

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 25, 2011

Legal Services Staff Attorneys

Stan Gunter
Deputy Executive Director

Chuck Olson
General Counsel

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Resource Coordinator

Gary Bergman
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Todd Hayes
Traffic Safety Resource Prosecutor

THIS WEEK:

- **Speedy Trial; *Barker v. Wingo***
- **Statements; *Bruton***
- **Search & Seizure**
- **Venue**
- **Jurors; Motion to Withdraw as Counsel**
- **Penal Institutions; Judicial Comment**
- **Witnesses; Restitution**
- **Trafficking in Methamphetamine; Severance**
- **Jury Charges**
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- **Jury Charges; Sentencing**
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Speedy Trial; Barker v. Wingo

Higgins v. State, A10A2034 (3/8/ 2011)

Appellant was charged with aggravated assault. He appealed from the denial of his plea in bar asserting the denial of his constitutional right to a speedy trial. The record showed that he was arrested and indicted in March, 2007. The case was nolle prossed after the victim could not be located for trial in October, 2007. Thereafter, the case was reindicted in December, 2008, but the case was placed on the dead docket when appellant could not be located. He was re-arrested in September, 2009, and the case taken off the dead docket in December, 2009. Appellant filed his plea in bar in Febru-

ary, 2010, and it was denied in May, 2010.

The Court held that the length of the delay from the date of his first arrest until the decision on his motion was 38 months. However, the Court found that the 14 months between the time the case was nolle prossed and his reindictment could be eliminated from consideration in determining the length of the delay. Nevertheless, the resulting 24 month delay was presumptively prejudicial, requiring an analysis of the four-factor *Barker* test.

The Court found that the length of the delay was prejudicial and was weighted against the State, but not heavily. Similarly, the reason for the delay was also weighed against the State, but not heavily, because there was no evidence of deliberate delay. The Court weighed the assertion of the right to a speedy trial heavily against appellant because he failed to raise his constitutional right to a speedy trial following his first arrest and indictment, and in fact, did not raise the issue until after the case has been placed on a trial calendar on two occasions following his second arrest.

Finally, the Court found no prejudice. Appellant made no showing of any unusual anxiety, concern or restraint beyond mere allegations. Also, appellant's claim that his key witness could no longer be located was also not prejudicial because he failed to demonstrate how the delay made his witness unavailable and made no showing of how this witness's testimony was material to his defense. Thus, the Court found, the trial court did not abuse its discretion in denying the plea in bar.

Statements; Bruton

Smith v. State, A10A2057 (3/3/2011)

Appellant and his co-defendant, Andrea Sinyard, were convicted of multiple drug of-

fenses. Appellant argued that the trial court erred by allowing a statement of Sinyard's to come into evidence when she did not testify at trial. The evidence showed that the State sought to prove at trial that appellant lived at Sinyard's residence, where controlled substances had been found by law enforcement. A police officer, who had searched Sinyard's residence, testified to finding various items indicating that appellant lived there, including mail addressed to him and a bank card bearing his name. Counsel for Sinyard then asked: "[D]id you discover any other physical evidence that [appellant] resided at [the residence]?" The officer responded: "Just the mail, the clothing, and Ms. Sinyard's statements." Appellant objected and moved for a mistrial, which the court denied but gave a curative instruction.

The Court found no error. *Bruton* only excludes statements by a non-testifying co-defendant that directly inculpate the defendant, and *Bruton* is not violated if a co-defendant's statement does not incriminate the defendant on its face and only becomes incriminating when linked with other evidence introduced at trial. Although the challenged testimony referred to the existence of statements made by Sinyard, it did not describe the contents of any such statements. Thus, the challenged testimony did not present to the jury any co-defendant's statement clearly incriminating appellant in violation of *Bruton*. Under these circumstances, the trial court did not abuse its discretion in giving a curative instruction rather than granting appellant's motion for mistrial.

Search & Seizure

Jupiter v. State, A10A2277 (3/11/2011)

Appellant was convicted of armed robbery and related crimes. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant and three others armed robbed a convenience store. Officers gave chase as the perpetrators' vehicle left the parking lot. The vehicle finally stopped and appellant took off running and was able to get away, running towards his mother's house where he lived. Within 45 minutes of the robbery, appellant's mother showed up at the convenience store and parked almost right where the other vehicle had parked. The police spoke to her. While speaking with her, other officers arrived at her house based on statements from appellant's cohorts. They

noticed underneath the crawlspace of the house, dark clothing matching that worn by the perpetrators. At an officer's request, the mother consented to drive back to the house with the officer and she gave her consent to a search of her home.

