Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING APRIL 1, 2011

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THIS WEEK:

Sentencing

Hedden v. State, S10G0806 (3/18/2011)

Appellants were convicted under OCGA § 16-12-100 (b) (8) of sexual exploitation of children by knowingly possessing photographic images stored in their respective computers that depicted a minor's body engaged in sexually explicit conduct. Under OCGA § 17-10-6.2, one of the crimes for which a sentence is to include a minimum time to be served in prison is the sexual exploitation of children as set forth in OCGA § 16-12-100 (b) (8). Under the statutory scheme set forth in OCGA § 17-10-6.2, a trial court is prohibited from probating, suspending, staying, deferring, or withholding any of the mandatory term of imprisonment stated for any of the specified offenses. However, if certain factors are found, a sentencing court is given the discretion to deviate from the mandatory minimum prison sentence; all of the factors stated must be present to authorize a court to deviate from the mandatory minimum sentence OCGA § 17-10-6.2 (c) (1) (A)-(F). One of those factors is that "[t]he victim was not physically restrained during the commission of the offense." OCGA § 17-10-6.2 (c) (1) (F). Since each appellant had possession of a photograph showing a minor being physically restrained, the trial court held that they were not eligible to be considered for deviation from the mandatory minimum prison sentences. The Court of Appeals affirmed and the Supreme Court granted a writ of certiorari.

The Supreme Court reversed. The Court held that due regard was not given to all the statutory language. Specifically, that factor (F) precludes a trial court from exercising sentencing discretion when the victim was "physically restrained *during the commission of the offense*." OCGA § 17-10-6.2 (c) (1) (F) (emphasis supplied.). Since appellants were charged with possession of material in violation of OCGA § 16-12-100 (b) (8), it would have to be shown that the child victims in the images were physically restrained at the same time that the appellants possessed the offending material in order for OCGA § 17-10-6.2 (c) (1) (F) to exclude the trial court from having the sentencing discretion set forth in OCGA § 17-10-6.2 (c) (1). It was uncontroverted that no

such evidence existed. Accordingly, the Court found, the trial court erred in determining that it was without discretion to deviate from the minimum sentencing requirements of OCGA § 17-10-6.2 (b), and the Court of Appeals erred in affirming that ruling.

Right to Public Trial

Purvis v. State, S10G0664 (3/18/2011)

Appellant contended that his right to a public trial was violated by the holding of his trial in the county jail. The record showed that the jury was selected at the courthouse, but the trial was held in a courtroom at the jail. Appellant's brother was denied access to the courtroom during the trial although other members of the public were allowed to attend.

The Court reversed appellant's conviction. The Sixth Amendment guarantees the right to a public trial. Moreover, "Georgia law… regarding the public aspect of hearings in criminal cases is more protective of the concept of open courtrooms than federal law…. [O]ur state constitution point-blankly states that criminal trials shall be public." Here, the trial court may not have deliberately intended that members of the public be prevented from attending the trial, but it was the trial court that deliberately decided to hold appellant's trial in the county jail courtroom. By doing so, the trial court totally relinquished to jail officials the authority to control the public's access to the courtroom. "We hold that the trial court, by deciding to hold appellant's trial in a facility where the public's access was governed exclusively by the jail authorities, failed in its obligation to take reasonable measures to accommodate public attendance at appellant's trial." In so holding, the Court found no significance that the trial court did not specifically order the exclusion of appellant's brother. But did find significance in the fact that the record was devoid of any explanation as to why the trial court chose to hold appellant's trial in the jail courtroom, thereby causing the violation of appellant's right to a public trial.

Ineffective Assistance of Counsel; Venue

Thompson v. Brown, S10A1992 (3/18/2011)

Brown was convicted of VGCSA and that conviction was affirmed on appeal. He then filed a habeas petition alleging ineffective assistance of appellate counsel. Specifically, Brown contended that his appellate counsel was ineffective for failing to argue that the State failed to prove venue at his trial. The habeas court granted the petition and the State appealed.

To prevail on a claim of ineffective assistance of appellate counsel, a habeas petitioner must show that his appellate counsel was deficient in failing to raise an issue on appeal and that, if counsel had raised that issue, there is a reasonable probability that the outcome of the appeal would have been different. The evidence showed that Brown made two drug sales to an informant cooperating with a multi-jurisdictional drug task force. The informant testified that the first sale occurred at some point while he and Brown were driving from Brown's residence to a store, both of which are located in Vidalia, Georgia. The second sale occurred while they were driving from another store in Vidalia to Brown's residence. Testimony from the task force agents working with the informant established that they constantly surveilled the informant while he was driving with Brown, but that they did not witness the drug sales. Like the informant, the agents identified various stores and locations as being in Vidalia, but no witness testified that the entire driving route (or any location except Brown's residence) was in Toombs County.

