

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 19, 2013

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THIS WEEK:

- **Out-Of-Time Appeals; Judicial Comments**
- **Similar Transactions**
- **Theft By Receiving; Sufficiency Of The Evidence**
- **Right to Remain Silent; Prosecutorial Comments**
- **Search & Seizure**
- **Speedy Trial; Barker v. Wingo**
- **Search & Seizure; Inevitable Discovery**
- **Evidence; Relevancy**
- **Child Hearsay; Right of Confrontation**

Out-Of-Time Appeals; Judicial Comments

Henderson v. State, S13A0356 (4/15/13)

Appellant pled guilty to murder, rape, burglary and other offenses. He appealed after the trial court denied his motion for an out-of-time appeal. The Court stated that an out-of-time appeal is designed to address the constitutional concerns that arise when a criminal defendant is denied his first appeal of right because, although he was entitled to the effective assistance of appellate counsel, his lawyer was professionally deficient in not advising him to file a timely appeal and he was prejudiced by that deficiency. The Court noted that appellant's motion for an out-of-time appeal asserted that he was not advised by anyone of his right to directly appeal his conviction. But even assuming that this was a claim that his lawyer was professionally deficient, appellant was not entitled to an out-of-time appeal

unless he had the right to file a direct appeal, and a direct appeal from a judgment of conviction and sentence entered on a guilty plea is available only if the issue on appeal can be resolved by reference to facts on the record.

Appellant contended that the trial court did not properly inform him of his right against compulsory self-incrimination or that he was waiving that right by pleading guilty. The Court disagreed. After reviewing the record, the Court found that the State met its burden of showing that appellant was advised of his right against compulsory self-incrimination, as well as the other *Boykin* rights, and therefore, appellant was not entitled to an out-of-time appeal on this issue.

Appellant also argued that the trial court improperly made "personal remarks" after it accepted his plea and imposed his sentence. The remarks about which appellant complained consisted of the trial court's statements - apparently to the family of the victims - that the guilty plea would "close this case forever, and we'll sentence him to prison forever" and that there was no chance that appellant's convictions would be "overturned 15 years from now on some . . . grounds that we haven't even thought of yet." Appellant contended that these remarks violated Supreme Court Rule 29, which prohibits "[p]ersonal remarks which are discourteous or disparaging to opposing counsel or to any judge." But, the Court stated, Supreme Court Rule 29 applies to remarks made on appeal, not remarks made in the trial court during a plea hearing. And, in any event, appellant failed to show that the remarks were either "discourteous or disparaging" and were not directed "to opposing counsel or to any judge." Moreover, appellant failed to show why the remarks should invalidate the guilty

plea that he had already entered by the time the remarks were made. Thus, the record failed to establish that the claims of error appellant could have raised in a timely direct appeal would have been meritorious. Accordingly, the Court held, it need not consider whether appellant's right to appeal was frustrated by ineffective assistance of counsel, and the trial court did not err when it denied appellant's motion for an out-of-time appeal.

Similar Transactions

Harvey v. State, S13A0598 (4/15/13)

Appellant was convicted of malice murder, rape, aggravated sodomy, and aggravated assault in connection with a death caused by strangulation. Appellant contended that the trial court erred by allowing the State to present the testimony of three similar transaction witnesses for the purpose of showing his course of conduct of manually choking and raping women. Appellant conceded that "under present case law there was no error in allowing the similar transactions into evidence" but urged the Court to adopt more severe restrictions limiting the admission of such evidence, "otherwise character and propensity are relevant and admissible in a criminal trial." The Court rejected the invitation, reiterating that it has permitted evidence of such similar prior incidents involving defendants in order to show the defendant's course of conduct or bent of mind is a legitimate and proper purpose under the law applicable at the time of appellant's trial, even if it comes "dangerously close" to being evidence of a defendant's character. "We note, however, that the Georgia legislature enacted a new evidence code effective January 1, 2013, which provides that '[e]vidence of other crimes, wrongs, or acts shall not be admissible to prove the character of a person in order to show action in conformity therewith. It may, however, be admissible for other purposes, including, but not limited to, proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake or accident.' O.C.G.A. § 24-4-404(b)."