Appellant contended that (1) he had standing to challenge the consent given by his mother, and (2) his mother's consent to the search was invalid because his mother was illegally detained. The Court held that when a defendant's own rights are violated, he unquestionably has standing to suppress evidence obtained through an illegal search or seizure. But, neither probable cause nor a search warrant is required to search property when voluntary consent is obtained from the individual whose property is searched or a third party who possesses common authority over the premises to be searched. Here, the Court stated, it had "no doubt" that appellant's mother had common authority over the crawlspace because there was no evidence that appellant paid rent to his mother for the exclusive use of the crawlspace or that he had exclusive domain over it. Moreover, the trial court's finding that the mother's consent was freely and voluntarily given was supported by the evidence.

Appellant also argued that the mother was illegally detained by the officers. However, the Court found, the officer did not command the mother to ride along in his car; he requested that she do so, and she willingly complied. Furthermore, there was no indication that the mother was threatened by police or otherwise pressured to consent to a search of her home. Finally, the reasons why the mother was approached, questioned, and thereafter asked for consent to search her home were all related to the search for appellant and the investigation of an armed robbery that had just taken place at the location of the stop less than an hour beforehand. Thus, premitting whether the stop was a first- or second-tier encounter, either encounter would have been valid because the mother's consent was voluntary and that the officer's actions were reasonable due to (1) her arrival at the crime scene shortly after the commission of the robbery, (2) the black mask spotted near her vehicle, (3) the mother's familial relation to appellant, and (4) the fact that the more extensive search was only conducted after she gave the officers permission to do so. Accordingly, there was evidence to support the trial court's finding that, while

the actions of the officer who stopped and questioned the mother were perfectly reasonable given the totality of the circumstances, and there was nothing presented to rebut the evidence that the mother's consent to search was entirely voluntary.

Smith v. State

A11A0099 (3/8/2011)

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress on the ground that the police did not knock on his home's door and announce their presence before executing a search warrant that did not contain a "no-knock" provision. The evidence showed that three officers approached the front of the house with the search warrant while three other officers went around to the back door. The officers at the front saw several people on the porch and repeatedly identified themselves as police officers with a search warrant. The people on the front porch immediately ran into the house. The officers followed them, continued to announce that they were police with a search warrant and ordered the occupants of the house to get on the ground. The occupants ignored the commands and continued running throughout the house. The investigator and other officers at the back of the house heard the announcements and commands made by the officers in front and also heard the people from the porch running into the house. The officers at the back then announced their presence and forced their way into the house through the barricaded back door.

Generally, OCGA § 17-5-27 requires that police make a good faith attempt to verbally announce their authority and purpose before entering a building to execute a search warrant. But compliance with OCGA § 17-5-27 in the execution of a search warrant is not required where the police have a reasonable, good faith belief that forewarning would increase their peril or lead to the immediate destruction of evidence. The Court found that this case was similar to, and controlled by, *Jackson v. State*, 280 Ga. App. 716, 717 (1) (2006). Here, the immediate flight upon seeing police, into a residence where police had confidential information of recent drug purchases, provided sufficient evidence to support the trial court's ruling that the officers had a reasonable belief that the fleeing occupants may retrieve weapons

or may destroy evidence. Thus, the existence of exigent circumstances authorized the officers' no-knock execution of the search warrant.

Hesrick v. State, A10A1770 (3/10/2011)

Appellant was convicted of sexual exploitation of children. He contended that the trial court erred in denying his motion to suppress. The evidence showed that officers were called to a domestic dispute between housemates. Appellant had apparently kicked his housemate out of appellant's house. Appellant invited the officers into the house while they investigated. At some point, the housemate, who was outside, told the officers that appellant kept child pornography on his computer. Again, the officers knocked on the door and appellant let them in. The officers asked appellant if he had images of children under the age of 18 in "explicit acts, without clothing." According to the officers, appellant stated that "he did have that on his computer" and that he had been looking at it. When asked if he would show them the pictures, however, appellant responded that he did not know what material they were talking about and that they would need a search warrant to find out any further information. On advice from the their Special Victims Unit, the officers then seize all of the computers and other media that were in plain view due to the possibility that appellant was going to destroy the evidence. The officers seized a laptop computer that they saw in the corner, as well as a desktop computer that was in another room, and locked them in their patrol car.