The Court noted that the habeas court took judicial notice of the fact that Vidalia is located in both Toombs and Montgomery Counties. Although the State relied on OCGA § 17-2-2 (e), the Court found that this statute only applies when "it cannot readily be determined in which county the crime was committed." But here, the informant would have known the general locations where the two sales occurred and the agents knew the exact route that the informant and Brown traveled. Therefore, the State could have readily determined whether the drug sales occurred in Toombs County and offered evidence to the jury on that essential point. The Court also distinguished *Chapman v. State*, 275 Ga. 314 (2002) because the officers were part of a multi-jurisdictional task force and in any event, did not exercise their police power during the sales. Thus, the Court stated, "We understand that all the participants in Brown's trial —the members of the jury, the judge, the prosecutor, defense counsel, and Brown himself —may have known from their daily lives in and around Toombs County that the entire route driven by Brown and the informant was in the part of Vidalia that lies in that county, making venue over the drug sales seem obvious to them. Nevertheless, that fact is not established by the trial record, and defendants may not be convicted of crimes based on extra-judicial knowledge rather than evidence of such essential facts admitted at trial." The Court therefore affirmed the grant of habeas corpus and in so doing, "strongly urge[d]" trial courts to give appropriate charges on venue and prosecutors to make sure not to overlook venue as an essential part of their cases.

Pre-trial Habeas Corpus

Daker v. Warren, Sheriff, S10A1541 (3/18/2011)

Appellant appealed from the denial of his pre-trial habeas corpus petition. The State argued that the trial court properly denied the petition without a hearing because the petition and exhibits disclosed without contradiction that the petition was meritless. The Court found that the petition and exhibits did not reveal without contradiction that appellant's claim that the trial court abused its discretion in denying appellant bond under *Ayala v. State*, 262 Ga. 704 (1993) was meritless. Accordingly, the Court reversed the dismissal of appellant's habeas petition and remanded the matter to the habeas court for a determination on the merits.

Jury Charges; Closing Arguments

Johnson v. State, S10A1720 (3/18/2011)

Appellant was convicted of murder and other charges. He contended that the trial court erred in responding to a jury question regarding accomplices. During trial, a co-conspirator, who pleaded guilty to voluntary manslaughter, testified against appellant. The record showed that the jury sent out a note, asking whether someone who pleads guilty is automatically an accomplice. Appellant argued that the trial court should have said, "Yes" rather than instruct the jury that "whether or not any witness in this case was an accomplice is a question for you to determine from the evidence in this case."

The Court found that it is not error to submit to the jury the question of whether a witness for the State is an accomplice even

where the witness has confessed to being an accomplice and has been jointly indicted with the defendant at trial. Moreover, it would be error to charge the jury that a particular witness was an accomplice as a matter of law, because such an instruction could be deemed the intimation of the court's opinion as to the defendant's guilt in violation of OCGA § 17-8-57. Therefore, the trial court's response was not an abuse of discretion.

Appellant also argued that the closing argument of the prosecutor was plain error. The prosecutor argued, "[T]he burden of proving his guilt to you remains with the State. It never shifts to [appellant]. He doesn't have to do a thing, doesn't have to say a thing. But he has the ability and he has the right to present evidence if he so chooses. We have seen and heard in the trial he chose not to do that, and you can't hold that against him. But I do want to ask you one question. If [appellant] was not sitting behind [the victim] on March 27, 2004, shooting him in the back of the head, where was he? Where was he? Where was he?" The Court held that since appellant did not object, he waived any objection and that the Court would not review it under a plain error standard. Nevertheless, the Court stated, its decision "should not be read as condoning the prosecutor's argument."

Interstate Agreement on Detainers

Herbert v. State, S10A1830 (3/18/2011)

Appellant was convicted of felony murder and other crimes. He contended that the trial court erred in denying his motion to dismiss the indictment base on an alleged violation of the Interstate Agreement on Detainers (IAD). The record showed that appellant travelled from North Carolina with friends to Georgia, that he and a friend murdered a drug dealer and then returned to North Carolina. In February, 2006, Clayton County issued an arrest warrant for him in connection with the crimes, but he was not immediately arrested. In July, 2006 Appellant was convicted of a felony in North Carolina and began serving a sentence of 18 to 22 months of incarceration. Appellant waived extradition which was received by Clayton County in December, 2006. The detainer was withdrawn and he was subsequently indicted in May, 2007. A new arrest warrant and new detainer were issued based on the indictment. After an extradition hearing, Georgia officials took custody of him at the end of his prison sentence in October, 2007.

