Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 26, 2010

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THIS WEEK:

Ineffective Assistance of Counsel; Habeas Corpus

Brown v. Baskin, S09A1956

The State appealed from the grant of a writ of habeas corpus to Baskin. Baskin and his co-defendant, Ervin Head, were jointly indicted, tried, and convicted of armed robbery, hijacking a motor vehicle, and aggravated assault. Both convictions were affirmed on appeal. Baskin subsequently filed this habeas action alleging ineffective assistance of appellate counsel for failing to raise an issue of ineffective assistance of trial counsel. At trial, Baskin's attorney failed to challenge the trial court's ruling that he could not impeach the victim with evidence that the victim was under indictment. *Davis v. Alaska*, 415 U.S. 308, 94 SC 1105, 39 LE2d 347 (1974), guarantees a defendant in a criminal trial the specific right to cross-examine a key State's witness concerning pending criminal charges against the witness. To obtain habeas corpus relief on a claim of ineffective assistance of appellate counsel, a petitioner must satisfy the two-prong test of *Strickland v. Washington* by showing that appellate counsel was deficient in failing to raise an issue on appeal and that the deficiency prejudiced the defense. Here, the Court found that the habeas court was correct in determining that appellate counsel was deficient for failing to raise this issue because trial counsel was deficient for failing to challenge this ruling despite the opportunity to do so. The error was also prejudicial to Baskin because the evidence was not overwhelming and the case was premised on the credibility of the victim. Therefore, the Court could not say that the deficiency was such that, absent the unprofessional error on trial counsel's part, the result of the trial would have been different.

Ineffective Assistance of Counsel; Habeas Corpus

Frazier v. Mathis, S09A1458

The Warden appealed from the grant of habeas corpus to Mathis. The record showed that an officer stopped a vehicle in which Mathis was a passenger. Inside the vehicle, the officer found 18 bags of cocaine. Mathis, the driver, and another passenger were all charged with possession with intent to distribute. Mathis entered into a negotiated plea to

simple possession and first offender treatment. Thereafter, he contended his counsel rendered ineffective assistance. The evidence showed that his counsel met him on the day he pled guilty and only spent two hours with him. The habeas court granted Mathis's petition, finding that the two hours that passed between the time counsel first met Mathis and Mathis's entry of his guilty plea could not result in effective representation.

The Court reversed. It found that the amount of time counsel spent conferring with Mathis is not dispositive, as there exists no magic amount of time which counsel must spend in actual conference with his client. Mathis failed to demonstrate how any additional communication with counsel would have changed his decision to enter a guilty plea. In fact, he presented no evidence from which the habeas court could have concluded that the results of the challenged plea hearing would have been more beneficial to him had counsel spent more time with him, or investigated the case further; the only evidence placed before the habeas court was that the information available to counsel would have been the same, there would have been no change in the circumstances surrounding the State's prosecution of Mathis, and hence no change in counsel's advice. Accordingly, the habeas court erred in granting the petition.

Venue, Jury Charges

State v. Dixon, S09G1130

Dixon was convicted of armed robbery in Dekalb County. At trial, the evidence showed that Dixon robbed the victim at gunpoint of his truck and personal possessions. The robbery took place at a gas station in Dekalb County. Dixon claimed that he came across an unlocked truck with the engine running at a gas station in Clayton County. He admitted he took the truck and wanted a charge on theft by taking. He also stated that he was willing to waive the requirement of venue. The trial court refused the requested charge. The Court of Appeals held that the charge should have been given and reversed his conviction. The Supreme Court granted certiorari and reversed, affirming Dixon's conviction.

