Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 28, 2013

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THIS WEEK:

Jury Charge

Rudison v. State, A13A0510 (6/13/13)

Appellant was convicted of armed robbery, aggravated assault, burglary, and possession of a firearm during the commission of a crime, all stemming from a home invasion. The record showed that during deliberations, the jury twice informed the court that it could not reach an agreement on a verdict. After having deliberated for seven hours, the jury stated in a note: "We cannot agree on some of the charges. What do we do?" With the acquiescence of appellant's counsel, the court instructed the jury, "Continue deliberation." About an hour later, the jury sent another note to the trial court, stating: "We cannot come to an agreement. We have voted multiple times. We have at least two members who have stated that they will not change; what do we do?" When the trial court again proposed instructing the jury to continue deliberations, counsel for one of appellant's co-defendants objected and appellant's counsel joined the objection and moved for a mistrial. The trial court opined that a mistrial was premature and instead instructed the jury to continue deliberations. The jury deliberated another full day, during which it requested to be recharged on certain points and to rehear the audiotape of the 911 call. The jury gave no further indication that it was deadlocked, and the trial court never gave the jury an *Allen* charge. The next day, the jury reached its verdict.

Appellant argued that the second instruction to continue to deliberate was reversible error because the instruction was improperly coercive and did not contain the safeguards of an approved *Allen* charge. The Court disagreed, noting that the trial court made no statements that could be construed as attempting to force any juror to give up his or her honest opinion. The fact that the trial court did not reiterate that a jury should not surrender his or her convictions merely in order to reach a verdict did not render the situation coercive.

Jury Charge; "Plain Legal Error"

Jordan v. State, A13A0801 (6/13/13)

Appellant was convicted of two counts of aggravated assault. The evidence showed that appellant was at a nightclub and got thrown out of the nightclub by a bouncer. Appellant told the bouncer "wait 'til I go to the car, I'll be back." A few minutes later, shots were fired in the direction of the bouncer and an innocent bystander was hit.

Appellant argued that the trial court erroneously charged the jury that a defendant can commit the assault required for an aggravated assault by "intentionally committ[ing] an act that placed the alleged victim in reasonable fear of immediately receiving a violent injury." He contended that this instruction was improper because the indictment specifically alleged only "the attempted battery type aggravated assault" in the count alleging aggravated assault against the bouncer. But, the Court found, the indictment was not so specific. It merely alleged that appellant "unlawfully ma[de] an assault upon the [bouncer] with a gun, a deadly weapon, by shooting at him." This allegation could encompass either method of committing an assault—attempting to commit a violent injury to the person of another under O.C.G.A. § 16-5-20(a)(1), or committing an act that places another in reasonable apprehension of receiving a violent injury under O.C.G.A. § 16-5-20(a)(2). The trial court did not charge a separate, unalleged method of committing aggravated assault, but simply defined both methods of committing simple assault, a lesser included offense.

However, the Court took the opportunity to clarify nomenclature for the proper standard of review on appeal. The Court noted that both parties wrote that the standard of review is "plain legal error"—which is an expression the Court adopted as a synonym for "de novo." But, the Court said, the State confused the plain legal error standard with the plain error doctrine—which is something else entirely. The plain error doctrine authorizes consideration on the merits for a narrow category of issues that had been waived. Until January 1, 2013 that doctrine applied only to alleged error in three circumstances not present in this case: The sentencing phase of a trial resulting in the death penalty; a trial judge's expression of opinion in violation of O.C.G.A. § 17-8-57; and a jury charge affecting substantial rights of the parties as provided under O.C.G.A. § 17-8-58(b) when no objection was made at trial. Also, the Court noted, the new Evidence Code changed this rule in cases tried after January 1, 2013, allowing a court to consider plain errors affecting substantial rights more generally.

The Court found that in light of the similarity of the two expressions, the State's confusion was understandable. And the expression "plain legal error" is confusing in another respect. It wrongly implies that, under the de novo standard, an appellate court would let stand a legal error that is not "plain." Moreover, the Court noted, the use of "plain legal error" as a synonym for "de novo" was apparently unique to Georgia. Thus, the Court concluded, the phrase "plain legal error" should not be used to designate the de novo standard of review. Instead, the Court recommended describing the standard of review applicable to questions of law as simply "de novo"—as in, "the Court reviews questions of law de novo."