The Court held that a defendant has the constitutional right to demand a speedy trial even if he is incarcerated in another jurisdiction. The IAD provides the mechanism for states to satisfy their obligation to provide a speedy trial for an out-of-state prisoner. By its terms, the Georgia IAD applies only to detainers that are based on "any untried indictment, information or complaint." OCGA § 42-6-20 (Art. III (a)). It does not apply to detainers based on arrest warrants. Nevertheless, appellant argued that once the indictment against him was filed in May, 2007, he was subject to a detainer based on an untried indictment and at that time, his pre-indictment waiver of extradition and request for final disposition on the arrest warrant triggered the Georgia IAD's 180-day deadline to start his trial or dismiss the indictment. The Court disagreed. In 2006, appellant waived extradition to Georgia and requested final disposition of the first arrest warrant, but that warrant did not come under the IAD. When he was later indicted in May 2007, the detainer based on the first arrest warrant was withdrawn and Clayton County requested a new detainer based on the untried indictment, but appellant never waived extradition for trial on the indictment or requested a final disposition of the detainer based thereon. Thus, appellant did not comply with the procedural requirements of the Georgia IAD, the 180-day deadline was never triggered, and there was no violation of the Georgia IAD. Accordingly, the trial court properly denied his motion to dismiss the indictment with prejudice.

Impeachment Evidence

Carter v. State, S10A1999 (3/18/2011)

Appellant was convicted of malice murder and other offenses. He contended that the trial court erred by only allowing into evidence the certified convictions of a State's witness and not allowing the indictments associated with those convictions to be admitted into evidence as well. Under OCGA § 24-9-84.1 (a) (1), "[e]vidence that a witness has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more under the law under which the witness was convicted if the court determines that the probative value of admitting the evidence outweighs its prejudicial effect to the witness." An indictment represents only accusations against a defendant, and is not in itself a conviction. Therefore, the Court found, the trial court did not err.

Ineffective Assistance of Counsel; Conflict of Interest

State v. Mamedov, S10A2005 (3/18/2011)

Mamedov, a permanent resident alien from Uzbekistan, was charged with kidnapping, but pled guilty to false imprisonment. After I.C.E. detained him for deportation, he filed a habeas petition. The trial court granted the petition, finding that his plea counsel rendered ineffective assistance by simultaneously representing both Mamedov and his co-defendant in the kidnapping case without informing Mamedov of the potential for a conflict of interest and the ramifications thereof.

The facts showed that while Mamedov was driving a fellow countryman to the store, the passenger saw a woman he liked, who also happened to be from Uzbekistan. Mamedov stopped the vehicle; the passenger got out, declared his love for the woman, and tossed her into the car. They drove around for a couple of minutes and then returned to about where the woman had originally been standing and let her out of the vehicle. According to the woman, such "kidnappings" were not uncommon in her country and she was unharmed.

To establish ineffective assistance based on a conflict of interest on the part of trial counsel, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance. A conflict of interest is involved if there is a substantial risk that the lawyer's representation of the client would be materially and adversely affected by the lawyer's duties to another. Further, for ineffectiveness claims premised on a conflict of interest, a petitioner need not prove prejudice as is typically required; rather, prejudice will be presumed where the petitioner can establish an actual conflict of interest that adversely affected the adequacy of counsel's representation.

Here, the Court found a conflict of interest because the passenger's family retained counsel to represent both men. Aside from an initial brief meeting at the jail shortly after his arrest, Mamedov never met with counsel

outside the presence of the passenger or his family. Counsel never explored with Mamedov the possibility of mounting any defense to the kidnapping charge. In fact, counsel testified he believed Mamedov had no defense. Counsel never raised with Mamedov the issue of any potential conflict of interest inhering in his dual representation of both men or explained to Mamedov that he could elect to retain his own attorney. Thus, the fact that the passenger alone was paying counsel's fees created a strong incentive for counsel to prioritize the passenger's interests in the matter over Mamedov's. In addition, even though the men pursued a unified defense in that their accounts of the incident were consistent, the record reflected that Mamedov was the less culpable of the two in the crime. But, counsel not only failed to pursue an alternative defense theory on behalf of Mamedov, he failed even to recognize the possibility that one might exist. Had counsel been retained and paid by Mamedov alone, such a theory would at the very least have been considered. And, had such a theory been pursued on Mamedov's behalf, it was impossible to predict what the outcome of the proceedings would have been for him. Since Mamedov was not required to establish actual prejudice to prevail on this claim, the habeas court properly granted the petition.

Severance

Williams v. State, A10A1959 (3/16/2011)

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to sever his trial from his two co-defendants, who were husband and wife. The evidence showed that all three were in a vehicle which the husband was driving. The vehicle allegedly hit a deer. An officer responded and determined that the husband had a suspended license and no proof of insurance. The vehicle was impounded and inventoried. A blue duffel bag was found on the passenger's side of the floorboard, and in the bag was a brown paper sack. Inside the sack was a plastic bag wrapped in a white towel and contained a white powdery substance that appeared to be cocaine. In the bottom of the bag was a pistol in a holster. At trial, the husband and wife testified that appellant owned the duffel bag.