Appellant contended that the warrantless seizure was illegal. The Court disagreed. The Court found that the trial court correctly determined that the officers had a reasonable suspicion that child pornography was inside; that appellant voluntarily allowed the officers to enter his house; that, while speaking with the officers, admitted possessing child pornography; and that appellant told the officers that the materials could be destroyed. Thus, the trial court properly concluded that the warrantless seizure of the computers was authorized by exigent circumstances, specifically, the objectively reasonable concern that the seizure was necessary to prevent appellant's imminent destruction of the computer images of child pornography, images that were vulnerable to quick destruction, irreplaceable, and essential to proving that a crime had been committed.

Venue

Powers v. State, A10A2303 (3/9/2011)

Appellant was convicted on aggravated child molestation. He contended that the State failed to prove venue. The Court agreed and reversed his conviction. The victim's mother provided the only direct evidence of the location where the molestation occurred, but the mother gave only the street address and the city where the residence was located. However, proving that a crime took place within a city without also proving that the city is entirely within a county does not establish venue. A detective with the County Sheriff's Office testified, but the investigating officers' county of employment does not, in and of itself, constitute sufficient proof of venue to meet the beyond a reasonable doubt standard. Finally, although an EMC employee testified that the company performed work at the address at a time that corresponded to one of the victim's outcries in which he stated to his mother that appellant molested him while some diesel trucks were outside, that worker also testified that the company only serviced parts or portions of the county. Nevertheless, the Court held that because the evidence of the crime was otherwise sufficient, appellant may be retried.

Jurors; Motion to Withdraw as Counsel

Billings v. State, A10A1907 (3/8/2011)

Appellant was convicted of cruelty to children, family violence terroristic threats, and family violence battery. He contended that the trial court erred in not dismissing a juror for cause. The record showed that the juror worked for an insurance company, had spoken to the prosecutor "a few times" and provided some information to the prosecutor involving restitution and trial dates. The Court found no error. This was a criminal prosecution in which the juror's employer was neither a party nor a representative of a party. Although appellant argued that if the case involved the collection of restitution payable to the insurer, it would benefit the juror's employer, no evidence was presented to that effect. Since the juror stated she could decide the case fairly and impartially based solely on the evidence and the law, the trial court did not abuse its discretion in declining to strike the juror for cause.

Appellant also argued that the trial court erred in denying his counsel's motion to withdraw from representation, contending that the record showed an "irreconcilable conflict and complete breakdown in the attorney-client relationship." The Court stated that the Sixth Amendment guarantees effective assistance of counsel, not preferred counsel or counsel with whom a meaningful relationship can be established. An indigent defendant is not entitled to have his appointed counsel discharged unless he can demonstrate justifiable dissatisfaction with counsel, such as conflict of interest, an irreconcilable conflict, or a complete breakdown in communication between counsel and client. Where a defendant does not have a good reason for discharging his court-appointed attorney, the trial court does not err in requiring him to choose between his appointed attorney and proceeding pro se. The record showed that prior to trial, appellant asserted that he was dissatisfied with counsel because he did not believe his counsel had sufficient time to prepare for trial. When the trial court told him this was not necessarily sufficient to get a continuance, appellant then stated that his counsel threatened him. Defense counsel then asked to withdraw, stating that he did not threaten appellant and was not happy with the serious accusations made by appellant. The Court found that the trial court made a "commendable and thorough investigation of the allegations" including a recess in which he spoke to appellant alone. The trial court found that appellant's allegations of threats were just vague and conclusory. In fact, the "threats" appeared to be that appellant did not like his lawyer's tone in stating what might be appellant's fate if convicted and that this all stemmed from the fact that appellant did not believe his attorney had sufficient time to prepare. The Court found that given these circumstances, the trial court did not abuse its discretion in giving appellant the option of proceeding pro se and denying the motion to withdraw.

Penal Institutions; Judicial Comment

Paul v. State, A10A2142 (3/8/2011)

Appellant was convicted of the offense of riot in a penal institution under OCGA § 16-10-56. He contended that the trial court violated OCGA § 17-8-57 by instructing the

jury that the Harris County Jail was a “penal institution.” The Court agreed and reversed.

The record showed that defense counsel was willing to stipulate prior to trial that appellant was legally confined but not that he was legally confined in a penal institute. During trial, an officer testified that the Harris County Jail housed prisoners for pretrial confinement, probation violations, and for a short time following a conviction until a prisoner is transferred to another facility. The officer testified that the jail was a penal institution, without a defense objection. But when the State asked the officer whether appellant was “in your penal institution, the Harris County Jail,” defense counsel objected to the characterization, arguing that “it is for the jury to determine, whether or not it’s a penal institution, or this Court.” The trial court thereafter sent the jury out, heard arguments of counsel and when the jury was returned, instructed them that the court had overruled the objection and that “you may consider the Harris County Jail as a penal institution.”