Theft By Receiving; Sufficiency Of The Evidence

Thornton v. State, S13A0683 (4/15/13)

Appellant was convicted of malice murder, armed robbery, theft by receiving a gun,

and possession of a firearm during the commission of a felony. He contended that the evidence was insufficient to support his conviction for theft by receiving. The Court agreed and reversed his conviction on this count. The gun's owner testified that a stainless-steel .38 caliber Smith & Wesson was stolen from her car on August 3, 2005. The gun identified as that used in the crimes for which appellant was convicted was traced, via its intact serial number, to the gun owner, and she identified the gun as her's. O.C.G.A. § 16-8-7 makes it a crime to receive, dispose of, or retain stolen property which one "knows or should know was stolen. . . ." Proof that appellant knew or should have known the handgun was stolen is an essential element of the crime, and knowledge sufficient to establish guilt may be inferred from possession of recently-stolen property coupled with circumstances which would excite suspicion in the mind of an ordinary prudent person. However, proof of possession of recently-stolen property, alone, is not sufficient to establish that element. While it was established that the weapon used by appellant on January 1, 2008, had been stolen from the gun's owner 29 months earlier, there was no evidence from which a rational trier of fact could conclude that appellant knew or should have known the gun was stolen. Accordingly, the Court held, appellant's conviction for theft by receiving must be reversed.

Right to Remain Silent; Prosecutorial Comments

Johnson v. State, S13A0209 (4/15/13)

Appellant was convicted of murder. The evidence showed that the victim was dating appellant's ex-girlfriend, but that appellant and the woman were still friends. The victim showed up at appellant's house while the ex-girlfriend was visiting appellant. While the ex-girlfriend and the victim were talking at the door, appellant walked past them to a truck where he spoke to some men about a marijuana transaction. It was undisputed that the only words exchanged at any time between the victim and appellant were the victim's request for a cigarette and appellant's negative answer. After appellant twice returned to the house, he went back outside, struck the victim in the head with a baseball bat, chased him into the parking lot, knocked him to the ground, and struck him with the bat several more times. The

victim was unarmed and had not threatened appellant or made any aggressive movements toward him.

Appellant contended that the trial court improperly allowed the State to cross-examine him about his failure to come forward and make a statement. The evidence showed that soon after the crime occurred, appellant waived his *Miranda* rights, was interviewed by a police investigator, and gave a statement. During cross-examination, the prosecutor elicited testimony that at no point during the interview or at any other time did appellant ever indicate that he feared for his safety or the safety of his mother. Appellant then agreed that, at a hearing two weeks before trial, he testified for the first time about being afraid for his safety. And then the prosecutor asked him, "So, almost a year and a half went by before you ever mentioned anything about being in fear of your safety?"

Appellant argued that by this cross-examination, especially the question just quoted, the State improperly commented on his silence and failure to come forward after his pre-trial statement. The Court noted that appellant did not timely object to the question, but even if he had made a timely objection, the Court found that it was not improper for the prosecutor to cross-examine him regarding his failure to mention his fear to officers or others when he made his statement or at any other time before trial. Appellant chose to speak to the investigating officer without ever invoking his right to remain silent. Under the circumstances, the State's questions were proper inquiries into the inconsistency between his pre-trial statement and his testimony at trial. Moreover, even assuming that the State's cross-examination did include improper comments on appellant's silence, reversal of his conviction was not warranted because extensive eyewitness testimony and other evidence proved his guilt, refuted his claim of self-defense, and was overwhelming.