Appellant's motion to sever did not contend that the joint trial created confusion or that evidence of his co-defendants' crimes would implicate him; instead he argued that his defense was antagonistic to that of his two co-defendants. But, the Court found, all three defendants denied the respective charges against them, and neither of the two co-defendants testified that the drugs belonged to appellant. Rather, each maintained that they did not know anything about the drugs in the duffel bag. Furthermore, although they testified that the duffle bag belonged to appellant, he never denied possessing it.

Nevertheless, appellant argued, severance was required because he was not permitted to question the husband about his possible past involvement in drug activity. The Court held that the simple fact that a defendant desires certain testimony of a co-defendant which might be unavailable at a joint trial is not enough to require severance, absent a showing of prejudice to the defendant. In fact, as a threshold matter, when the defendant requests a severance under these circumstances, the defendant must prove: (1) a bona fide need for the testimony; (2) the substance of the testimony; (3) its exculpatory nature and effect; and (4) that the co-defendant will in fact testify if the cases are severed. Here, appellant made no such showing and therefore, the trial court did not err in denying the motion to sever.

Speedy Trial; Barker v. Wingo

Butler v. State, A10A1825 (3/17/2011)

Appellant appealed from the denial of her plea in bar based on a violation of her constitutional right to speedy trial. The record showed that she was arrested in May, 2007 for crimes relating to armed robbery and the shooting of a cab driver. She was indicted in October, 2007 and denied bond. She had five separate attorneys between her arrest and March, 2010 and during that time, filed pro se letters requesting that her case be tried. Her plea in bar was filed in January, 2010 and denied after a lengthy hearing in March, 2010.

The Court found that the 32-month delay between her arrest and the denial of her motion triggered the four factor balancing test of *Barker v. Wingo*. As to the first factor, the Court found that the 32 month delay was excessive and should be weighted heavily against the State. The trial court apparently found that a witness who testified at the motion hearing that appellant attempted to get her to lie about the crime for apellant, showed that appellant had "unclean hands" and therefore, found this weighed against her as to the reason for the delay. The Court found this to be error. Instead, the Court found that this factor must be weighed against the State because of the complete lack of an explanation for the uncommonly long delay and the fact that appellant wrote multiple letters to the State (or sent copies of letters to the State) asserting her right to a speedy trial. Thus, the Court stated, the State's neglect was neither inadvertent nor was the delay beyond the control of the prosecution.

As to the assertion of the right factor, the Court found that the letters appellant wrote had no legal effect because she was represented at the time by counsel. Thus, her first viable demand for a speedy trial was asserted in January 2010 by counsel in a motion to dismiss filed almost three years after her arrest, and this delay in asserting her constitutional right to a speedy trial should have been weighed against her, though not heavily.

Finally, the Court presumed prejudice because of the 32-month delay in combination with the following factors: 1) although the case was not complicated, the State allowed it to languish for no discernable reason; 2) the delay was not inadvertent; and 3) appellant suffered some type of depression, anxiety and physical problems as a result of her extended incarceration.

Accordingly, in balancing the four *Barker v. Wingo* factors, the Court found that the trial court erred in denying the plea in bar and remanded with directions to enter a discharge and acquittal of appellant.

Entrapment; Attempted Child Molestation

Logan v. State, A10A2100 (3/17/2011)

Appellant was convicted of computer crimes, attempted child molestation, and aggravated child molestation. The evidence showed that an officer, posing as "Tiffany Bankston," a 14-year-old girl, met appellant online through Craig's List and arranged to have sex with him at a secluded park. Appellant first contended that he was entrapped. The Court disagreed. Entrapment is an affirmative defense that is established by showing that (1) the idea for the crime originated with the State agent; (2) the defendant was induced by the agent's undue persuasion, incitement,

or deceit; and (3) the defendant was not predisposed to commit the crime. Also, as an affirmative defense, a defendant must admit the commission of the crime and then show that he did so because of the unlawful acts of law enforcement. Here, appellant did not admit the offense. But, even so, the record did not support his defense because (1) appellant continued communicating with and did not report Tiffany Bankston to Craig's List when he learned that she was 14 years old; (2) he initiated the explicit nature of the online conversations between the two; (3) he initiated the conversation during which the meeting was arranged and described in detail the sex acts he wished to perform on Tiffany Bankston at the park; and (4) he arrived at the park with a condom on his person.

Appellant also contended that the evidence failed to show that he committed the offenses of attempted child molestation and attempted aggravated child molestation because he failed to take a substantial step toward the commission of the crimes. Again the Court disagreed. Via electronic communications, appellant asked the undercover officer posing as Tiffany Bankston to engage in sexual intercourse and oral sodomy with him, even after she told him she was 14. Appellant then arrived at the park —the location the two had discussed meeting for sex —and he possessed a condom on his person. The Court held that these facts were sufficient to show that appellant took a substantial step toward committing child molestation and aggravated child molestation.