The Court held that a criminal defendant may waive jurisdictional defenses, and may expressly authorize factual stipulations that will obviate the need for proof. But a defendant cannot generally do so over the State's objection. Venue is not a fact to which the State is required to stipulate whenever the defendant wishes to do so, particularly where, as here, the State disbelieved the defendant's account of that fact. Stipulations and waivers of jurisdictional defenses streamline a proceeding where both parties agree on a fact, making further proof unnecessary. Stipulations and jurisdictional waivers are not a means of forcing an opposing party to agree to facts it believes are not true and would mislead the factfinder. Therefore, Dixon could not require the State to agree that he committed theft by taking in Clayton County, or require the trial court to instruct the jury on a lesser included offense over which the court lacked venue.

Merger

Mikell v. State, S10A0567

Appellant was convicted of malice murder, felony murder while in the commission of an aggravated assault, aggravated assault, and burglary. The felony murder count was vacated by operation of law. The Court sua sponte held that the aggravated assault merged into the malice murder conviction. The evidence showed that appellant stabbed the victim 49 times with a knife. The Court held that when a victim suffers multiple wounds inflicted in quick succession, each infliction of injury does not constitute a separate assault. Instead, a separate judgment of conviction and sentence is authorized only if a defendant commits an aggravated assault independent of the act which caused the victim's death. Here, the medical examiner testified that the 49 knife wounds to the victim "had to have been inflicted relatively quickly" and "could have been produced inside of a minute." Since there was no evidence to establish a "deliberate interval" in the series of wounds, appellant's conviction for aggravated assault must be vacated because it merged as a matter of fact into the conviction for malice murder.

Preval v. State, A09A2384

Appellant was convicted of trafficking in marijuana by "unlawfully and knowingly possessing more than ten pounds of marijuana," (OCGA § 16-13-31 (c)), and for violating the Georgia Controlled Substances Act by "unlawfully manufacturing marijuana." (OCGA § 16-13-30 (j) (1)). Appellant argued that the trial court should have merged his two convictions. The Court agreed and reversed for resentencing.

A defendant may be prosecuted for more than one crime if his conduct may establish the commission of more than one crime, but multiple convictions arising from the same conduct are prohibited if one crime is included in the other. Under *Drinkard v. Walker*, 281 Ga. 211, (2006), the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. Here, the Court held, the only element needed to prove trafficking under OCGA § 16-13-31 (c), in addition to the elements required by OCGA § 16-13-30 (j) (1), is that the quantity of marijuana possessed be more than ten pounds. In other words, OCGA § 16-13-30 (j) (1) does not require the proof of any fact which OCGA § 16-13-31 (c) does not require. Therefore, although the State charged appellant with possession in one count and manufacturing in the other, the offenses merged because both counts arose from the same set of facts, and each provision does not require proof of a fact which the other does not.

Habeas Corpus; Mailbox Rule

Roberts v. Cooper, S09A1512

On October 28, 2002, Cooper pled guilty to armed robbery and aggravated assault. Under OCGA § 9-14-42 (c) (1), one who, like Cooper, was convicted of a felony before July 1, 2004, is required to file his petition for a writ of habeas corpus on or before July 1, 2008. The State moved to dismiss Cooper's petition because it was filed on July 2, 2008. The habeas court denied the motion, finding that the mailbox rule of *Massaline v. Williams*, 274 Ga. 552 (2001), applied to Cooper's petition and he "mailed" his petition on June 27 when he gave it to the prison officials to be posted.

In a 4-3 decision, the Court reversed. *Massaline* created a rule of appellate procedure by which, when a habeas petitioner is proceeding pro se, his application for a certificate of probable cause to appeal and notice of appeal will be deemed filed on the date he delivers them to the prison authorities for forwarding to the clerks of the Supreme Court and the superior court, respectively. But, the mail-

box rule does not apply to all pro se prisoner litigants and there is no valid justification to broaden the mailbox rule. "The rule pertains only to appellate jurisdiction…. It does not aid those who are represented by counsel. It affords no relief to those who seek appeals in arenas other than habeas corpus. It is a judicially-created rule of accommodation." It therefore did not apply to the pro se filing of a petition for habeas corpus and consequently, the trial court erred in not dismissing Cooper's petition as untimely filed.