The Court held that under OCGA § 16-10-56, the State was required to prove (1) that appellant was legally confined at the time of the incident; (2) that the Harris County Jail was a penal institution of a political subdivision of the state; and (3) that appellant committed an act in a violent and tumultuous manner. Accordingly, whether or not the jail constituted a penal institution was an element of the offense. Thus, the question of whether the Harris County Jail qualified as a penal institution under OCGA §16-10-56 was properly for the jury, and the trial court violated OCGA § 17-8-57 in determining the issue as a matter of law. In so holding, the Court rejected the contention that the trial court was merely “clarifying the law for the jury.” The Court stated that the trial court’s direction went beyond clarifying the law on a particular issue; it involved applying the law to the evidence to draw a conclusion on an element of the State’s case. “We know of no statute that provides or any appellate decision that holds that every county jail is a ‘penal institution’ as a matter of law.”

Witnesses; Restitution

Ezebuir v. State, A11A0111 (3/8/2011)

Appellant was convicted of robbery by intimidation. She contended that the trial

court erred when it allowed the victim —a 66-year-old woman who, at the time of the trial, apparently required the help of medical personnel to travel to the courthouse —to testify in rebuttal while seated on an ambulance gurney. The record showed that the State called the victim as a witness on the first day of evidence, and because the victim typically used a wheelchair and apparently could not travel to the courthouse without assistance, the prosecutor’s office made arrangements for a medical transport company to bring the victim and her wheelchair to the courthouse. The trial court, without objection, permitted the victim to testify while seated in her wheelchair. The following day, the State unexpectedly needed to recall the victim on rebuttal. Because it was unexpected, the State could not use the same medical transport company. Instead, the State called the Fire Department who brought her to court on a gurney. Defense counsel objected but refused to allow the trial court to explain to the jury the reason the victim was on the gurney or to explain why the paramedics did not bring the victim’s wheelchair to court.

The Court found that a trial court is vested with considerable discretion when conducting court proceedings. The Court found that there was no question that the victim need assistance to get to court and that the prosecutor did not deliberately arrange for the wheelchair to be left behind at the victim’s home. When the victim arrived in the courtroom on a gurney, appellant objected and tried to force the trial court to choose between allowing the victim to testify from the gurney or disallowing her testimony altogether. Indeed, appellant presented the trial court with no other alternatives, for example, inquiring whether the paramedics could safely move the victim to a chair or bench in the courtroom before she testified, or ask for a continuance until the next day to allow the prosecutor’s office an opportunity to bring the victim’s wheelchair to court. And when the trial court offered to explain to the jury why the victim was seated on a gurney, appellant objected to any such explanation. “In these circumstances, and given the limited choice to which [appellant] put the trial court, we do not think the trial court abused its wide discretion.”

Appellant also contended that the trial court erred in ordering her to pay \$800 in restitution because the trial court failed to hold a hearing on restitution when there was

no agreement on the amount of restitution and that the trial court failed to enter written findings to justify the award of restitution. First, the Court found that the trial court took up the issue of restitution as a part of its consideration of a proper sentence, immediately following the return of the guilty verdict. Appellant was allowed to offer argument on the issue of restitution, and she did not object to the trial court proceeding to decide the issue of restitution at that time. Nor did she ask for a continuance, ask that a restitution hearing be set for a later date, or state that she had evidence to present on the question of restitution. Thus, she waived any error in the decision of the trial court to decide the question of restitution as a part of the sentencing hearing, rather than in a separate and distinct hearing. As to the failure to make written findings, the Court in light of an amendment of the restitution statutes in 2005, a trial court no longer is required, before awarding restitution, to make written findings of fact concerning the factors set out in OCGA § 17-14-10.

Trafficking in Methamphetamine; Severance

Flores v. State, A10A1828; A10A1829 (3/10/2011)

Flores, Lopez, and Garcia-Maldonado were tried together on drug and weapons charges. The jury found Flores and Lopez guilty of trafficking in methamphetamine and possession of a firearm during the commission of a felony and they appealed. Flores contended that the trial court erred in not severing his case from Garcia-Maldonado because there was a danger that evidence against Garcia-Maldonado would be considered against him and because Garcia-Maldonado and he asserted antagonistic defenses. The Court stated that the existence of antagonistic defenses in and of itself does not require severance, and Flores failed to demonstrate any clear prejudice and denial of due process which might have been avoided by severing the trials. Thus, the testimony of Garcia-Maldonado implicating Flores was admissible in a separate trial, as well as evidence of Flores’s attempted flight, and, under certain circumstances, statements Flores made while cooperating with the State. Moreover, because Garcia-Maldonado testified at trial, Flores had

ample opportunity to cross-examine him and no prejudice amounting to a denial of due process rights is shown where an accomplice, who is subject to cross-examination, takes the stand and blames the appellant or attributes to the appellant a greater degree of culpability than the accomplice himself bears.