Closing Arguments

Powell v. State, A10A2237 (3/16/2011)

Appellant was convicted of aggravated assault. He contended that the trial court erred in allowing the State to make a "religious based" argument during closing. The Court held that references to religion that invite jurors to base their verdict on matters not in evidence should be avoided in prosecutorial argument. Here, the prosecutor stated, "let me call your attention to Matthew, Mark, Luke and John, four books of the Bible, first four books in the New Testament. They all have a little minor inconsistency between each of them, here and there, and that's because of perspective. But what do we call those four books of the Bible, ladies and gentlemen? We call them the gospel truth, ladies and gentlemen, the gospel truth." The Court found that the biblical reference did not invite jurors to base their verdict on extraneous matters, or exhort jurors to reach a verdict on religious grounds. Rather, the prosecutor used the references to encourage jurors to overlook inconsistencies in the evidence. Accordingly, the trial court did not err.

Fatal Variance; Intent to Possess

Serna v. State, A10A2275 (3/17/2011)

Appellant was convicted of sexual battery and possession of dangerous drugs. He contended that the evidence was insufficient because of a fatal variance in the indictment. The record showed that he was charged with possession of "'Amsterdam Poppers[,'] also known as Amyl Nitrate,…," which substance is not included as a dangerous drug. The evidence showed he possessed a substance which included alkyl nitrite, which is listed as a dangerous drug. The Court, citing *Hardin v. State*, 142 Ga. App. 795 (1977), found that the difference was due to an obvious typographical error. Moreover, the indictment notified appellant of the date of the offense, the type of offense, and the basis for the offense; and he was convicted of the same offense listed in the indictment. Thus, his defense was not compromised at trial, and he was protected from a second prosecution for the same offense. Therefore, the variance between the allegations in the indictment and proof at trial was not fatal. Although appellant was correct that the trial court erred by leaving for the jury the question of whether any variance between the indictment and proof at trial was fatal, the Court found the error to be harmless.

Appellant also argued that the evidence was insufficient to show his intent to possess a dangerous drug because he was unaware that the chemical compound of alkyl nitrite in the "Amsterdam Poppers" bottle was classified as a dangerous drug under OCGA § 16-13-71. The Court disagreed because ignorance of the law is no excuse. Moreover, at trial, there was evidence supporting an inference that appellant used the dangerous drug to sedate his sexual battery victim. This conduct demonstrated his knowledge of the harmful effect of the compound and authorized the jury to conclude that he intended to possess a dangerous drug, even if he was subjectively unaware of the precise chemical compound in the bottle and its regulated nature.

Statements

State v. Brown, A10A2202 (3/16/2011)

Brown was indicted on charges of aggravated sodomy, aggravated child molestation, child molestation, and felony sexual battery. Prior to his indictment, Brown confessed to investigators that he sexually molested the 4-year-old victim, but the trial court suppressed his statements on the ground that they were made involuntarily from a "hope of benefit" —namely, that he would not be charged with any of the crimes to which he confessed. Specifically, that the investigators gave him the impression at the beginning of the interview that he would not face criminal charges when the investigators told Brown he would go home after the interview regardless of what he told them.

The Court reversed. The reward of a lighter sentence is generally what is meant by the phrase "hope of benefit," as used in OCGA § 24-3-50. When an accused is made a promise concerning a collateral benefit, however, his subsequent confession is not excludable. Here, the Court viewed the videotape of the confession, both before and after *Miranda* warnings were given and found that when considered in the totality of the circumstances, the statements by investigators did not suggest that Brown would never be arrested or charged regardless of what he said during the interview. Instead, immediately before telling Brown that he would go home after the interview, the officers said that they could not promise him what a judge would do if he confessed to molesting the child. Also, Brown repeatedly expressed a keen understanding that there would indeed be serious consequences for his actions. Accordingly, as indicated by his own statements in the interview, Brown could not have reasonably understood the investigators' statements to mean that he would never be charged or arrested for his crimes.

The Court also agreed with the State that, even if the complained-of statements did constitute an improper "hope of benefit," they, nevertheless, when viewed in the totality of the circumstances, did not actually induce Brown's confession. The record showed that Brown was familiar with his constitutional

rights; was 19 years old at the time of the interview; was a high school graduate (who had previously taken criminal-justice classes); was aware of the allegations against him; was not in custody when he initially confessed; was not yet indicted; was not yet subject to any arrest warrants; and was questioned for approximately two hours but confessed after less than one hour. Additionally, a large portion of the interview consisted of the investigator explaining that he could no longer talk to Brown unless and until he signed a *Miranda* waiver form. Reviewing the videotape at length, the Court found that Brown's change in demeanor began only after the investigators asked whether he had merely responded to the child's desire to be touched, and it was this line of questioning and the emotional appeals made by the investigators to Brown —to clear his conscience and bring closure to this matter —that ultimately induced the confession that followed. Additionally, Brown repeatedly asked the officers questions and made statements to them about the consequences he would face if he admitted to molesting the child —a strong indication that he fully understood the ramifications of his actions and that he was in no way under the impression that making an inculpatory statement would spare him from arrest, prosecution, or jail time. Finally, Brown at no point attempted to repudiate his statements, even after an investigator told Brown that he would not be able to leave. In fact, upon being advised that he would not be allowed to leave the premises, Brown indicated that he knew going home was no longer an option.

