Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 11, 2011

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Speedy Trial

State v. Pickett, S10G0542 (2/28/2011)

The trial court granted Pickett's motion to dismiss on constitutional speedy trial grounds. The Court of Appeals affirmed and the Supreme Court granted certiorari. The facts showed that Pickett was arrested on child molestation charges in June of 2003. He was indicted in April, 2007. He filed his motion to dismiss in November, 2008 and it was denied in December, 2008.

The Court held that the delay between his arrest and the date of the denial of his motion was presumptively prejudicial, triggering a *Barker-Doggett* analysis. The length of the delay was uncommonly long and weighed against the State. The reason for the delay was also weighed against the State but not heavily because there was no evidence of deliberate delay.

The Court found that the trial court erred in weighing the assertion of the right factor in Pickett's favor. It held that the right accrues at arrest and that the five and a half year delay must be weighed heavily against Pickett. The Court also held that the trial court erred in determining prejudice to Pickett's defense. The trial court found actual prejudice based on the undue anxiety that Pickett had suffered as a result of his pending child molestation charges "making it impossible to get a professional job." However, the Court noted, this finding implied that Pickett had held a "professional" job at some point, had the ability to obtain one, or had lost one as a result of his arrest. But, there was no evidence or proffer at the hearing on the motion to dismiss concerning this point. Therefore, the trial court erred in this regard.

The Court found that if the trial court significantly misapplies the law or clearly errs in a material factual finding, the trial court's exercise of discretion can be affirmed only if the appellate court can conclude that, had the trial court used the correct facts and legal analysis, it would have had no discretion to reach a different judgment. Here, the Court concluded that, if the trial court had not weighed the assertion-of-the-right factor in Pickett's favor and had not erred in finding actual prejudice regarding Pickett's inability to find a professional job, the court necessarily would have ruled that his constitutional right to a speedy trial was violated. Therefore, the Court of Appeals erred in affirming the trial court and the case must be remanded to the

trial court for a correct legal analysis based on supported factual findings.

RICO; Receiverships

Pittman v. State, S10A1436 (2/28/2011)

Appellants, the Pittmans and their business, Hungry Jacks, appealed from the order of the trial court that, among other things, appointed a receiver to take control of the assets of and to manage Jumping Jacks. The record showed that the State filed a civil RICO forfeiture action against appellants and obtained an ex parte TRO prohibiting them from, among other things, disposing of any of the documents or assets of the business. A temporary receiver was authorized to manage and take control of the assets of the business. After a hearing, the trial court then issued an interlocutory injunction continuing the receivership.

Appellants contended that that the trial court erred in issuing the interlocutory injunction and in continuing the receivership. The Court held that while it is true that the power of appointing a receiver should be prudently and cautiously exercised and should not be resorted to except in clear and urgent cases, the grant or refusal of a receivership is a matter addressed to the sound legal discretion of the trial court. Thus, a court may appoint a receiver when any fund or property is in litigation and the rights of either or both of the parties cannot otherwise be protected. The purpose of the receivership is to preserve the property which is the subject of the litigation, and to provide full protection to the parties' rights to the property until a final disposition of the issues. Similarly, a trial court has broad discretion to issue interlocutory injunctions to preserve the status quo more generally pending final adjudication of a dispute.

Under the circumstances here, where the individual appellants controlled the assets that are the subject of the litigation, raising the possibility that they could be dissipated before the litigation is resolved, the Court found that the trial court did not abuse its discretion in enjoining them from disposing of any of the documents or assets of the business and continuing the receivership. Moreover, although appellants made several "vague arguments" about the powers granted to the receiver by the trial court, they failed to show that the trial court abused its discretion in granting those powers.

Armed Robbery; Impeachment

Fox v. State, S10A1719 (2/28/2011)

Appellant was convicted of malice murder and armed robbery. The evidence showed that the victim's husband arrived home and found his the victim dead from multiple gunshot wounds to the head. The victim was found in a room adjoining the kitchen. Money kept in a kitchen drawer, gold coins kept in a jar, and the victim's wallet was missing. The evidence also showed that appellant had prior knowledge of where the victim and her husband kept the money in the kitchen. Appellant contended that the evidence was insufficient to support his armed robbery conviction. The Court agreed and reversed.