Transferred Intent; Jurors

Coe v. State, S13A0478 (6/17/13)

Appellant and co-defendant were convicted of malice murder and other charges stemming from the shooting death of the victim. The record showed that after appellant had been robbed by the co-defendant and his associates, appellant encountered the co-defendant while attempting to purchase marijuana and a gunfight ensued between appellant and the co-defendant. During the exchange of gunfire, an innocent bystander was struck in the head by a stray bullet.

Appellant contended that ballistics and medical evidence was not conclusive to determine whether the fatal shot to the victim's head was fired from appellant's pistol or the co-defendant, and contended that the evidence was thus insufficient to convict him of malice murder because it was not shown that he caused the victim's death. The Court disagreed. Under the doctrine of transferred intent, it was irrelevant whether appellant attempted to shoot the victim or only the co-defendant. And, the fact that there was no definitive evidence as to whether appellant or his co-defendant fired the fatal shot did not absolve appellant of malice murder. O.C.G.A. § 16-2-20(a) provides that "[e]very person concerned in the commission of a crime is a party thereto and may be charged with and convicted of commission of the crime." Moreover, criminal intent is a question for the jury, and it may be inferred from that person's conduct before, during, and after the commission of the crime. Here, the Court held that from the circumstances provided in the case, a rational jury could have inferred that appellant shared a common criminal intent with the co-defendant to engage in a gunfight in the presence of innocent bystanders. Moreover, even though the victim evidently was not an intended target of the gunfight, the evidence was sufficient for a rational trier of fact to find that appellant was a party to the crime of malice murder under the doctrine of transferred intent. Therefore, the evidence adduced at trial was legally sufficient to sustain the malice murder conviction.

Appellant also contended that the trial court erred in allowing a juror to remain seated for his trial when the juror realized that she was acquainted with the victim's widow, and called the trial court's attention to that fact. The record showed upon further voir dire of the juror, she testified that she had known the widow during their youth, but had not known her by her married name and thus had not recognized it during prior voir dire. The juror could not recall any contact with the widow since 1979 or 1980, and when asked if she would have sympathy for her, the juror testified that the sympathy she would have for the victim's widow was the same as she would have for any witness who had similarly lost a loved one. The juror further testified that she could be fair and impartial despite the prior acquaintance.

The Court stated that a juror's knowledge of, or relationship with, a witness, attorney, or party is a basis for disqualification only if it has created in the juror a fixed opinion of guilt or innocence or a bias for or against the accused. Moreover, whether to strike a juror for cause lies within the sound discretion of the trial judge, and the trial court's exercise of that discretion will not be set aside absent a manifest abuse of discretion. Here, the Court noted that there was no evidence of such bias or fixed opinion. Thus, the Court held the trial court did not abuse its discretion in failing to excuse the juror for cause.

Search & Seizure

Westmoreland v. State, A13A0396 (6/17/13)

Appellant was charged with VGCSA. The evidence showed that officers were conducting surveillance of a house where drug activity was suspected. They observed appellant's vehicle leaving the house and followed her. The officers then pulled appellant over for an independent traffic violation. One of the officers, who was with the narcotics unit, approached the vehicle, and immediately recognized the distinct smell of manufactured methamphetamine. He then detained appellant, and called the drug

dog, which arrived 50 minutes later. The dog alerted to the presence of drugs in the car. Officers then searched the vehicle and seized methamphetamine.

Appellant contended that the search of her car violated her Fourth Amendment rights when officers prolonged the traffic stop by calling the drug dog. The Court noted that immediately after the initial stop, an officer trained and experienced in recognizing the distinct odor of manufactured methamphetamine smelled the odor coming from inside the car. Moreover, the officer's detection of an odor associated with the presence of contraband can be used to establish probable cause to search for that contraband if the evidence showed that the officer was qualified to know the odor, and the odor is sufficiently distinctive to identify the contraband. Thus, based on the qualifications of the officer, the Court held that the officer's detection of the odor of methamphetamine was enough to give him probable cause to search the vehicle.

Moreover, the Court stated, even though the officer called for a police canine unit to confirm the presence of contraband in the car, the wait did not unlawfully prolong the traffic stop. Although the officer had independent probable cause to search the car immediately after smelling the methamphetamine, the alert by the trained drug-sniffing dog about 50 minutes later simply provided an additional basis for probable cause to do the search. Additionally, there is no requirement that the warrantless search of a vehicle occur contemporaneously with its lawful seizure. Therefore, the Court held, the 50-minute wait for the arrival of the drug-sniffing dog only delayed the warrantless search based on probable cause of criminal conduct independent of the traffic stop. Thus, the trial court correctly denied the motion to suppress.