Speedy Trial; Statute of Limitations

State v. Godfrey, A10A1979 (3/15/2011)

Godfrey was charged with numerous counts of rape, aggravated child molestation and other sexual offenses related to one victim. The State appealed from the grant of Godfrey's motion to dismiss the indictment on constitutional speedy trial grounds and from the dismissal of many counts in the indictment on statute of limitations grounds.

The record showed that Godfrey was originally arrested in 2003. The trial court granted a motion to dismiss on constitutional speedy trial grounds in 2008, but the Court reversed and remanded. Thereafter, the case was called twice for trial, but not reached. In January, 2010, Godfrey again successfully moved to dismiss the indictment on constitutional speedy trial grounds and the State again appealed.

The Court again reversed. The Court found that although the trial court made a reference to the Court's prior ruling in *Godfrey I* in evaluating the reason for the delay, it analyzed each of the *Barker* factors as if it were Godfrey's first assertion of speedy trial grounds. But, it is axiomatic that the same issue cannot be re-litigated *ad infinitum*, and this includes appeals of the same issue on the same grounds. However, a former judgment binds only as to the facts in issue and events existing at the time of such judgment, and does not prevent a re-examination even of the same questions between the same parties, if in the interval the material facts have so changed or such new events have occurred as to alter the legal rights or relations of the litigants. The Court found that it was apparent from the trial court's order that it did not consider that the Court's former judgment was binding as to the facts in issue and events existing at the time of that judgment, and it made no determination as to whether in the interim following that judgment, material facts had changed or new events had occurred to alter the rights of the parties. The Court therefore vacated this portion of the trial court's judgment and remanded the case for the trial court to enter an order balancing the legal factors under the proper standard.

The State also appealed from the dismissal of counts 4-8 on statute of limitations grounds. Counts 5, 7, and 8 of the indictment alleged that Godfrey committed the offenses of aggravated child molestation, child molestation, and statutory rape with a child under the age of 16 and the language invoked the statute of limitation tolling provision set forth in OCGA § 17-3-2.1. The Court found that although the trial court was correct that when an exception is relied upon it must be alleged and proved, an allegation that the victim was under the age of 16 is sufficient to satisfy this requirement. Therefore, the Court reversed as to these three counts. However, counts 4 and 6 alleged that Godfrey committed child molestation and aggravated child molestation to a child under the age of 14 (which tracked the language of former OCGA § 17-3-1 (c) for application of the seven-year limitation period for offenses occurring prior to 2002). Because the State did not allege that the victim was under the age of 16, the tolling provision of OCGA § 17-3-2.1 was not invoked. The State therefore had to indict Godfrey within seven years after the commission of the crimes. Since counts 4 and 6 alleged that the crimes were committed between October 13, 1994, and June 30, 1995, the State had to indict Godfrey before June 30, 2002 at the latest. But, Godfrey was first indicted in April 2006, and then re-indicted in December 2009. Because the State failed to indict Godfrey within the applicable limitation period, the trial court did not err in granting Godfrey's plea in bar to dismiss these counts.

Search & Seizure; Identification

Hall v. State, A10A1985 (3/16/2011)

Appellant was convicted of two counts of robbery by force against two victims. He contended that the trial court erred in denying his motion to suppress. The record showed that appellant and co-defendant robbed two cab drivers. During the second robbery, the cab driver tasered one and they both jumped out of the car and fled. After the police set up roadblocks and patrols, appellant was found walking in the road. He was detained and eventually arrested. He argued that any evidence derived from his seizure, specifically his responses to the officer's questions and the second victim's identification of him at the scene, should have been suppressed because the officers lacked reasonable suspicion to justify the investigatory detention.

Momentary detention and questioning is legal if the stop is based upon specific and articulable facts, which, taken together with rational inferences from those facts, justify a reasonable scope of inquiry not based on mere inclination, caprice or harassment. The Court found that while the victim's description of her assailants was not very specific, appellant matched the description in build, height, race, and clothing color. With the assistance of a tip from a concerned citizen, appellant was found at 3:00 or 4:00 a.m. within walking distance of the crime shortly after it was committed and within the perimeter law enforcement officials had established. There were no other pedestrians or traffic in the area. He was out of breath and sweaty despite being underdressed for the weather, and he gave conflicting accounts of where he was coming and going. Based on the

totality of the circumstances, the investigatory stop was based on reasonable suspicion arising from a particularized and objective basis for suspecting him of criminal activity. Also, the fact that the officer was armed and appellant was placed in handcuffs when first detained did not automatically convert a second-tier encounter to an arrest. Therefore, the trial court did not err in denying the motion to exclude evidence obtained as a result of his detention.

