficient to support the revocation of probation on this ground.

Appellant also contended that the trial court erred in revoking his probation for failing to complete a drug program. The evidence showed that he was involuntarily removed from the program as a result of his arrest. The Court stated that a violation of the conditions of probation generally requires some voluntary act on the part of the probationer. Since the evidence was insufficient to show that appellant committed the offense for which he was arrested, “his own actions” did not cause him to be dismissed from the drug treatment program, and he therefore was not in “willful and voluntary” violation of his probation. Accordingly, the trial court manifestly abused its discretion by revoking appellant’s probation.

Custodial Statements; Miranda

Anguiano v. State, A11A1564 (12/28/11)

Appellant was convicted of criminal attempt to commit child molestation and criminal attempt to commit enticing a child for indecent purposes. The evidence showed that appellant was caught in a ruse intended to catch child molesters who operate online. The ruse used adult decoys posing on the internet as underage girls to lure adult males to a house under the pretense that an unsupervised girl was waiting to have sex with them. The operation was run jointly by NBC, which was filming a television production about catching on-line sexual predators, and Perverted Justice (“PJ”), a “watchdog group” dedicated to exposing adults who use the internet to seek sexual activity with children. The sheriff’s office invited PJ to film the NBC show locally and helped NBC find an appropriate location, an unoccupied dwelling with a detached carport separated by some 15 feet from the house. NBC arranged to rent the house, and NBC’s crew brought in “truckloads of equipment,” which they set up inside the house. NBC allowed the police to set up a “control room” in a room located over the carport, but the officers were not ever allowed inside the house. The sheriff’s office did not pay NBC or PJ in connection

with the filming, nor did NBC or PJ make any payments to the sheriff’s office. Appellant showed up, thinking that he was going to have sex with a 14 yr. old. Instead, he met Chris Hansen of Dateline NBC who then proceeded to interview appellant. Hanson told appellant that he was free to leave, but when he left the house, he was arrested by the sheriff’s office.

Appellant contended that the trial court erred in admitting the videotape of his interview with Hansen because it was a custodial interrogation and he was not advised of his *Miranda* rights before speaking with Hansen. The Court disagreed. The Court noted that appellant came to the location, a private house, of his own free will. There was no evidence that he was physically restrained or otherwise prevented from leaving the house until after he admitted to criminal conduct. The record made clear that appellant’s freedom of movement was not restricted until he was placed under arrest after he exited the house. Further, even where police have probable cause to arrest at the time of the interrogation and intend to arrest the suspect in the future, the intent to arrest in the future is irrelevant to the custody issue, unless the police communicate the intent during the course of the interrogation. Here, police were solicitous not to show their presence before appellant entered the house, and they certainly did not disclose their view that he was a suspect or that they intended to arrest him later. Also, appellant’s subjective view of his situation, based on having seen the NBC television show previously, was not determinative of whether he was in custody. Accordingly, the evidence authorized a finding that a reasonable person in appellant’s position would have believed that he was free to terminate the interview and leave.

Search & Seizure

Hilbun v. State, A11A1782 (12/28/11)

Appellant was granted an interlocutory appeal from the order denying her motion to suppress. The evidence showed that officers arrived at a trailer to take part in a search based on the parole status of the resident. The resident was not there when the officers arrived, but the officers encountered appellant inside the residence. She was asked by a narcotics officer to step outside and talk to

him. The officer asked appellant her name and she initially gave him a false name. Because the officer was aware that the parolee resident was known for dealing narcotics, he asked appellant if she was present to buy marijuana and asked her the identity of the two passengers in her car. Although she described the male occupant as her boyfriend, she could not remember his name. She did, however, identify the female occupant. The officer then asked if he could search her and appellant emptied her pockets of ten tan and blue pills suspected to contain hydrocodone, a Schedule III substance. Although she first said the pills were hers, she then told the officer that she was there to sell the pills to the parolee.

Although the State argued that this was a first tier encounter, the Court found that the evidence was sufficient to support the trial court's finding that this was a second tier detention. Nevertheless, the Court found that the officer had a particularized and objective basis for suspecting that appellant was involved in criminal activity at the time he told her to leave the residence and talk to him. The officer was aware that the parolee was known for dealing narcotics from a number of prior cases he had personally worked on and the officer believed that appellant was there to buy marijuana. Further, when asked for identification, she did not have any on her and, initially, gave a false name. Also, she could not identify the man in the car with her, although she said he was her boyfriend. Accordingly, the evidence provided sufficient reasonable articulable suspicion to support a brief detention of appellant.