Ineffective Assistance of Counsel; Jury Charges

State v. Nejad, S09G1015

Nejad was of convicted of various sexual offenses as well as assault with a deadly weapon and aggravated battery. The Court of Appeals reversed his conviction for two reasons. First, it found that he received ineffective assistance because his counsel did not inform him of his right to testify. Second, the trial judge erred when it instructed the jury that a pellet gun was a deadly weapon *per se*.

As to the first ground, the issue centered on whether the trial court had informed Nejad of his right to testify on his own behalf. The transcript of Nejad's trial certified by the court reporter did not reflect that the trial judge informed Nejad of his right to testify and that the decision whether to testify was to be made by Nejad after consulting with counsel. At the motion for new trial, the State's position was that the certified trial transcript did not fully disclose what transpired in the trial court while Nejad's position was that the certified transcript was true, complete and correct. Because it is critical that the certified trial transcript reviewed by an appellate court speak the truth so that the appellate court can conduct its review with the knowledge that the transcript accurately reflects what took place in the trial court, Georgia law authorizes a trial court to conduct a hearing when a party contends the transcript does not fully disclose what took place and to "resolve the difference so as to make the record conform to the truth." OCGA § 5-6-41(f). The State did not file a motion to supplement the record. Nevertheless, Nejad participated in a hearing centered, in part, on establishing the deficiency, without voicing an objection to the lack of a written motion having been filed. Nejad then joined the State in submitting a stipulation regarding the trial judge's recollection of events, again without objection to the presentation of the issue to the trial court for resolution. In effect, the Court held, Nejad acquiesced in the State's presentation of its theory that the trial transcript was incomplete and in the State's effort to have the discrepancy resolved so as to make the record conform to the truth. The trial court conducted an evidentiary hearing regarding the conflict and resolved it by concluding that the trial judge had made Nejad aware of his right to testify and his right to decide whether he would testify. Thus, the trial transcript was amended by the trial court's determination to show that Nejad was made aware of his right to testify and to have the final say in whether he exercised that right. In light of the finality of that decision, the Court of Appeals was not authorized to reverse the trial court's determination that Nejad had been advised of his right to testify by the trial judge and should not have reversed his conviction for ineffective assistance of counsel.

The Court of Appeals also ruled it was error to instruct the jury that a pellet gun is a *per se* deadly weapon and it was for the jury to resolve whether the manner and means by which it was used made it a deadly weapon. The Court held that a firearm is a deadly weapon as a matter of law. A firearm pointed at a victim and reasonably appearing to the assault victim to be loaded is a deadly weapon as a matter of law, regardless of whether it is loaded and, under such a circumstance, the trial court does not err when it takes the issue of "deadliness" from the jury. Because here each victim perceived the weapon used by Nejad to be a gun that could be used to shoot her, the trial court did not err when it informed the jury that the pellet gun was a deadly weapon *per se*. Accordingly, the Court of Appeals erred when it ruled that the issue of the deadliness of the weapon was for the jury.

Rape; Sentencing Constitutionality

Merritt v. State, S09A1476

Appellant was charged with rape. He moved to declare unconstitutional OCGA § § 16-6-1 (b) and 17-10-6.1, the rape sentencing statutes. He argued that the sentencing scheme created by these statutes for first convictions of rape violated his due process and 6th Amendment rights because the statutes were so vague that they failed to apprise him with sufficient clarity of the maximum sentence that may be imposed should he be convicted of violating OCGA § 16-6-1 (a), with the result that he was unable to knowingly and voluntarily decide whether to plead guilty to the rape charge or proceed to trial.