Lopez contended that the evidence was insufficient to support his convictions. The Court agreed and reversed. The evidence showed that using a confidential informant (CI), the State arranged for the purchase of a trafficking amount of methamphetamine. A green car driven by Garcia-Maldonado pulled into the parking lot. Three to four minutes later, a black vehicle entered the parking lot and drove in front of the room where the CI was standing, approximately 150 feet away from the green vehicle. When the CI approached the black vehicle and made contact with its occupants, officers moved in and pulled the occupants out of both vehicles. Flores was the driver of the black vehicle, and Lopez was the passenger. Officers found a handgun on the Flores's side floorboard, and a handgun on Lopez's person. They found no drugs in the black vehicle. The methamphetamine was found in the green vehicle and Garcia-Maldonado made statements that he was driving the car at the direction of Flores.

The Court found that the evidence against Lopez was insufficient to authorize a rational trier of fact to find beyond a reasonable doubt that he was in actual or constructive possession of the drugs. There was no presumption of drug possession because there was no evidence that Lopez owned or controlled the vehicle in which the drugs were found; in fact, there was no evidence that he had even been in or had any connection to that vehicle. No testimony from Garcia-Maldonado (or anyone else) implicated Lopez in the transaction. The evidence showed nothing more than Lopez's presence in the vehicle with Flores. The State was required to produce evidence of some meaningful connection between Lopez and the drugs, which it failed to do. There was also no evidence that Lopez had the power and intent to exercise control over the drugs found in the other vehicle. Further, Lopez's conviction cannot be upheld on the ground that he was a party to the crime of trafficking in methamphetamine, as the State failed to adduce evidence that he intentionally caused another to commit the crime, aided

or abetted in the commission of the crime, or advised or encouraged another to commit the crime. Thus, his conviction for trafficking was reversed. Moreover, because the evidence did not support the "during the commission of a felony" element of the firearm possession charge, Lopez's conviction for possession of a firearm during the commission of a felony was also reversed.

Jury Charges

Alexander v. State, A10A1822 (3/8/2011)

Appellant was convicted of one count of sexual battery as a lesser included offense of rape and one count of child molestation. He contended that the trial court erred in instructing the jury that it was required to convict him of rape, statutory rape, or sexual battery as to Count 1 of the indictment. The Court disagreed. It found that in its instruction, the trial court correctly charged the jury as to Count 1 of the indictment (Rape) and its lesser included offenses as follows: "[I]f you believe and believe beyond a reasonable doubt that the defendant is guilty in Count 1 . . . , of the offense charged, the form of your verdict would be 'We, the jury, find the defendant guilty of Count [1].' On the other hand, as charged[,] you can also consider whether or not the defendant is guilty of the two lesser included offenses under Count 1[.]" Viewing the charge as a whole, the Court found no error.

However, the Court stated, it was required to determine if substantial error, requiring reversal, was present in light of the foregoing portion of the charge arguably suggesting that the jury was authorized to convict if it "believed" that appellant was guilty. The Court stated that its concern was that this instruction may have "watered down" the beyond a reasonable doubt standard to that of something less, citing *Ward v. State*, 271 Ga. 62, 64 (1999) and *Jones v. State*, 252 Ga. App. 332, 334 (a) (2001). The Court noted that the trial court gave a proper instruction on the definition of reasonable doubt. The trial court made no attempt to summarize its reasonable doubt charge as an honestly held belief or to otherwise explain it. Although the trial court used the term "believe," it did so in the context of the reasonable doubt standard which the trial court clearly and correctly charged in its instruction. Under these circumstances, the Court found no substantial error and concluded that the

charges were distinguishable from those condemned by *Ward* and *Jones*. Thus, while the best practice would not have been to employ the word "believe" in its charge as it did, the trial court did not improperly summarize the burden of proof or otherwise confuse the same in doing so. Accordingly, the charge, read as a whole, was proper.