The evidence showed that after appellant's arrest, the victim of the first robbery came forward and identified appellant from his picture in the newspaper. Appellant argued that the trial court erred in allowing into evidence his pretrial identification from the newspaper photographs by this victim, arguing that it was "suggestive," particularly in light of the victim's extremely general description of his attackers. However, for the Fourteenth Amendment to come into play in an identification procedure, state action must be involved. The Court found that the pretrial identification at issue here involved no state action, and therefore raised no Fourth Amendment issues. The reliability of this victim's pretrial identification was simply a question of his credibility for the trier of fact to determine. Thus, the trial court did not err in admitting into evidence the victim's identification of appellant from the newspaper article.

Prosecutorial Misconduct

Terry v. State, A10A1728 (3/16/2011)

Appellant was convicted of possession of cocaine. The evidence showed the police went to serve an arrest warrant at a residence. They heard a commotion in the back, and when they investigated, they saw appellant and another man, exiting through a back window. Appellant ran through the yard and tossed a baggie of cocaine on the ground. The other man was caught by the window. Appellant's sole defense was that the cocaine was that of the other man, an admitted 25-year user of crack cocaine. Appellant intended to put the other man up as his sole defense witness. At a pre-trial meeting with the defense attorney and the prosecutor, the witness stated that the cocaine was his. The prosecutor then told him that if this was true, he would be prosecuted. At trial, the witness did not state that the cocaine was his.

Appellant, citing *Webb v. Texas*, 409 U. S. 95 (1972), argued that the prosecutor's misconduct in threatening the witness violated his constitutional right to due process by depriving him of a fair trial. The Court disagreed. In *Webb*, a trial judge, without any basis in the record to conclude the witness might lie, delivered a lengthy and unnecessary harangue to the defense witness about the possibility of prosecution —effectively driving the witness off the stand. Here, however, appellant's witness testified and did so in appellant's favor. The witness, described the area behind the residence where the cocaine was found as woods, generally used by individuals in the drug trade to stash their supplies. The witness also provided a reason for his and appellant's flight when numerous unexpected individuals converged upon the residence and they thought that a home invasion was occurring. Moreover, the potential for unconstitutional coercion by a government actor diminishes when a defendant's witness has consulted with an independent attorney and here, before the witness took the stand, he did so with his own counsel. Finally, when the witness took the stand, he did not invoke the Fifth Amendment, nor did he otherwise refuse to answer any question posed to him. Nevertheless, defense counsel made a strategic decision not to ask the witness whether —despite his generalized drug-use characterization of the area behind the residence located in the "hoodlum neighborhood" —the cocaine seized in this case belonged to him. Thus, while appellant may have shown that the prosecutor warned his witness about the consequences of claiming the cocaine as his own, *Webb* does not stand for the proposition that merely warning a defense witness of the possible consequences of testifying demands reversal. Even accepting appellant's claim that the prosecutor's statements during the interview were improper, appellant failed to show that the prosecutor so interfered with his right to present his defense as to constitute a denial of due process.

Polygraphs

Harris v. State, A10A2296 (3/17/2011)

Appellant was convicted of rape and other crimes. Citing *Sisson v. State*, 181 Ga. App. 784 (1987), he contended that the trial court erred by denying his ex parte motion for funds to retain "a polygraph expert to testify regarding the inherent unreliability of polygraphs in general." The record showed that the State and appellant entered into a stipulation to admit the results of a polygraph examination taken by appellant after his arrest. In *Sisson*, the Court held that a defendant who stipulated to the admissibility of the results of a polygraph examination was entitled to present testimony from his own expert regarding the results of the examination. But in *Sisson*, the defendant stipulated only to the *admissibility* of the examination results. Here, however, appellant stipulated to the admissibility, *accuracy*, and voluntariness of the examination. Thus, appellant's reliance on *Sisson* was misplaced and the trial court correctly determined that granting the motion would run contrary to the spirit of the agreement into which appellant voluntarily entered and that the ends of justice would not be served by the granting of the motion.

Jury Charges

Dockery v. State, A10A1855 (3/17/2011)

Appellant was charged and convicted of possession of methamphetamine with intent to distribute. He contended that the trial court erred by giving an improper sequential charge when it instructed on possession of methamphetamine, as a lesser included offense. A sequential charge is acceptable so long as the trial court does not insist upon unanimity with regard to the jury's decision on the greater offense. The record demonstrated that neither the trial court nor the verdict form required the jury to reach a unanimous verdict on the greater offense before considering the lesser-included offense. The jury was instructed to consider the lesser offense of possession of methamphetamine only if they did not believe beyond a reasonable doubt that appellant was guilty of possession of methamphetamine with intent to distribute. Therefore, the trial court did not err.