OCGA § 16-6-1 (b) sets forth four sentencing options as punishment available for a person convicted of the offense of rape: death; imprisonment for life without parole; imprisonment for life; or "a split sentence that is a term of imprisonment for not less than 25 years and not exceeding life imprisonment." OCGA § 17-10-6.1 provides that if the split sentence is given, the entire 25 years must be served. Neither death nor life without parole may be given upon a conviction for rape. Appellant argued the statutory scheme is therefore unconstitutional because when the language in OCGA § 16-6-1 (b) and subsection (c) (4) of OCGA § 17-10-6.1 are construed together, the result is that trial courts are authorized to impose what may constitute a "de facto" sentence of life without parole by sentencing a defendant to a term of years that, while "not exceeding life imprisonment" as provided by OCGA § 16-6-1 (b), may nevertheless equal a defendant's probable life span, which the defendant would then be required by OCGA § 17-10-6.1 (c) (4) to serve in its entirety without any possibility of parole.

The Court disagreed. First, it held that contrary to appellant's argument, there is no conflict between the term of years sentencing option in OCGA § § 16-6-1 (b) and 17-10-6.1 and the Court's previous finding that life without parole cannot be a punishment for rape. Second, the possibility of a "de facto" sentence of life without parole created by the term of years sentencing option in OCGA § § 16-6-1 (b) and 17-10-6.1 did not violate appellant's right to due process of law. A defendant never before convicted of rape who is contemplating a plea of guilty to a rape charge would reasonably understand that he faces either a life sentence, for which he would be eligible for consideration for parole after 30 years, or a term of years during which no parole was possible, with the term ranging from a minimum of 25 years to a number that would encompass the rest of his natural life. These statutes enable a defendant to readily ascertain the relevant law governing the sentences available for a first conviction for

rape such that a defendant can be apprised of and fully understand the possible consequences when weighing whether to enter a guilty plea to the charge. "Moreover, to the extent any confusion may have existed previously in the law regarding the sentencing consequences regarding a first conviction of rape, that confusion is removed by this opinion."

Sexual Offender Registration; Constitutionality

Rainer v. State of Ga., S09A1900

Appellant was convicted of robbery and false imprisonment. The victim was a minor. Appellant was notified that he must register as a sexual offender. He filed this declaratory judgment arguing that because the offenses for which he was convicted were not "sexual" in nature, requiring him to register as a "sexual offender" constituted cruel and unusual punishment in violation of the Eighth Amendment, and arguing that OCGA § 42-1-12 violates substantive due process in that it is unconstitutionally over inclusive.

The Court held that sexual offender registry requirements contained in OCGA § 42-1-12 are regulatory, and not punitive, in nature. Therefore, the statute doe not violate the Eighth Amendment because the registration requirements themselves do not constitute punishment. Nor would the nature of the offense requiring the registration somehow change the registration requirements themselves into a form of "punishment" for purposes of an Eighth Amendment cruel and unusual punishment analysis.

The Court also disagreed with appellant's contention that OCGA § 42-1-12 is unconstitutionally over inclusive because it requires him to register as a sexual offender even though the offense that he committed against a minor did not involve sexual activity. First, appellant was not a member of a suspect class, and he had no fundamental right, as one who falsely imprisoned a minor and who was not the child's parent, to avoid the registration requirements of OCGA § 42-1-12. Second, the State has a rational basis to conclude that requiring those who falsely imprison minors who are not the child's parent to register pursuant to OCGA § 42-1-12 because it advances the State's legitimate goal of informing the public for purposes of protecting children from those who would harm them. Finally, the fact that appellant's offense did not involve sexual activity is of no consequence. The term "sexual offender" is specifically defined in OCGA § 42-1-12 (a) (20) (A) as "any individual . . . [w]ho has been convicted of a criminal offense against a victim who is a minor or any dangerous sexual offense." Under the statute, one only needs to have committed a "criminal offense against a victim who is a minor" (as that phrase is defined under OCGA § 42-1-12 (a) (9) (B)) in order to meet the statutory definition of "sexual offender" for purposes of registration. There is no requirement that sexual activity be involved.