Statements; Prosecutorial Misconduct

McMahon v. State, A11A0239 (3/8/2011)

Appellant was convicted under OCGA § 16-10-20 of making a false statement. The evidence showed that appellant asked that the prosecution of her husband be dropped and in so doing, lied to an investigator, victim's advocate, and ADA in the District Attorney's Office when she told them that the police had never made a domestic violence call to her home before. Appellant argued that the trial court should have granted a mistrial pursuant to OCGA § 24-3-50 because the prosecutor improperly introduced evidence of plea negotiations. The record showed that during trial, the prosecutor asked her investigator, "Did the defendant ask you not to or ask me not to prosecute her for these charges?" The investigator responded, "She did." The Court found that the statement did not violate OCGA § 24-3-50 because it was not a confession because appellant's request that she not be prosecuted in no way admitted the elements of the crime. Moreover, OCGA § 17-8-75 did not require the trial court to rebuke the prosecutor for asking the question and failing that, to grant a mistrial because the question was not an impermissible reference to a confession made during plea negotiations. Also, the trial court complied with the statute by instructing the jury that the question was not evidence.

Appellant also contended that her conviction should have been reversed because the State failed to prove an essential element of the offense, namely that the office of the district attorney is a government agency under OCGA § 16-10-20. The Court disagreed. The investigator testified that he was an investigator for the District Attorney's office for the Northeastern Judicial Circuit, which includes Hall and Dawson Counties. Therefore, the jury could reasonably have inferred from this testimony that the District Attorney's Office is an agency of county government.

Guilty Pleas

Agnew v. State, A10A1929 (3/9/2011)

Appellant appealed from the denial of his motion to withdraw his plea in two cases. The record showed that appellant was separately indicted for crimes committed on different days and against different victims. The later crime was called for trial and before closing arguments, the trial judge suggested that appellant might want to consider whether he wanted to take responsibility in both cases. After a recess, defense counsel informed the court that appellant wanted to enter an *Alford* plea in both cases. Before the plea proceedings began, the State clarified that appellant was facing life without parole based upon a recidivist notice filed by the State in the case not being tried. Appellant then entered an *Alford* plea in both cases and the judge gave him identical concurrent sentences in both cases. He thereafter unsuccessfully moved to withdraw his pleas, contending that he was erroneously advised that he was facing a recidivist sentence.

The State conceded that it erroneously represented that appellant had three prior felony convictions and was facing a life without parole sentence in the second case. Because appellant decided to plead guilty to both cases at the same time, the Court stated that it could not separate the harm caused by the State's erroneous representation that he was facing life without parole in one of the cases from the other. And because appellant was given affirmative erroneous information at the time he decided to enter his guilty pleas, the trial court should have granted the motion to withdraw his guilty plea in both cases to correct a manifest injustice. The Court therefore reversed the trial court's denial of appellant's motion to withdraw his guilty pleas.

Theft by Conversion

Thomas v. State, A11A0207 (3/9/2011)

Appellant was convicted of theft by conversion. He contended that the evidence was insufficient to support his conviction. The evidence showed that the victim-customer paid \$1,675 to appellant for the replacement of the engine in her van and appellant initially promised her that the work would be complete by February 8, 2007. Briefly stated, appellant kept re-setting the date that the van would be ready and ignored many of the victim's calls.

On March 26, the victim filed a civil complaint in magistrate court. At a hearing before the magistrate court on May 9, appellant claimed that the work on the van was complete, and the trial court ordered him to deliver it to the customer on the next morning. The magistrate court also ordered appellant to pay damages of approximately \$3,000 to the customer. Appellant never delivered the van, however, and the victim testified at appellant's criminal trial about her belief that appellant no longer worked at the shop where her van had been stored and that the shop's owner had arranged for someone to tow her van to a junkyard in May, 2007. The customer apparently never recovered her van.

Appellant was charged with one count of theft by conversion of the van under OCGA § 16-8-4 (a). Appellant was not charged with having converted the money that the victim paid to him for the repair of the van. The Court stated that "[a]s we have cautioned before, this statute is intended to punish the fraudulent conversion of property, not mere breaches of contract or broken promises." Here, the Court found, appellant "did not apply best business practices in the operation of his automotive repair business, did not keep the promises that he made to a customer, and may have lied in civil proceedings commenced by that customer." Thus, the evidence showed that appellant abandoned his work on the van; he apparently abandoned the van at the shop at which he had worked; and he never delivered the van to the customer. He did these things despite his promises to complete the work, his repeated assurances that the work would soon be complete, his statement to the magistrate court that he had, in fact, completed the work, and the direction of the magistrate court to deliver the van to the customer. But, there was no evidence that appellant drove the van, that he cannibalized it for spare parts, or that he used it for any other purpose, except to perform work upon it. There was no evidence that appellant did anything to conceal the whereabouts of the van from the customer or to keep her from recovering possession of it. And although it appears from the record that the van ultimately was taken from the shop to a junkyard, nothing in the record suggested that appellant had anything to do with the disposal of the van. In fact, the victim admitted her belief that the owner of the shop made the decision to tow away her van after appellant quit working at the shop. The Court stated that appellant's "treatment of his

customer was contemptible and reprehensible. But the evidence [was] insufficient to prove beyond a reasonable doubt that it amounted to a crime." Appellant's conviction for theft by conversion was accordingly reversed.