The indictment charged that appellant committed armed robbery in violation of OCGA § 16-8-41 (a) by taking United States currency and the victim's wallet by "use of an offensive weapon," a handgun. The State therefore was required to prove beyond a reasonable doubt that appellant's use of the handgun occurred "prior to or contemporaneously with the taking." Here, however, the evidence supported two equally reasonable hypotheses. First, appellant surreptitiously entered the house, took possession of the cash, coins, and wallet in the kitchen, and only then was confronted by the victim, who was found dead in a room adjoining the kitchen, as she approached from the back of the house. The other hypothesis is that, when appellant entered the house, he confronted and killed the victim before he took the items. There was no direct evidence regarding where the victim was when appellant entered the kitchen. Nor was there evidence, like signs of forced entry, from which the jury might have reasonably inferred that the victim heard and confronted appellant before he could take anything, or that she usually kept her wallet on her person or in her bedroom, which might support an inference that appellant had to confront her before taking the wallet. Accordingly, the evidence was insufficient to support appellant's armed robbery conviction.

Appellant also contended that the trial court erred in ruling that the State would be allowed to present rehabilitative evidence at trial. The evidence showed that appellant's girlfriend testified that appellant threatened her. Appellant sought to impeach her with the fact that she made a previous allegation that resulted in appellant's indictment for making a terroristic threat, but she later came to court and testified that she had lied to the police. The trial court agreed with the State that, if appellant cross-examined her about that incident, the State would be allowed to have her explain the reasons for her recantation, including the role that other incidents of domestic violence by him against her might have played. The Court found that if appellant had questioned her about her recantation of the allegation, other incidents of domestic violence by him against her would have been relevant to explain her recantation. Accordingly, the trial court did not abuse its discretion in making this evidentiary ruling.

Murder; Unborn Child

Pineda v. State, S10A1643 (2/28/2011)

Appellant was convicted of the malice murder of three individuals and the unborn child of one of those individuals. He contended that the evidence was insufficient to support his conviction and sentence for the crime of malice murder in causing the death of the unborn child. Under OCGA § 16-5-1 (a), "[a] person commits the offense of murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being." The Court found that the only evidence presented was that the unborn child was alive solely in the mother's uterus, died due to the death of the mother, and never had an independent circulation or other evidence of independent existence. Thus, there was no evidence presented that appellant committed the crime of malice murder of the unborn child. Accordingly, the judgment of conviction and sentence for that crime was vacated.

Search & Seizure; Best Evidence Rule

Baptiste v. State, S10A2004 (2/28/2011)

Appellant was convicted of felony murder. He contended that the trial court erred when it denied his motion to suppress evidence obtained from searches of his home and his truck, because the State did not prove by competent evidence that the searches were conducted pursuant to valid search warrants. Specifically, appellant contended that the warrants were invalid because the State did not produce at the suppression hearing the affidavits signed and

sworn to by the investigator that he submitted to the judge with his applications for search warrants for appellant's residence and truck.

The evidence showed that the State presented photocopies of the warrants issued and executed for appellant's residence and for the seizure of his pickup truck. Attached to the photocopied search warrant for appellant's residence was a document identified by the investigator as his unsigned affidavit that did not contain a completed jurat. The investigator testified that the original search warrants issued by the judge and the officer's original signed and sworn affidavits were retained and sealed by the issuing judge who had been unsuccessful in locating the sealed packet. The investigator described the unsigned, unsworn document presented at the suppression hearing as containing information identical to that contained in the affidavit he had executed before the issuing judge in order to obtain the warrant for appellant's truck and, with the deletion of the last few lines, was identical to the affidavit he had executed before the issuing judge to obtain the warrant for appellant's residence.

OCGA § 24-5-4(a) provides that "[t]he best evidence which exists of a writing sought to be proved shall be produced, unless its absence shall be satisfactorily accounted for." The Court held that the statute makes the best evidence rule inapplicable whenever the absence of the original writing is "satisfactorily accounted for." OCGA § 24-5-21 provides that "[i]f a paper shall have been lost or destroyed, proof of the fact to the court shall admit secondary evidence. The question of diligence is one for the sound discretion of the court." This rule applies both to secondary documentary evidence and to parol testimony. The Court determined that given the investigator's testimony concerning the loss of the sealed packet containing the original search warrants and affidavits, the trial court did not abuse its discretion when it admitted secondary evidence, i.e., the testimony of the investigator as to the contents of the missing affidavits. Accordingly, the trial court did not err in denying the motion to suppress.