Photographs; Statements

Stewart v. State, S09A1847

Appellant was convicted of felony murder of two victims. He argued that the trial court erred in admitting pre-autopsy photographs of the victims. Specifically, he argued that the pictures were gruesome and inflamed the jury because they 1) included medical devices such as forceps, rulers, and headrests; 2) depicted one victim with duct-tape about his hands and head; 3) reflected the shaved head of a victim around the bullet wound; and 4) were published to the jury via an ELMO projector. The Court held that pre-autopsy photographs of murder victims are generally admissible at trial to show the nature and extent of the wounds inflicted. The trial court exercised its discretion when it looked at each pre-autopsy photograph and admitted those that were relevant, and excluded two or three photographs which it deemed to be duplicative. The instrumentation appellant complained about, namely forceps holding a ruler next to the head wounds and headrests propping up the victims' heads were merely used to show the extent of the injuries, which is permissible. Likewise, a photograph of the victim's shaved head is merely a means to show the extent of injury and is also permissible. As for the duct tape found on one victim's body, there was witness testimony that the perpetrators used duct tape to bind the victim's hands and cover his eyes. Therefore, any photographs showing those materials were part of the res gestae of the crime and admissible. Also, the use of projectors to display undistorted photographs, including pre-autopsy photographs, to the jury is an accepted method of publication at trial.

Appellant also contended that the trial court erred by allowing jurors to refer to transcripts while listening to the recording of his verbal custodial statement and the reading of his written custodial statement. The Court held that a trial court may allow the jury to refer to transcripts while listening to the recording of a defendant's verbal statement and the police officer's reading of that written statement. Here, the trial court gave specific instructions to the jurors that the transcripts were not evidence, that the transcripts would not be sent back to the jury room, and that the jurors were to rely on what they heard when making their factual determinations. The use of the transcripts coupled with the trial court's limiting instruction did not constitute error.

Ineffective Assistance of Counsel; Search & Seizure

Suluki v. State, A09A2021

Appellant was convicted of possession of a firearm by a convicted felon and carrying a concealed weapon. He argued that he received ineffective assistance of counsel because his lawyer failed to move to suppress the gun that formed the basis of the State's charges against him. The Court agreed and reversed. The evidence showed that the police went to a motel armed with arrest warrants for murder on two third party individuals. They arrested one of the individuals and were told that the second individual would be returning shortly with another person who turned out to be appellant. Appellant had his own room, but the officers knew that the wanted individual and appellant frequented each other's rooms so they staked both rooms out. When appellant came back to his room, he was surprised by the officers and arrested.

The Court held that an arrest warrant is valid only against the person named in it. An officer arresting one not bearing the name set forth in the warrant acts at his peril. And even though the officer acted in good faith in arresting someone other than the person named, the warrant will not justify the action. The Court also rejected the State's argument that appellant was merely subjected to a second tier *Terry* stop. The Court found that a person in appellant's position would have believed that his detention would not be temporary. The police surprised him from inside his room, he either fell or was taken down to the floor by police officers, placed in handcuffs, and questioned about the murder before the gun

was located by the police. Therefore, trial counsel's performance was defective because he failed to move to suppress the only piece of State's evidence against appellant in this case. Moreover, a reasonable probability existed that the outcome would have been different if appellant's counsel had filed such a motion.

Speedy Trial

State v. Nagbe, A09A2144

The State appealed from the grant of Nagbe's plea in bar on constitutional speedy trial grounds. The record shows that Nagbe was arrested and jailed on May 10, 2007, and subsequently indicted on May 18, 2007, on charges of false imprisonment, cruelty to a person 65 years of age or older, and battery. She was released on bond on May 25, 2007. Nagbe was arraigned in Fulton County Superior Court before Judge Manis on July 13, 2007, and appeared at a case management hearing on August 14, 2007, and a final plea calendar on September 19, 2007. Nagbe pled not guilty, and her counsel asked Judge Manis to try the case before she retired and took senior status. Nagbe was subsequently ordered to appear before Judge Westmoreland and then Judge Arrington, who, on February 20, 2009, ordered that the case be transferred to Judge Baxter. On February 23, 2009, Nagbe filed a plea in bar and it was granted.