Severance

Boatright v. State, A10A2120 (3/8/2011)

Appellant was convicted of child molestation, aggravated sexual battery, and two counts of tattooing the body of a minor. The evidence concerned three different victims, two of which were sisters and the third, a friend of one of the sisters. Appellant argued that the trial court erred in denying his motion to sever the offenses. Severance is required if offenses are joined solely because they are similar in nature. Severance is not mandated, however, where the similarity of the offenses is coupled with evidence of a pattern which shows a common motive, plan, scheme, or bent of mind. Where the modus operandi of the perpetrator is so strikingly alike, that the totality of the facts unerringly demonstrate and designate the defendant as the common perpetrator, the offenses may be joined—subject to the right of the defendant to severance in the interests of justice. Severance in this particular kind of circumstance lies within the sound discretion of the trial judge.

Here, the Court found, although the charged sex offenses involved different female victims and occurred on different dates, they all reflected appellant's pattern of touching or fondling adolescent females while they were sleeping in his home and all of the sex offenses were similar and showed appellant's common motive, plan, scheme, or bent of mind to satisfy his sexual desires. Also, the circumstances surrounding the tattooing offenses would have been admissible at the trial of the sex offenses to show appellant's lustful disposition and bent of mind. Therefore, severance was not required.

Moreover, the Court determined, the case was not so complex as to impair the jury's ability to distinguish the evidence and apply the law intelligently as to each offense. Consequently, the trial court did not abuse its discretion in denying the motion to sever.

Jury Charges; Sentencing

Barbee v. State, A10A2315 (3/9/2011)

Appellant was convicted of burglary. He contended that the trial court erred in twice

recharging the jury regarding recent, unexplained possession of stolen property. The Court noted that appellant did not assert that the recharges were incorrect statements of the law, but that the repetition of the charge itself was error. The Court held that a mere repetition of a principle of law will not work a reversal unless it appears from the charge as a whole that there was such undue emphasis as to result in an unfair statement of the law in relation to the defendant's rights. Mere repetition of a correct and applicable principle of law is not such error as requires reversal unless it is an argumentative or opinionative utterance which would tend to prejudice the minds of the jury. Here, the trial court's repetition of the recent possession charge was in direct response to specific inquiries from the jury and was accompanied by admonitions to not place additional weight on the recharges in isolation. Reviewing the recharges, the Court concluded that the trial court did not make an "argumentative or opinionative utterance," but rather addressed the jury in a neutral manner aimed at resolving any confusion that had arisen during deliberations. Accordingly, the trial court acted within its discretion in twice recharging the jury on the recent, unexplained possession of stolen property.

Appellant contended that the trial court erred in sentencing him as a recidivist under OCGA § 17-10-7 (c) based on certified copies of his three prior felony convictions from Tennessee in aggravation of sentence. Although there was no Tennessee court order expressly consolidating the three prior felony offenses for a single trial, appellant argued that the prior offenses were "consolidated for trial" for purposes of OCGA § 17-10-7 (d) and should have been treated as one prior felony for purposes of sentencing. The Court found that the trial court correctly concluded that appellant's three prior offenses were not consolidated for trial under OCGA § 17-10-7 (d). The three prior crimes involved different victims, and each conviction had a separate case number, indictment, and sentencing order. Under these circumstances, the record reflected that there was no consolidation. Moreover, although appellant emphasized that he completed and submitted to the same Tennessee trial judge one "Petition to Enter Plea of Guilty" for the three prior offenses, and that the trial judge imposed concurrent sentences, the fact that the prior offenses were pled out at the same time, before the same judge, and resulted in the same sentence to run concurrently

does not establish that they were consolidated under OCGA § 17-10-7 (d).