Hearsay; Similar Transactions

Newsome v. State, S10A1905 (2/28/2011)

Appellant was convicted of murder, felony murder and multiple counts of aggravated assault and armed robbery. He contended that the trial court committed reversible error through the introduction of hearsay evidence. At trial, a detective testified that, during his investigation into the crimes, he spoke with appellant's co-indictee, Haynes, and then answered affirmatively when the prosecutor asked if "at some point" he obtained an arrest warrant for appellant. Appellant contended that this testimony was hearsay and its admission was reversible error, because the jury may have inferred from the testimony that Haynes, who was called as a State witness but refused to answer any questions, had provided the information for the warrant. The Court disagreed. Testimony is considered hearsay if the witness is testifying to another party's statement in order to prove or demonstrate the truth of the matter asserted in that statement. Here, the detective did not testify to what Haynes or any other person related to him during the investigation. In so holding, the Court also rejected appellant's assertion that the testimony constituted an example of "implicit" hearsay because it was not apparent in this case that Haynes was the only source for the information the detective used when obtaining the arrest warrant.

Appellant also contended that the trial court allowed the State to admit similar transaction evidence without using the procedure of Rule 31.3. At trial, a witness named Bentley was allowed to testify that appellant, while riding with Bentley in a vehicle a few days before the crimes in issue, told Bentley he wanted to go to a "shot house" so that appellant could rob it. Although it was uncontroverted that appellant did not actually commit or even attempt a robbery of the shot house, appellant argued that his words to Bentley by themselves were sufficient to qualify as a similar transaction. The Court disagreed. Words uttered by a defendant may be admissible as a similar transaction only in those instances where the utterance itself constituted a crime. Utterances may also be admissible where the words reflect prior difficulties between the defendant and the victim. Here, however, appellant's statement to which Bentley testified was neither a crime in and of itself nor a relevant expression of prior difficulties between appellant and any of the victims of the charged crimes. Rather, statements such as the challenged words repeated by Bentley here would clearly fall within the definition of character evidence, which is irrelevant and should be excluded unless admissible for some other legal purpose. Therefore, the trial court did not err when it declined to exclude Bentley's testimony about appellant's "shot house robbery" statement based on appellant's objection that the statement was rendered inadmissible by the State's failure to follow the procedural rules appropriate to similar transaction evidence. In so holding, the Court noted that language to the contrary of its holding in *Smith v. State*, 142 Ga. App. 1 (1977), and *Waters v. State*, 168 Ga. App. 918 (2) (1983) are overruled to the extent that they are inconsistent with this opinion.

Judicial Comments; OCGA § 17-8-57

Gibson v. State, S10A1661 (2/28/2011)

Appellant was convicted of felony murder, armed robbery, and possession of a firearm during the commission of a crime. He contended that, by referring to the appellate process in its answer to a question from jurors during deliberations, the trial court committed reversible error. The Court agreed.

The record showed that the jury, during deliberations, sent a note to the trial court stating, "We'd like to have all of the evidence. Have only exhibits through 72." The trial court responded: "Let me tell you that you have all of the evidence, which by law, you are entitled to. There are several things that, if I give them to you, we would have to try the case all over again . . . Some evidence is considered to be such that it's disadvantageous for you to have it out with you, particularly in regard to statements and things like that. They are supposed to be read like any other testimony, and it would be reversible error for me to give you all the exhibits."