Search & Seizure

Waldron v. State, A13A0116 (4/5/13)

Appellant was charged with DUI. He was granted an interlocutory appeal to challenge the trial court's denial of his motion to suppress. The evidence showed that a real estate agent, who was preparing to show an empty commercial property, discovered that the property had been burglarized and that several

air-conditioning units had been taken from the building and stacked together near an open door, seemingly in preparation for transport away from the building. The agent called the police. The responding officer testified that the building that had been burglarized was located on a hill, behind two other closed businesses, at the end of a 45-yard-long driveway. The area was dark, given the evening hour, and it was secluded behind a tree-line. As the officer was talking with the real estate agent, he observed a pick-up truck moving along the driveway toward them. Although there were several places where the driver could have turned the truck around, the driver continued toward the crime scene until the truck's lights illuminated the officer's patrol car. The driver stopped abruptly, backed up, and drove away. Given that the burglary under investigation appeared to be in progress, and given that there was no other apparent reason for the driver to be behind closed businesses, the officer followed the pick-up truck and pulled the driver over. The officer asked the driver what he was doing in the area, and the driver said that he and his friend were looking for scrap metal. The officer smelled an alcoholic beverage coming from the driver, and appellant was arrested and charged with DUI.

Appellant contended that his arresting officer lacked articulable suspicion to stop his vehicle. The Court stated that although an investigative stop cannot be based on an officer's mere hunch that criminal activity is afoot, an officer may draw on his or her own experience and specialized training when making inferences and deductions. The inquiry is whether, given the totality of the circumstances, the officer has a particularized and objective basis for suspecting that a person is, or is about to be, engaged in criminal activity. In considering the totality of the circumstances in each case, a court must avoid evaluating the facts in isolation. Even where each in a series of acts may be susceptible to an innocent explanation, taken together they may collectively amount to reasonable suspicion justifying an officer's investigative stop. Moreover, a determination that reasonable suspicion exists need not rule out the possibility of innocent conduct.

The Court found that under the totality of the circumstances, the officer had a reasonable suspicion that the driver of the vehicle he stopped was, or was about to be, engaged in criminal activity for these reasons: The burglary to which the officer responded appeared

to be in progress. Someone had apparently intended to come back for the air-conditioning units stacked by the open door into the premises. The hour was late, the businesses were closed, and there was no reason for anyone to be driving to them or to the empty properties. The driver, nevertheless, continued down a 45-yard-long driveway toward the crime scene, although there were several places to turn around. The driver was in a pick-up truck, a vehicle capable of transporting several air-conditioning units. Finally, the driver quickly retreated when he saw the police car. Taken together, the above factors were sufficient to give the officer a particularized and objective basis for a reasonable suspicion to stop the vehicle and to investigate.

Speedy Trial; Barker v. Wingo

State v. Gay, A12A2155 (4/15/13)

The State appealed from the trial court's grant of Gay's motion to dismiss based on constitutional speedy trial grounds. The record showed that Gay was indicted on September 9, 2008 for an armed robbery alleged to have occurred on April 20, 2004. The case was placed on the administrative dead docket by order entered March 25, 2009. On August 7, 2009, Gay, acting pro se, filed a demand under O.C.G.A. § 17-7-170 for a speedy trial. The case was removed from the administrative dead docket by order entered September 11, 2009, and, on October 12, 2009, the trial court denied Gay's statutory speedy trial demand as untimely. Following appointment of defense counsel, Gay was arraigned on or about November 9, 2009. On September 11, 2011, Gay filed a motion to dismiss the indictment for violation of his constitutional right to a speedy trial. The trial court granted Gay's motion to dismiss in an order entered March 15, 2012.

The State conceded that the delay was more than one year and thus presumptively prejudicial, requiring an analysis under the *Barker v. Wingo* four-factor balancing test. The first factor is the length of the delay. The State argued that the trial court erred in finding the length of delay to include the four years from the date of the offense until the date of indictment. The Court agreed. Delays before arrest or indictment are subject to due process, and not speedy trial, analysis. Thus, the trial court erred to the extent it found the length of the delay was seven years and ten months

for purposes of Gay's contention that the State had violated his Sixth Amendment right to a speedy trial.