Williamson v. State, A10A2071 (3/16/2011)

Appellant was convicted of armed robbery, aggravated assault and other related felonies. He contended that the trial court erred in denying his request to give the following charge: "Simply because an accomplice's testimony is corroborated in most details, it does not follow that his (the accomplice's) testimony alone as to the identity and participation of the accused is sufficient to justify conviction." The Court

stated that the only requirement regarding jury charges is that the charges, as given, were correct statements of the law and, as a whole, would not mislead a jury of ordinary intelligence. After a review of the transcript, the Court concluded that the trial court fully instructed the jury on corroboration of accomplice testimony. The trial court gave the pattern jury charge on corroboration, and charged the jury on the State's burden to prove beyond a reasonable doubt the identity of appellant as the person who committed the crimes in the indictment, witness credibility, and factors the jury should consider in assessing the reliability of identification evidence. Thus, the jury charge when considered as a whole fully covered the law on the required corroboration of accomplice identification testimony, and no reversible error occurred in failing to give appellant's requested jury charge.

Identification

Delgiudice v. State, A10A2070 (3/14/2011)

Appellant was convicted of kidnapping with bodily injury and numerous counts of aggravated assault relating to a home invasion. He contended that the identification of him by the kidnapping victim through the use of a pretrial photo array should have been suppressed because it was unduly suggestive. Specifically, he argued that it was unduly suggestive because he was the only black man in the array among five Hispanic males. Pretermitting the issue of whether it is possible to be both black and Hispanic, the Court stated that the fact that the accused may be of a different race or ethnicity does not in and of itself make the identification procedure impermissibly suggestive, especially when there are other individuals in the line-up having roughly the same characteristics and features as the accused. Here, the array was not impermissibly suggestive because the six men depicted were of the same race or ethnicity, the same general age group, and had similar hairstyles and facial hair.

Exculpatory Evidence; Brady

Smith v. State, A10A2204 (3/17/2011)

Appellant was convicted of aggravated assault. He contended that the prosecution failed to disclose evidence favorable to the defense. Specifically, the prosecution failed to inform his attorney that the police chief and another investigator had concluded that the shooting was self-defense. The evidence showed that appellant pointed a pistol from the inside of his truck at the victim and then shot the victim at a range of 6 or 7 feet. Appellant's defense was that the victim reached into the truck, tried to get the gun and appellant shot the victim in self-defense. The two officers' opinion was apparently based on some blood evidence on the door of the truck, although the blood evidence was lost and never analyzed. The Court found that appellant was on notice prior to, or during trial of the information, but did not raise an objection or *Brady* claim and therefore waived his right to raise it on appeal.

But, even in the absence of waiver, in order to obtain a new trial based upon a *Brady* violation, a defendant is required to prove, among other things, that he did not possess the evidence and could not have obtained it with due diligence and that a reasonable probability exists that the outcome of the trial would have been different had the evidence been disclosed. Here, 1) defense counsel conceded that the State provided him the evidence upon which the officers based their opinion; 2) he discussed the blood evidence with the police before trial and knew that it was missing or destroyed; and he admitted questioning the State's police witnesses about the blood evidence. Thus, appellant failed to establish that he did not possess the pertinent evidence. Moreover, the officers' opinions are not evidence and, would not have been admissible at trial. Finally, defense counsel argued to the jury the very evidence cited in support of the officers' opinions. Therefore, appellant failed to establish a reasonable probability that the outcome of his trial would have been different if the State had disclosed the opinions earlier.

Child Molestation; Cross-examination

Cobb v. State, A10A1700 (3/16/2011)

Appellant was charged with numerous counts of child molestation against two victims, but was convicted of only one count of aggravated child molestation and one count of child molestation against one victim. He argued that the trial court erred in refusing to allow him to cross-examine the State's expert "regarding children's suggestibility to other children." The Court, citing *House v. State*, 236 Ga. App. 405 (1999), found no error. In *House*, the Court expressly disapproved of allowing the questioning of a child other than the victim about sexual abuse by a non-defendant. Appellant argued that *House* was distinguishable because it prohibited cross-examination of a brother about prior sexual abuse, whereas here, appellant sought to cross-examine an expert about the victims' previous abuse. However, the Court held, this distinction did not render *House* inapposite because the rationale is equally applicable to this case. Moreover, the Court noted that appellant was not precluded from presenting evidence regarding suggestibility. There was evidence that the children discussed their abuse by appellant amongst themselves. And appellant introduced his own expert, Dr. Nancy Aldridge, who specifically testified about "impressionability or suggestibility[, which] is that sometimes children begin to own what another child says and says yes, that happened to me too," and she discussed the applicability of the theory to the children in this case. Thus, the State expert's testimony regarding suggestibility would have been merely cumulative of other evidence offered at trial, and its preclusion did not warrant reversal.