Utilizing the four part test of *Barker v. Wingo*, the Court first found that the approximately 22-month pre-trial delay in this case was presumptively prejudicial. The reason for the delay was unexplainable and not attributable to the defense. But, there was not any evidence of deliberate delay, so this was weighted against the State, but not heavily. The Court also agreed with the trial court finding that Nagbe's assertion of her right to a speedy trial was "sufficient" under the circumstances of the case because she asked for the case to be set down for a trial in 2007 and consistently maintained her not guilty plea and readiness for trial.

Finally, the most important component of the prejudice analysis is whether the defendant's ability to raise a defense was impaired by the delay. Here, the alleged victim died during the pendency of the case. An investigator interviewed the alleged victim before her death, and the defense introduced a videotape of that interview at the hearing to show that the victim denied being harmed by Nagbe. The Court again agreed with the trial court that Nagbe was prejudiced by this loss of her "witness." In so holding, the Court rejected the State's argument that the victim was probably incompetent to testify because she suffered from Alzheimer's disease. The Court also found that the trial court was not required to accept the State's stipulation to the introduction of the videotaped interview as a sufficient substitute for the loss of the alleged victim's trial testimony. Therefore, the Court concluded, considering the length of the delay, the lack of a reason for the delay, and the impairment to the defense caused by the death of a material exculpatory witness, the trial court did not abuse its discretion in granting Nagbe's plea in bar for violation of her constitutional right to a speedy trial.

Sentencing; Waiver of Defenses

Lord v. State, A09A2192

Appellant entered into a negotiated plea of guilty on charges of child molestation and incest, the trial court sentenced him to serve 20 years in confinement on each count, consecutively, for a total of 40 years. He contended that his conviction and sentence for incest was void because it was included as a matter of fact in the crime of child molestation. When a criminal defendant pleads guilty to counts of an indictment alleging multiple criminal acts, and willingly and knowingly accepts the specified sentences as to such charged counts, the defendant waives any claim that there was in fact only one act and that the resulting sentences are void on double jeopardy grounds. Therefore, the Court found, appellant having pled guilty to both the child molestation and incest counts, admitted to committing both crimes. As such, he was estopped from now claiming that any of the counts to which he pled guilty should have merged.

Juveniles

In the Interest of A.T., A09A1711

Appellant, a juvenile, was adjudicated a delinquent for possession of cocaine. She was placed on probation, and ordered to pay a fine and fees. She contended that the juvenile court erred by refusing to dismiss the delinquency petition and by imposing the fine and fees. Appellant's motion to dismiss was premised on OCGA § 15-11-39 (a), which provides in pertinent part: "After the petition has been filed the court shall set a hearing thereon, which, if the child is in detention, shall not be later than ten days after the filing of the petition." The hearing required by the statutory provision is the adjudicatory hearing, not the arraignment hearing. The language of OCGA § 15-11-39 (a) is mandatory and the adjudicatory hearing must be set for a time not later than that prescribed by the statute. This procedural mandate, however, may be waived, or the hearing may be continued for good cause. The record showed that appellant was placed in detention on November 5, 2008, the day of the incident. A delinquency petition accusing her of cocaine possession was filed on November 7 and she was arraigned on November 13. Her adjudicatory hearing was set for December 11, more than one month after the filing of the petition, without objection. The court subsequently rescheduled the adjudicatory hearing from December 11 to December 18. On that date, she filed her motion to dismiss, complaining that the juvenile court had not held the hearing within ten days of the filing of the delinquency petition. The Court found that at arraignment, defense counsel did not object to an adjudicatory hearing date set by the court beyond the statutorily prescribed ten-day time frame. Subsequently, she did not object to the scheduled hearing date at any time during the statutorily prescribed ten-day time period. Neither did she object to the scheduled hearing date at any other time before the date of the hearing. Given these circumstances, the juvenile court did not err in denying appellant's motion to dismiss.