Right to Appeal; Prosecutorial Misconduct

State v. Smith, A10A1655 (3/10/2011)

The State appealed from an order of the trial court suppressing the photographic and in-court identifications of Smith without first holding an evidentiary hearing. The record showed that the hearing on the defendant's motion was scheduled for November 17. The State claimed it was not properly served with notice of the motion and therefore did not have its witnesses available. The Court then took up the motion again on February 8. At that time, the witnesses were present and the State announced it was prepared to go forward with the evidentiary hearing. However, the trial court found that it believed that the motion had merit and the State had the opportunity to present its case on November 17 and that the State was dilatory in not being prepared to go forward on November 17. The trial court therefore granted Smith's motion to suppress without holding an evidentiary hearing, finding that the State failed to proffer any evidence to contest the motion, even though the State was ready and prepared to do just that at the February 8 hearing.

The en banc Court first addressed whether the State had the right to appeal the decision of the trial court. Citing *Strickman v. State*, 253 Ga. 287 (1984), the Court held that the enactment of OCGA § 5-7-1 was remedial in nature and as such, was to be liberally construed. Here, the trial court either (1) granted the motion to suppress as an improper sanction, or (2) denied the State the opportunity to proffer evidence in opposition to the motion as a sanction, and then granted the motion because the State's inability to introduce such evidence precluded it from satisfying its burden of showing the legality of the photographic lineup. In either event, the State's direct appeal was from an order that (1) was issued prior to the impaneling of a jury or Smith being put in jeopardy, and (2) granted Smith's motion to suppress evidence that was allegedly obtained in an illegal manner, and which the trial court deemed to be "meritorious" even apart from the prosecutor's supposed dilatory conduct. Consequently, the Court concluded, the State's direct appeal was authorized by OCGA § 5-7-1 (a) (4).

The Court then addressed the merits of the appeal. It found that the trial court clearly abused its discretion in barring the State from presenting evidence in opposition to Smith's motion to suppress, and then erred as a matter of law in granting the motion. Specifically, the trial court held that the State failed to proffer any evidence contesting Smith's motion to suppress in a timely manner, and did so even though the State was prepared to offer evidence in opposition to the motion at the final hearing. In essence, despite stating in its order that it granted the motion to suppress because the State failed to counter it, the trial court prohibited the State from proffering evidence in opposition to Smith's motion to suppress as a means of sanctioning the State's prosecutor for, in its view, contesting the motion in a dilatory manner, and then granted the motion because the State was then unable to satisfy its burden of showing that the identifications were lawfully obtained. In doing so, the trial court erred.

In so holding, the Court found that "a trial court should exercise great caution before barring the State from showing why evidence it seeks to admit at trial should not be suppressed." The Court also noted that the State gave a facially valid good faith reason why it was not prepared to go forward on November 17; that Smith was not prejudiced; the ruling did not serve the interests of judicial economy; and finally, that "by barring the State from presenting evidence to contest Smith's motion as a means of sanctioning the State's prosecutor (which resulted in the exclusion of the victims' identifications of Smith), instead of making a finding that Smith's due-process rights were actually violated, the trial court clearly abused its discretion and impermissibly expanded the scope of a judicially-created rule of evidence suppression far beyond its intended and limited purpose."

The dissent argued that because the trial court granted the motion to suppress as a sanction for the State's dilatory conduct rather than on the substantive ground that the evidence was unlawfully obtained, the Court was without jurisdiction to hear the State's interlocutory appeal.

Character Evidence

Russell v. State, A11A0168 (3/9/2011)

Appellant was convicted of several counts of VGCSA. The evidence showed that appel-

lant sold cocaine to an undercover GBI agent. At trial, appellant claimed that he was working for law enforcement e reference to appellant's photograph being pulled from the website of the State Board of Pardons and Paroles was improper. Although the reference did not identify any specific crime of which appellant was convicted, it did suggest, at the least, that appellant had been convicted of some crime. Nevertheless, a mistrial is not always required when testimony improperly touches upon the character of the accused, especially when the testimony is not purposefully elicited by the State. The trial courts are vested with considerable discretion to determine whether a mistrial is, in fact, essential to preserve the right to a fair trial or whether some other remedial measure is sufficient. Here, the chief was called as a witness by appellant, not the State, The chief's answer was not purposefully elicited by the prosecutor, and although his answer implied some prior conviction, it did not identify any specific crime of which appellant had been convicted. Moreover, the trial court immediately gave a curative instruction, in which the trial court told the jury to "disregard" the answer "in all respects" and not to consider it "in any form or manner." Under these circumstances, the Court found that the curative instruction was sufficient to remedy any prejudice arising from the response. Therefore, the trial court did not abuse its discretion in denying the motion for mistrial. In so holding, the Court also noted that the evidence against appellant was overwhelming.