Void Sentence; Error Coram Nobis

Jones v. State, A13A0001 (6/17/13)

Appellant contended that he was entitled to relief from his child molestation conviction. The record showed that in 1995, appellant entered a negotiated guilty plea to a child molestation charge on a multi-count indictment, and the remaining charges against him were dismissed. Appellant was granted first offender treatment, pursuant to which no judgment of guilt was entered, and ordered to serve a five-year sentence on probation. Before the expiration of the probationary period, the State filed a petition for adjudication of guilt and imposition of sentence, alleging that appellant had violated his probationary terms. After a hearing, the trial court executed an order on August 20, 1997 adjudicating appellant guilty of child molestation and sentencing him to imprisonment. On September 19, 1997, appellant filed a notice of appeal; the State moved the trial court to dismiss it on the ground that an appeal from a probation revocation was discretionary pursuant to O.C.G.A. § 5-6-35. The trial court dismissed the notice of appeal in February, 1998.

In 2012, appellant filed a pro se "Motion to Set Aside Void Order Dated August 20th, 1997," which appellant subtitled, "Petitions—Error Coram Nobis and/or Audita Querela-sic." Appellant complained that, without counsel, he had been confronted with the probation revocation proceedings that resulted in an order of adjudication of guilt and the imposition of a sentence of imprisonment. Further, at the probation revocation hearing, appellant objected to proceeding without appointed counsel. The transcript of the probation revocation hearing showed that the trial court overruled his objection, explaining that appellant had an opportunity to have an attorney, that a court administrator had interviewed him, that appellant refused to talk to the court administrator and refused to provide him any financial information, and that appellant thus had not complied with the conditions necessary to get a court-appointed attorney. Nevertheless, in his 2012 motion, appellant relied upon a line of cases in an attempt to support his argument that the cited circumstances warranted his child molestation sentence of imprisonment to be vacated as "void." The trial court summarily denied appellant's 2012 motion and he thereafter filed a motion seeking the appointment of appellate counsel, which the trial court also denied.

First, appellant contested the denial of his motion, characterizing his sentence of imprisonment as "void," citing O.C.G.A. § 17-9-4. A sentence is void if a court imposes punishment that the law does not allow. The Court noted that appellant's motion did not set forth any argument that the sentence imposed upon him in 1997 for child molestation was not authorized by law. Instead, he complained that he was without counsel during the probation revocation proceedings, which resulted in the sentence of imprisonment. Thus, the substance of appellant's claims was not about his sentence, but his conviction. The Supreme Court of Georgia has held that a petition to vacate or modify a judgment of conviction is not an appropriate remedy in a criminal case. The Court explained that the only remedies for asserting the right to challenge a judgment of conviction as void under O.C.G.A. § 17-9-4 are through one of the three statutory procedures: 1) an extraordinary motion for new trial, under O.C.G.A. § 5-5-41; 2) a motion in arrest of judgment, under O.C.G.A. § 17-9-61; or 3) a petition for habeas corpus, under O.C.G.A. § 9-14-40.

Here, the Court noted, appellant's motion could not be construed as an extraordinary motion for new trial since that remedy is not available to one who pled guilty. Additionally, a motion in arrest of judgment must be filed within the same term of court in which the judgment was entered and appellant's motion was not so filed. Moreover, the Court could not construe the claim as a habeas petition because it was filed in the convicting court rather than in the county in which he was incarcerated. Therefore, appellant was not entitled to file a motion to vacate his criminal conviction and his appeal was subject to dismissal.

Next, appellant's characterization of his 2012 motion as "Petitions—Error Coram Nobis and/or Audita Querela-sic" was also without merit. The Court explained that several decades ago, the Supreme Court of Georgia concluded that a writ of error coram nobis was merely the ancient grandfather of an extraordinary motion for new trial based on newly discovered evidence and recommended to the Bar to "grant this lingering ghost a peaceful rest" to prevent further confusion among judges and justices charged with the task of appellate review. Moreover, the Court noted, the requirements for issuing the ancient petition for writ of error coram nobis, and granting an extraordinary motion for new trial based on newly discovered evidence are basically the same. Thus, before a court authorizes either, it is generally required that the moving or petitioning party base the pleading on facts which are not part of the record and which could not by due diligence have been discovered at the time of the trial.

Here, the Court found, appellant's 2012 motion challenging the child molestation conviction was not based on facts which were not part of the record and which could not by due diligence have been discovered at the pertinent time. Rather, his 2012 motion was grounded on the lack of counsel during the probation revocation proceedings, which unquestionably was known to appellant during the proceedings. Therefore, the Court held that appellant could not properly challenge his child molestation conviction under a writ of error coram nobis.