Citing *Faust v. State*, 222 Ga. 27 (1966), the Court held that the statements regarding potential error could have intimated to the jury that the requested exhibits were harmful to appellant and that the trial court believed he was guilty. This, in turn, may have caused undue focus on the exhibits being withheld and lessened the jury's sense of responsibility for the verdict. The jurors are presumed to be intelligent people, and the trial court's comments could have logically led them to the conclusion that "the trial court was telling them that after the trial had ended, the defendant and his counsel would be cast in the role of 'excepting' to what had taken place during the

trial- in other words, that they would lose the case and defendant would be convicted." As in *Faust*, the trial court's statement that there was certain evidence that could be considered "disadvantageous" could have led the jury to believe that the exhibits were actually disadvantageous or harmful to appellant and any defenses he presented. This prejudice, coupled with the reference to the reviewing courts at a crucial point in the trial, constituted reversible error. Moreover, it did not matter that defense counsel failed to object at the time since violations of OCGA § 17-8-57 are subject to plain error review.

Justices Nahmias and Carley dissented; arguing that the Court has created a rule in which a trial court's passing mention of "reversible error" will require automatic reversal of a criminal conviction.

Right to be Present

Ward v. State, S10A1841; S11A0033 (2/28/2011)

Appellants were convicted of malice murder, aggravated assault and other offenses. They contended that the trial court erred by discharging a juror outside of their presence. The Court agreed and reversed.

The record showed that after a lunch recess, which took place at the conclusion of closing arguments for the defense, the court and counsel returned to the courtroom. Neither appellant was present when the court placed on the record that during lunch he excused a juror who was apparently having a severe anxiety attack from being on the jury. Neither defense attorney objected when the trial court informed them of the action the court took in their absence.

The Court held that a defendant has a constitutional right to be present and see and hear all the proceedings which are had against him on the trial before the court. Notwithstanding, the right to be present belongs to the defendant and the defendant is free to relinquish that right if he or she so chooses. "The right is waived if the defendant personally waives it in court; if counsel waives it at the defendant's express direction; if counsel waives it in open court while the defendant is present; or if counsel waives it and the defendant subsequently acquiesces in the waiver." Here, the record showed no waiver by either appellant or an express authorization for counsel to waive the right on their behalf. Although neither counsel objected to the court's action, such inaction on the part of counsel did not constitute a waiver for their clients. Moreover, since appellants were not informed of the ex parte excusal of the juror, they could not knowingly acquiesce to the waiver on the part of their attorneys. Absent a valid waiver, the Court held, a violation of the right to be present triggers reversal and a remand for a new trial whenever, as here, the issue is properly raised on direct appeal.

Judicial Recusal

Gude v. State, S10A1748 (2/28/2011)

Appellant was indicted for murder and the case was assigned to Judge Arrington. The State moved to recuse the judge and he turned the case over to Judge Adams to hear the motion. Appellant then moved to recuse Judge Adams, who denied the motion without referring the matter to yet another judge and appellant appealed.

The Court first held that Judge Adams applied an improper legal standard for review in finding that the motion was without merit because it did not demonstrate actual bias. Instead, the Court found that the issue is whether the allegations alleged, if true, would support a finding that the Judge's impartiality might reasonably be questioned. Nevertheless, the Court upheld the order denying the motion under the "right for any reason" rule. First, appellant alleged that Judge Adams should recuse because she previously served as "a paid senior prosecutor in the major felony division" of the district attorney's office that indicted appellant "at the time of [his] arrest, indictment, and/or prosecution." The Court stated, "It appears that we have never addressed a situation where a trial judge presiding over a criminal matter previously served in the same division of a district attorney's office as the lawyers who were actually involved in the criminal matter but where the judge was never personally involved in the criminal matter as a prosecutor and had no supervisory authority over the lawyers who had such personal involvement …[W]e hold that a trial judge presiding over a criminal matter who previously worked in a district attorney's office while that office was involved in some aspect of the same criminal matter need not recuse himself or herself unless the trial judge, while still a prosecutor, was personally involved in some aspect of the criminal matter or served in a supervisory role over another lawyer while that lawyer was personally involved in some aspect of the criminal matter."

Second, the Court found that appellant's allegations that Judge Adams owed a debt of gratitude to the D.A. for her employment, even if true, would not warrant recusal of the Judge. Finally, appellant's allegation that the D. A. supported Judge Adams financially in her judicial campaign also did not require recusal. "Although a trial judge should recuse himself or herself from presiding over a case involving a party who has previously made an exceptionally-large campaign contribution, we hold that recusal is not required simply because the judge previously received any campaign contribution from a party…. Because [appellant]'s motion to recuse Judge Adams did not allege that she previously received any financial contribution impermissible under law or received any other specified form of exceptional support of her campaign that would require her recusal, we hold, applying the judicial ethics standards … that Judge Adams did not commit reversible error by not granting the motion to recuse based on this allegation."