The second factor is the reason for the delay. Here, the trial court found that Gay had no culpability in the length of the delay, while the State was completely at fault. Further, the trial court found that the State's delay from 2004 until the indictment in 2008 "amounts to bad faith" because although the State and law enforcement knew of Gay's whereabouts, "no one did anything." But, the Court stated, the State had neither arrested nor indicted Gay from 2004 until September of 2008, and so Gay's constitutional right to a speedy trial had not attached. Therefore, the State's inaction during this period should not have been considered as a reason for the delay. Moreover, the trial court further erred by finding that the State acted in bad faith by failing to indict during this time period. A finding of bad faith necessarily weighed more heavily against the State than mere negligence, which is considered to be relatively benign in the balancing process. And although the trial court also attributed the post-indictment delay to the State, it did not expressly find that the State acted in bad faith during that period. By miscalculating the period of the delay and assigning bad faith to the State's pre-indictment inaction, the trial court weighed this factor more heavily against the State than was authorized by the evidence.

The third factor is the assertion of the right to a speedy trial. The trial court found that Gay "clearly and timely asserted his right to a speedy trial." The record showed that Gay filed a motion for a statutory speedy trial on August 7, 2009, before he had been appointed counsel. Although the trial court concluded that the motion was not valid because it was not filed within the correct term of court, the evidence showed that Gay did not learn about the charges in this case until April 2009, and he asked for a speedy trial shortly thereafter. Thus, the trial court found, Gay "demonstrated his desire to assert his right as soon as he became aware of the charges." Gay's defense counsel later filed the motion to dismiss for violation of Gay's Sixth Amendment right to a speedy trial on September 21, 2011. However, the Court stated, Gay's assertion of his constitutional right to a speedy trial occurred over two years after he became aware of the indictment, a delay which would normally be required to be weighed against him, if not heavily so. And a

defendant's assertion of the statutory right to a speedy trial is not equivalent to the assertion of a constitutional speedy trial claim. Nevertheless, a trial court may accept the assertion of the statutory right as providing some notice to the State and militating in the defendant's favor for purposes of the *Barker* analysis. Thus a defendant's statutory speedy trial demand followed by the assertion of the constitutional right to a speedy trial in a motion for acquittal may weigh slightly against the State. Therefore, the trial court erred by failing to assign a specific weight to this factor based on the facts and circumstances of this case.

The last factor is whether the defendant has been prejudiced by the delay. The Court stated that prejudice is assessed in the light of the interests of defendants which the speedy trial right was designed to protect, namely to prevent oppressive pretrial incarceration, to minimize anxiety and concern of the accused, and to limit the possibility that the defense will be impaired. The trial court found that Gay established each of these factors. The Court noted that the State made no relevant argument that the trial court erred in finding that Gay was prejudiced by oppressive pretrial incarceration and by anxiety and concern, and so it would accept the trial court's findings and conclusions as they related to these two factors.

However, the Court said, notwithstanding the trial court's findings as to the prejudice caused by Gay's oppressive pretrial incarceration and anxiety, the most serious form of prejudice associated with an unreasonable delay before trial is the possibility that the accused's defense will be impaired because of the inability to adequately to prepare his defense. Here, the trial court noted Gay's testimony that his sister had recently passed away and would have been an alibi witness for him at trial. The trial court then found that "[t]he death of this witness caused a significant and substantial impairment to the Defendant's case." The Court disagreed. The sister's testimony would have provided general testimony that Gay had been at his mother's home doing yard work for the entire month of April. According to the indictment, Gay robbed a man in Fulton County on April 20, 2004. Gay testified that his mother's house was in Decatur and within the metropolitan Atlanta area. Thus, the Court found, Gay's testimony did not show that his sister was a witness to the alleged offense or that his sister could provide

an alibi in that he was with her at the time of the robbery, nor that, because his sister would have testified that he was at his mother's house in Decatur during the month of April, it might be reasonably inferred that he could not have committed the alleged crime. Generally, in order for a defendant to carry his burden of showing prejudice due to the unavailability of a witness, he must show that the missing witness could supply material evidence for the defense. Thus, Gay failed to show that his sister would have been a material witness, and the trial court erred in finding the death of his sister during the pendency of the trial substantially impaired Gay's defense.