Appellant also argued that the trial court erred by imposing a fine and fees. OCGA § 15-11-66 (a) (7) provides that: "if [a] child is found to have committed a delinquent act and is subsequently determined to be in need of treatment or rehabilitation, the court may make . . . [a]n order requiring the child to remit to the general fund of the county a sum not to exceed the maximum applicable to an adult for commission of any of the following offenses: . . .[including] possession of controlled substances." The juvenile court found appellant possessed cocaine, and was in need of treatment or rehabilitation. However, the Court found, OCGA § 16-13-30, which governs the offense of possession of cocaine, does not provide for the imposition of a fine for

the commission of that offense. The juvenile court thus was not authorized to impose a fine upon appellant for possessing cocaine, and therefore vacated the judgment to the extent that it imposed a fine and related fees.

Search & Seizure

Sosebee v. State, A09A2282

The trial court revoked appellant's probation for possession of a firearm by a first offender probationer. Appellant contended that the trial court erred by denying her motion to suppress. The record showed that the police executed a search warrant at appellant's hotel room and the weapon was found as a result. At the hearing on the motion, the State failed to produce the search warrant, but relied upon the testimony of the county sheriff that a warrant had been issued.

OCGA § 17-5-30 (b) provides that "the burden of proving that [a] search and seizure were lawful shall be on the state." In cases where the State relies upon a search warrant for the lawfulness of the search and seizure, the State meets its burden by producing the warrant and supporting affidavit at the motion hearing. The State failed to meet its burden. Moreover, the Court stated, even assuming that the State could meet its burden by some other means than the warrant and supporting affidavit, the State's burden was not met here. The hearsay rule that a witness must testify from his own firsthand knowledge to establish a fact applies to law enforcement officers. Because the sheriff lacked personal knowledge concerning the existence of the search warrant, the State failed to produce any competent evidence to prove that the search of the hotel room was lawful because conducted pursuant to such a warrant. The trial court thus erred in denying the motion to suppress.

DUI; Jury Charges

Myers v. State, A10A0106

Appellant was convicted of DUI. She contended that the trial court erred by failing to charge the jury on her sole defense that she lacked the intent to drive under the influence. The evidence showed that appellant drove while under the influence of alcohol, Xanax an Ambien. She testified that she had no recollection of the events that occurred between her taking a second Ambien and waking up in jail.

Citing *Crossley v. State*, 261 Ga. App. 250 (2003), the Court held that driving under the influence and reckless driving are crimes malum prohibitum, the criminal intent element of which is simply the intent to do the act which results in the violation of the law, not the intent to commit the crime itself. The State is not required to prove that the defendant intended to drive under the influence. Rather, it is required to show only that while intoxicated, the defendant drove. The trial court's charge regarding intent was aligned with the holding in *Crossley*. Therefore, the trial court did not commit reversible error.

Indictments; State's Right to Appeal

State v. Biddle, A09A2283

Biddle was charged with two counts of vehicular homicide in the first degree, one count of reckless driving and one count of driving on the wrong side of the highway. The charges arose from a collision between the vehicle driven by Biddle and another vehicle in which the victims were riding. The jury convicted him of all charges. Then the trial court, after reviewing the indictment, determined that the two charges for first degree vehicular homicide were actually written as second degree vehicular homicide and sentenced Biddle accordingly. The State appealed.

Biddle moved to dismiss the appeal, alleging that the State was attempting to appeal from a directed verdict. The Court disagreed. It found that it was plain from the record that this was not a finding based upon the evidence so that the trial court's action could be termed the grant of a directed verdict on the charges of vehicular homicide in the first degree. This appeal was therefore cognizable under OCGA § 5-7-1 (a) (1) as an appeal from an order, decision, or judgment setting aside or dismissing any indictment.