Sentencing

State v. Green, A10A1673 (2/22/2011)

The State appealed from the trial court's order vacating Green's 10-year-old sodomy conviction. The record showed that Green was convicted of sodomy in 1999 and subject to the sexual offender registration statute. In September 2009, Green filed in the trial court a "Motion to Pronounce a Valid Judgment" in which he sought an order vacating the underlying sodomy conviction, arguing that "it was entered in violation of his rights to due process of law and to privacy." Green argued that the conduct underlying the sodomy conviction was constitutionally protected. The trial court granted Green's motion and denied the state's motion to dismiss, holding that the court was authorized to vacate the conviction because the sentence was void. According to the trial court, in punishing Green for conduct that was no longer criminal, the court had imposed a punishment that the law does not allow.

The Court reversed. Regardless of the nomenclature, Green's motion sought to vacate his criminal conviction. However, because a motion to vacate a judgment of conviction is

not an established procedure for challenging the validity of a judgment in a criminal case, Green was not authorized to seek relief from his criminal conviction pursuant to such a motion. Thus, the Court found, his motion should have been dismissed. Moreover, Green's reliance on *Chester v. State*, 284 Ga. 162 (2008), overruled in part by *Harper v. State*, 286 Ga. 216 (2009) was misplaced. The division of *Chester* that was not overruled by *Harper* allows a trial court to correct a void sentence at any time. Green moved the trial court to vacate the conviction (which the trial court did), not to correct the sentence. A claim challenging a conviction and a claim challenging the resulting sentence as void are not the same. The trial court therefore erred in granting the motion.

Double Jeopardy; Prosecutorial Misconduct

Frye v. State, A10A1807 (2/22/2011)

Appellant appealed from the denial of his plea in bar based on double jeopardy as a result of alleged prosecutorial misconduct during the trial of his case. The record showed that appellant was charged with theft by taking a radio. A videotape of the theft was created by the pawn shop in which the radio was located, but before it could be copied, the store security system taped over it. A witness did view the incident on the tape, however, before it was deleted. The trial court ruled in a motion in limine that the any testimony about what was shown on the videotape was inadmissible hearsay because the videotape was no longer available. At trial, the prosecutor asked the witness numerous questions designed to obtain from the witness an opinion as to who stole the radio. Each question was objected to by defense counsel and the trial court warned the prosecutor that "the cumulative effect of your questions is coming really close to just blatantly disobeying my ruling." Appellant then asked for a mistrial and after consideration the court agreed. However, the trial court denied the plea in bar, finding that the prosecutor's conduct might have been overzealous, but was not done with intent to cause a mistrial.

The Court held that it does not matter that the prosecutor knew he was acting improperly, provided that his aim was to get a conviction. The only relevant intent is the intent to terminate the trial, not the intent to prevail at trial by impermissible means. Here, the trial court's finding that the prosecutor did not intend to goad the defense attorney into moving for a mistrial was not clearly erroneous. After the defense moved for the mistrial, the prosecutor argued against it, saying it was a last resort, and instead suggested that limiting instructions would cure the problem. He also asked that he be allowed to instruct his witness not to mention the videotape anymore. This evidence supported the trial court's finding that the prosecutor's actions were not designed to provoke a mistrial. "Even [if] the trial court may have been authorized [by the record] to reach the opposite result, we will affirm if there is evidence to support the trial court's finding."

Arrest; Jurisdictional Limits

Sullivan v. State, A10A2243 (2/28/2011)

Appellant was convicted of DUI and failure to maintain lane. He contended that his motion to suppress should have been granted because the officer who arrested him was outside his territorial limits at the time. The evidence showed that a UGA campus police officer, who was P.O.S.T. certified, noticed the vehicle appellant was driving while the vehicle was on campus. The vehicle was not maintaining its lane and eventually, the officer stopped the vehicle. OCGA § 20-3-72, which concerns personnel of the University of Georgia, states: "The campus policemen and other security personnel of the university system who are regular employees of the system shall have the power to make arrests for offenses committed upon any property under the jurisdiction of the board of regents and for offenses committed upon any public or private property within 500 yards of any property under the jurisdiction of the board." The officer stated that he was perhaps 600 yards from campus when he made the stop.