In balancing the factors, the Court concluded that had the trial court not miscalculated the length of the delay, not improperly considered the State's pre-indictment, pre-arrest inaction for purposes of evaluating the reasons for the delay, not failed to weigh Gay's assertions of the right to speedy trial, and had not erred in finding that Gay's defense was substantially impaired by the death of his sister, the trial court necessarily would not have ruled that Gay's constitutional right to a speedy trial was violated. Accordingly, the trial court's order was vacated and the case remanded for the trial court to exercise its discretion again using properly supported factual findings and the correct legal analysis.

Search & Seizure; Inevitable Discovery

Foster v. State, A12A2401 (4/15/13)

Appellant was convicted of VGCSA. She contended that the trial court erred in denying her motion to suppress. The evidence showed that appellant was a passenger in a car that a police officer stopped for a traffic violation. The driver was arrested when the officer determined that a bench warrant was outstanding for his arrest. The officer immediately searched the car incident to the driver's arrest and found appellant's open pocketbook from which a clear bag containing marijuana was sticking out. The visible marijuana prompted the officer to search the contents of the purse, where he found MDMA.

The State conceded that the search was not authorized as a search incident to arrest under the parameters set forth in *Arizona v. Gant*, 556 U. S. 332 (2009). However, under the inevitable discovery doctrine, if the State

can prove by a preponderance of the evidence that evidence derived from police error or illegality would have been ultimately or inevitably discovered by lawful means, then the evidence is not suppressed as fruit of an impermissible search or seizure. In other words, there must be a reasonable probability that the evidence in question would have been discovered by lawful means, and the prosecution must demonstrate that the lawful means which made discovery inevitable were possessed by the police and were being actively pursued prior to the occurrence of the illegal conduct.

The Court concluded that that the evidence supported the trial court's conclusion that the drugs would inevitably have been discovered. The officer testified that he smelled marijuana when the driver first got out of the car. At the post-trial motion to suppress hearing, the officer also testified that he had smelled marijuana when he first approached the car, and testified regarding his expertise in recognizing the odor. A trained police officer's perception of the odor of marijuana, provided his ability to identify that odor is placed into evidence, constitutes sufficient probable cause to support the warrantless search of a vehicle. Thus, the Court found, the contraband would have been inevitably discovered either during a search based on probable cause because the officer smelled marijuana in the car, or during a valid inventory search before the car was impounded.

Evidence; Relevancy

Sanchez v. State, A13A0213 (4/10/13)

Appellant was convicted of trafficking in methamphetamine. He argued that the trial court erred in allowing evidence that police found an unidentified substance in his pocket at the time of his arrest.

The evidence showed that law enforcement officers arranged through a CI to purchase two ounces of methamphetamine from a person named David. That person arrived at the designated spot for the transaction driving a car owned by appellant, who was the front seat passenger; a third person was in the back seat. Law enforcement officers arrested the three persons in the car, searched the car, and found two ounces of an off-white substance in two baggies inside a flashlight that was on the back seat floorboard. Subsequent testing identified this substance as methamphetamine.

An officer also searched appellant incident to his arrest and found in his front pocket a similar baggie containing a white, granulated substance that the officer suspected to be methamphetamine. Subsequent testing did not determine the identity of this substance but revealed that it was “negative for common drugs of abuse.”

Appellant argued that the trial court erred in denying his motion to exclude as irrelevant any evidence about the substance found in his pocket. The Court stated that the admission of evidence is a matter which rests largely within the sound discretion of the trial judge; and if an item of evidence has a tendency to establish a fact in issue, that is sufficient to make it relevant and admissible. The State presented evidence that the unidentified substance in appellant’s pocket resembled methamphetamine or a substance with which methamphetamine could be “cut” to increase the amount available for sale by weight, and evidence that the substance was packaged in a similar manner to the methamphetamine found in the flashlight. The Court held that this evidence could support a finding that appellant had knowledge or familiarity with the methamphetamine trade and that, consequently, the evidence tended to establish a fact that appellant had contested at trial - whether he knew that trafficking in methamphetamine was occurring in his car at the time of his arrest. Moreover, appellant’s arguments that undermined the State’s theories that the substance could have been sold as counterfeit methamphetamine or used to “cut” methamphetamine only went to the strength of the evidence regarding the unidentified substance, not its relevance. Therefore, the trial court did not abuse its discretion in allowing the evidence.