Deliberate Indifference; Tampering With Evidence

Kirchner v. State A13A0103 (6/17/13)

Appellant was convicted of possession of marijuana, less than an ounce; possession of marijuana, more than an ounce; tampering with evidence; and contributing to the delinquency of a minor. The evidence showed an officer responded to a complaint from a neighbor concerning cars blocking the neighbor's driveway. When the police responded they notice four or five cars in the cul-de-sac and an individual leaving the house and walking up to his car, parked in the middle of the cul-de-sac with the engine running. The officer saw that the individual was holding a paper bag tightly in front of him, and, while talking briefly with him, the officer smelled an odor of "real strong marijuana" coming from the individual and convinced him to open the bag and show what was inside. The bag contained a plastic baggy holding about eight ounces of marijuana. The officer placed the individual under arrest and called for backup assistance. After questioning, the officer learned from the individual that he bought the marijuana from appellant's 15 year old son. The police asked appellant, who had come outside, if she would consent to a search. She refused. The police then secured appellant's home and ordered the 9 or so occupants outside while awaiting a search warrant. During that time, appellant convinced an officer to let her go back inside the home in order to use the bathroom. Testimony showed that after she was in the home for 10-15 minutes, an officer checked on her and saw her running from one side of the house to the other, and officers observed the "sound of dishes being moved around" before appellant exited the home. Also, when she did come out of the house, she was panting and out of breath, and she asked the officer if she could sit down to rest.

When officers finally obtained the warrant about an hour later, they observed that the dishwasher had just stopped running and was still steaming in the kitchen. Moreover, the officers discovered several baggies that had been washed inside the dishwasher. An agent testified that some of the baggies contained a substance that, based upon his extensive training and experience in narcotics law enforcement, appeared to be marijuana residue. According to the agent, he did not collect the baggies as evidence to be tested by the crime lab because he knew that, when marijuana gets wet, it develops a toxic mold that is very harmful to humans if inhaled. In a basement, which also was a family room, the officer's located the son's locked bedroom. Inside the bedroom, the officers found a locked gun cabinet. Inside the cabinet, officers found a shotgun, and 13 ounces of marijuana. The bedroom also contained scales, baggies, and various other types of drug paraphernalia relating to marijuana. Additionally, in appellant's bedroom upstairs, the officers found a small amount of marijuana, less than an ounce.

Appellant challenged her conviction on possession of marijuana greater than an ounce. She argued that the evidence did not prove that she had actual knowledge of the marijuana in her son's locked gun cabinet located in her son's locked bedroom. The Court disagreed. First, the Court found, the evidence showed that on the day at issue, appellant's son was a 15-year-old high school dropout who was working part-time as a busboy at a bar. According to unrebutted testimony, the son spent most of his time in the downstairs family room of his mother's house, smoking marijuana and selling it to a regular stream of customers whose cars routinely cluttered the cul-de-sac. To safeguard the contraband, the son used a very large gun safe that probably cost between two and three thousand dollars. Further, when the officers opened the safe and exposed the marijuana, paraphernalia, and shotgun stored therein, appellant did not appear to be surprised and, in fact, demonstrated no change in her demeanor at this discovery. In addition, the evidence supported an inference that appellant convinced the officers to violate their official protocol and let her enter her house, under the pretense of desperately needing to use the bathroom, so that she could destroy material evidence by gathering several baggies of marijuana and washing them in the dishwasher. Finally, appellant's neighbor testified that, during a confrontation, appellant specifically referred to the drugs in her home as "our drugs." Thus, the Court found, the evidence was clearly sufficient for the jury to find that appellant knowingly allowed her son to possess felony amounts of marijuana in her home and, in fact, assisted him in that ongoing, shared criminal enterprise by, inter alia, purchasing a safe to store and conceal the marijuana, related paraphernalia, and a firearm. As a result, the jury was authorized to conclude that she was a party to the crime of felony possession of marijuana beyond a reasonable doubt.