Count One of the indictment stated as follows: "The grand jurors, . . ., in the name and behalf of the citizens of Georgia, charge and accuse …Biddle with the offense of HOMICIDE BY VEHICLE IN THE FIRST DEGREE for that the said accused; in the County aforesaid, on the [date], unlawfully, did then and there, without malice aforethought, cause the death of [the victim], a human being, through a violation of Official Code of Georgia Annotated Section 40-6-390, Reckless Driving, by driving his vehicle in a reckless manner, to wit: driving on the wrong side of a roadway and hitting the vehicle wherein [the victim] was a passenger, contrary to the laws of said State, the good order, peace and dignity thereof." Count Two of the indictment changed the victim's name and stated that this victim was the driver of the other vehicle. The Court held that the test of the legal sufficiency of an indictment is whether the indictment contains the elements of the offense that is intended to be charged and sufficiently informs the defendant of what he must defend. Here, Counts One and Two informed Biddle that he must defend against charges of vehicular homicide in the first degree by recklessly driving his vehicle in violation of OCGA § 40-6-390 on the wrong side of the roadway, striking the vehicle in which the victims were riding, and causing their deaths. By alleging that Biddle violated OCGA § 40-6-390, Reckless Driving, the indictment incorporated the elements of that offense that Biddle drove his "vehicle in reckless disregard for the safety of persons or property" and was sufficient to assert an indictment for vehicular homicide in the first degree. Biddle could not admit the charges as made in Counts One and Two and still be innocent, or only be guilty of homicide by vehicle in the second degree. Accordingly, the trial court erred by finding that Counts One and Two charged only homicide in the second degree.

Continuance; Discovery

McIntyre v. State, A09A2295

Appellant was convicted of child molestation. Appellant contended that the trial court erred in denying a continuance to allow his trial counsel additional time to prepare for trial. The record showed that appellant's public defender prepared and filed pretrial discovery motions on his behalf. The case was later assigned to another public defender, who subsequently became ill and was excused from the case for medical reasons. The case was then reassigned to trial counsel approximately four days before trial. This attorney told the court that he was not sure if he was "ready to go" but that if ordered, he would go to trial. The case then proceeded to trial. No motion for a continuance was filed.

The Court held that the issue was procedurally barred because of the failure to file a

motion for continuance. Nevertheless, mere shortness of time does not by itself show a denial of the rights of the accused, and mere shortness of time will not reflect an abuse of the trial court's discretion in denying a continuance, where the case is not convoluted and is without a large number of intricate defenses. Notwithstanding the State's expert testimony, the Court found that this was not a convoluted case. Furthermore, trial counsel was familiar with the case; had reviewed all of the discovery and materials in the defense file; had reviewed the videotape of the victim's interview multiple times; had prepared voir dire questions for jury selection and requests to charge; and, had demonstrated his preparedness through his opening statement and examination of the witnesses at trial.

Appellant also argued that the trial court erred in allowing the investigating detective to testify using notes that had not been provided to his counsel during discovery. The record showed that appellant opted in under the reciprocal discovery provisions of OCGA § 17-16-1 et seq. He had also requested discovery of "police reports and other law enforcement documents." At trial, when the investigating detective was observed referring to his notes during his examination, trial counsel stated, "Your Honor, . . . we're gonna need to see those [notes]" and asserted that he had not received the detective's reports in discovery. The trial court ruled that trial counsel would be afforded the opportunity to review the detective's notes or reports prior to his cross-examination. Trial counsel made no further comments regarding the issue; he did not request a continuance or move to exclude the detective's testimony. The Court held that if the State fails to comply with reciprocal discovery requirements, the trial court is vested with broad discretion in fashioning a remedy, including allowing defendant the opportunity to inspect the evidence or interview the witness, granting a continuance, or excluding the evidence upon a showing of prejudice and bad faith. Here, defense counsel requested only that he be given an opportunity to review the detective's notes, an opportunity which the trial court granted. Because counsel did not request any further relief, the Court "assume[d] that he was satisfied with the remedy afforded."