The Court held that ordinarily a peace officer has the power to make traffic stops and to arrest only in the territory of the governmental unit by which he was appointed. However, as the trial court correctly found, an exception to this rule applies in cases of moving violations. Pursuant to OCGA § 17-4-23, an officer has authority to arrest a person accused of violating any law or ordinance governing the operation of a vehicle where the offense is committed in his presence, regardless of territorial limitations. In fact, the Court stated, OCGA § § 17-4-23 and 40-13-30 (a) authorize police officers to arrest persons for traffic offenses in other jurisdictions. Pursuant to the latter, "[o]fficers of the Georgia State Patrol and any other officer of this state . . . having authority to arrest for a criminal offense of the grade of misdemeanor shall have authority to prefer charges and bring offenders to trial under [Article 2, Chapter 13, of the Georgia Code]." Therefore, the trial court did not err in denying appellant's motion to suppress.

Directed Verdicts; Jury Charges

Judice v. State, A10A2323 (2/24/2011)

Appellant was charged with statutory rape and child molestation. He was convicted of attempted statutory rape and child molestation. He first contended that the trial court erred in denying his motion for a directed verdict at the close of the State's case on the statutory rape charge. The Court held, however, that appellant was not convicted of statutory rape, but rather of attempted statutory rape. Therefore, the issue of whether the trial court erred in denying his motion for directed verdict of acquittal as to the statutory rape charge was moot.

Appellant also contended that the trial court erred in giving the State's requested charge on attempted statutory rape over his objection. Specifically, he argued that the instruction on attempted statutory rape was improper because he was not explicitly charged with this offense in the indictment. The Court disagreed. OCGA § 16-4-3 provides that "[a] person charged with commission of a crime may be convicted of the offense of criminal attempt as to that crime without being specifically charged with the criminal attempt in the accusation, indictment, or presentment." Furthermore, the trial court's instruction to the jury on attempted rape was properly tailored to fit the allegations in the indictment and the evidence admitted at trial. Under OCGA § 16-4-1, "[a] person commits the offense of criminal attempt when, with intent to commit a specific crime, he performs any act which constitutes a substantial step toward the commission of that crime." Moreover, OCGA § 16-6-3 (a) provides that "a person commits the offense of statutory rape when he or she engages in sexual intercourse with any person under the age of 16 years and not his or her spouse . . . ." Here, the 14-year-old victim

testified that appellant positioned himself between her legs with his pants unbuttoned, and that the two of them were about to engage in sexual intercourse before her grandfather came into her bedroom. Additionally, the grandfather testified that he saw appellant lying between the victim's legs with his privates exposed. Based on this evidence, a rational trier of fact could have concluded that appellant attempted to have sexual intercourse with a person under the age of 16.

Sentencing; Traffic Offenses

Jones v. State, A10A2218 (2/24/2011)

Appellant entered a non-negotiated guilty plea to speeding, reckless driving, and passing in a no-passing zone. He first argued that the trial court erred by sentencing him on the speeding charge to 12 months, to serve 45 days in jail and the balance on probation, because the enactment of legislation setting lower limits on speeding fines set forth in OCGA § 40-6-1 (b), which became effective on July 1, 2001, rendered the general misdemeanor punishment statute, OCGA § 17-10-3, inapplicable to speeding convictions. The Court found, however, that OCGA § 40-6-1 (b) simply sets limits on fines that may be imposed as punishment for a first offense of speeding. It does not restrict the available punishment for speeding to a fine. Therefore, appellant's sentence to serve 12 months for the speeding charge was within authorized limits.

Appellant next argued that the trial court erred by imposing a $1,000 fine for the speeding charge because OCGA § 40-6-1 (b) (6) provides that the maximum fine for a first offense of violating a maximum lawful speed limit "[b]y 24 or more but less than 34 miles per hour shall not exceed $500.00." At the sentencing hearing, the State provided, without objection, documents showing numerous speeding convictions by appellant. Nevertheless, appellant contended that because these were not certified convictions, the trial court should not have credited them. The Court found no error. The requirement that prior convictions be proved by certified copies thereof is really an application of the "best evidence rule," which may be waived by the failure to object.