Child Hearsay; Right of Confrontation

Whorton v. State, A13A0578 (4/10/13)

Appellant was convicted of one count each of child molestation and sexual battery. Appellant argued that the trial court erred in denying his request for a pre-trial hearing to determine the reliability of the child-hearsay statements and that the trial court erred in admitting the statements because they lacked sufficient indicia of reliability. The Court disagreed. There is no requirement in the child-hearsay statute that the trial court conduct

such a hearing prior to receiving the relevant testimony. Nor is there a requirement that the trial court make a specific finding of sufficient indicia of reliability in order for the out-of-court statements of child victims to be admissible. Indeed, the Court stated, the statutory requirement is met if after both parties have rested, the record contains evidence which would support such a finding. Thus, so long as sufficient evidence of indicia of reliability appears in the record either before or after the introduction of the child’s out-of-court statements, the right of a defendant to a fair trial is adequately protected.

Appellant nevertheless contended that a pre-trial *Gregg* hearing was required, citing *Ferreri v. State*, 267 Ga.App. 811 (2004). The Court found, however, stated that “*Ferreri* cannot possibly stand for such a proposition.” The fundamental error made by the trial court in *Ferreri* was in failing to make its decisions on the admissibility of certain child-hearsay statements outside the hearing of the jury, so that improperly admitted hearsay evidence did not contaminate the remainder of the trial, not in failing to hold a pre-trial hearing. Moreover, this case was nothing like *Ferreri*, which involved “a staggering amount of child-hearsay statements” introduced by the State to form the bulk of its case against the defendant, in addition to evidence of the victim’s tender age, inconsistent statements, coaching, and involvement of law enforcement in interviewing the child. The record here, however, contained sufficient evidence to support the trial court’s determination that the child-hearsay statements in question had indicia of reliability. Accordingly, the trial court did not abuse its discretion in admitting the child-hearsay statements.

Appellant also contended that the trial court erred in admitting child-hearsay statements in violation of his Confrontation Clause rights when, although made available to testify, the State did not call the child victim to testify at trial. The State conceded, and the Court agreed, that the trial court erred under the recent decision in *Hatley v. State*, 290 Ga. 480 (2012). In *Hatley*, the Supreme Court interpreted the child-hearsay statute and held as follows: “[W]e now interpret [the child hearsay statute] . . . to require the prosecution to notify the defendant within a reasonable period of time prior to trial of its intent to use a child victim’s hearsay statements and to give

the defendant an opportunity to raise a Confrontation Clause objection. If the defendant objects, and the State wishes to introduce hearsay statements under [the child hearsay statute], the State must present the child witness at trial; if the defendant does not object, the State can introduce the child victim’s hearsay statements subject to the trial court’s determination that the circumstances of the statements provide sufficient indicia of reliability.”

Nevertheless, *Hatley* Court found that despite the State’s failure to call the child victim as a witness, any error in admitting testimonial hearsay was harmless when it was cumulative of admissible nontestimonial hearsay. Similarly, although the Court stated that it was “constrained to hold that the trial court erred in admitting the child-hearsay statements made during two forensic interviews because those statements were clearly testimonial,” the error was harmless beyond a reasonable doubt because the statements to the forensic interviewers were cumulative of the admissible nontestimonial statements the victim made to her mother and her mother’s boyfriend- i.e., that appellant touched the child upon the genitals with his hand. Accordingly, the Court held, the admission of those statements was harmless. Appellant’s convictions were therefore affirmed.