Finally, appellant contended that the trial court erred in sentencing him to 400 hours of community service. The Court agreed. OCGA § 42-8-72 (a) (1) provides that "[c]ommunity service may be considered as a condition of probation" for traffic violations. The statute further provides, however, that the sentencing court may order "[n]ot less than 20 hours nor more than 250 hours in *cases* involving traffic or ordinance violations or misdemeanors. . . ." (Emphasis supplied). In so holding, the Court rejected the State's argument that the maximum number of community service house per charge cannot exceed 250 hours.

Statements; Co-conspirators

White v. State, *A10A2316* (2/24/2011)

Appellant was convicted of multiple counts of aggravated assault and attempted VGCSA. The evidence showed that appellant and his co-conspirator, Montford, arranged to buy two pounds of marijuana and then tried to steal it rather than pay for it. The drug deal erupted into a shootout, during which Montford was killed. Appellant contended that the trial court erred by allowing Montford's girlfriend to testify regarding statements he made to her regarding appellant and Montford's plans.

The Court stated that in order for an out-of-court statement to be admissible under OCGA § 24-3-5, the State must make a prima facie showing of the existence of the conspiracy, without regard to the declarations of the co-conspirators. A conspiracy may be shown by proof of an agreement between two or more persons to commit a crime. Proof that such an agreement existed may be established directly, or by inference, as a deduction from acts and conduct, which discloses a common design on their part to act together for the accomplishment of the unlawful purpose; and the "common design" may be shown by direct or circumstantial evidence. Conduct which discloses a common design, even without proof of an express agreement between the parties, may establish a conspiracy. Whether a conspiracy existed is a question for the jury to determine, and the jury may consider, as circumstances giving rise to an inference of the existence of a conspiracy, the defendant's presence, companionship and conduct before and after the commission of the alleged offenses. Here, the Court found evidence independent of Montford's declarations to the witness authorized the jury to infer that appellant and Montford had entered into a conspiracy to rob the victim, rather than to pay for the marijuana. Thus, the trial court did not err in allowing the statements to be admitted.

Right to be Present

Dunn v. State, A10A2233 (2/24/2011)

Appellant was convicted of statutory rape and other sexual offenses. Appellant contended that the trial court violated his constitutional right to be present during all critical stages in the proceedings. The Court agreed and reversed. The record showed that the court announced that during a break, and outside of the presence of appellant and his counsel, he had dismissed a juror because that juror slept through most of the prior day's testimony and because two other jurors complained the dismissed juror's body odor was so offensive, they could not concentrate of the evidence. After the announcement, the court elicited from each party that there was no objection.

First, the Court found that there was not a sound basis for the removal of the juror. Thus, there was nothing in the trial transcript to show that, at any time prior to announcing that he had dismissed the juror, the trial court judge made any statements in open court or in appellant's presence or otherwise indicated that he had personally observed the juror sleeping during the trial. Also, regardless of the source and extent of the judge's awareness of the juror's alleged inattentiveness, the judge's statements clearly showed that he had no personal knowledge about the juror's alleged offensive body odor and that, instead, he learned about the problem from someone else and there was no record of any effort by the judge to resolve the alleged odor problem before resorting to the extreme remedy of dismissing the juror.

Second, while the record demonstrated that the trial judge improperly dismissed the juror, the Court also had to determine if appellant acquiesced in the dismissal. The Court found that appellant did not. "[U]nder the circumstances presented here, with nothing in the record to show that [appellant] was informed that he had a right to be tried by the twelve jurors chosen at the beginning of his trial, that the judge was not authorized to change the composition of the jury by dismissing one juror and replacing him with an alter-

nate without sufficient legal cause, and that he had a right to be present for any questioning or communications that served as a basis for the dismissal, we conclude that [appellant]'s silence following his counsel's waiver of any objection to the dismissal did not constitute his knowing acquiescence to such waiver." Accordingly, appellant's conviction was reversed for a new trial.