Second, regardless of the merits of appellant's contention that she had no *actual* knowledge of her son's illegal activities, the evidence still supported a finding that she deliberately ignored the multiple, blatant signs of such activities and thus, was deemed to have the requisite knowledge to support her conviction. "This Court has repeatedly recognized that the knowledge element of a violation of a criminal statute can be proved by demonstrating either actual knowledge or deliberate ignorance of criminal activity. The deliberate ignorance instruction is based on the alternative to the actual knowledge requirement at common law that if a party has his suspicions aroused but then deliberately omits to make further inquiries, because he wishes to remain in ignorance, he is deemed to have knowledge." Here, given the evidence showing the open and pervasive use of substantial amounts of marijuana in the downstairs family room, the odor resulting therefrom, and the number and frequency of visitors to the house, the jury was authorized to find that, if appellant lacked actual knowledge of the illegal marijuana possession and use in her home, it was only because she deliberately ignored the blatant evidence of such activities.

Third, the Court found, the undisputed fact that appellant was the owner and a full-time resident of the house wherein the marijuana was discovered created a rebuttable presumption that she had control over the marijuana found inside. Here, the State established the presumption that appellant, as the house's owner and resident, had control of the marijuana found inside, including that in

the gun safe, and she was not entitled to rely on the equal access rule to rebut that presumption. This presumption, considered with the other inculpatory evidence, authorized the jury to find that appellant knowingly had constructive possession of the marijuana found in the gun safe and, thus, was guilty beyond a reasonable doubt of felony possession of marijuana.

Appellant also contended that the evidence failed to support her conviction for tampering with evidence. Specifically, that the State failed to have the residue in the baggies that were discovered in the dishwasher tested to determine if it was, in fact, marijuana residue. She argued that, as a result, the circumstantial evidence presented by the State failed to exclude the reasonable hypothesis that the residue in the baggies was actually herbs, spinach, or another legal substance. The Court again disagreed. By washing the baggies in the dishwasher, appellant destroyed virtually all of whatever substance was inside, leaving only a residue that the agent believed to be marijuana, based on his training and experience, but that he did not retrieve and submit for drug testing based upon his belief that to do so would create the risk of seriously injuring anyone who inhaled fumes from the residue. Thus, the record supported a finding that it was only as a direct consequence of appellant's intentional act of washing the baggies in the dishwasher that the State was unable to safely test the substance and, instead, was forced to rely on circumstantial evidence to prove that the substance originally in the baggies was marijuana and not some innocuous foodstuff. Moreover, although the officer did not test the residue of the baggies, the State showed the jurors pictures of the baggies found in the dishwasher and compared them to baggies found in the gun safe that indisputably contained marijuana. Additionally, the washed baggies matched those found in the paper bag that officers found on the individual the officers stopped as he left appellant's home. Thus, the similarity in the baggies showed appellant's intent to destroy the evidence before the imminent search of her home and therefore, the Court held, the evidence was sufficient for the jury to find that the only reasonable hypothesis was that the baggies found in the dishwasher contained marijuana when appellant put them in the dishwasher and that she did so with the intent to destroy material evidence.

Fatal Variance

White v. State, A13A1422 (6/18/13)

Appellant was convicted of attempted burglary of a locked carport. He contended that there was a fatal variance in the indictment and the evidence presented by the State at trial. The indictment alleged that the defendants, individually and as parties to a crime, "did attempt to enter the locked carport of [a] dwelling house . . . by prying at the locked carport door . . . ." Appellant claimed that because the State presented no evidence any defendant pried at the door, the State did not prove the crime was committed as alleged in the indictment.

The Court noted that Georgia law no longer adheres to the overly technical application of the fatal variance rule, focusing instead on materiality. The true inquiry is not whether there has been a variance in proof, but whether there has been such a variance as to affect the substantial rights of the accused. Moreover, the underlying reasons for the rule must be served: 1) the allegations must definitely inform the accused as to the charges against him as to enable him to present his defense and not to be taken by surprise; and 2) the allegations must be adequate to protect the accused against another prosecution for the same offense. Only if the allegations fail to meet these tests, will the variance be deemed "fatal."

Here, the Court held, the indictment adequately informed appellant as to the charges against him. It placed appellant on notice that the State claimed that he was at a dwelling house without authorization and attempted to enter a locked door to that house. Additionally, a jury could have concluded from the circumstantial evidence presented by the State that the co-defendant attempted to pry the door open. To the extent that the indictment varied from the State's evidence, it was immaterial and did not affect appellant's ability to defend himself. Likewise, the alleged variance also failed to subject appellant to another prosecution for the same offense.

Double Jeopardy; Indictment

State v. Williams A13A0521 (6/19/13)

The State appealed after the trial court granted a motion to dismiss the indictment. The complicated record showed that a grand jury originally indicted Williams for committing the crimes of malice murder, felony murder, and aggravated assault on August 29, 2004. Following a jury trial, Williams was found guilty of voluntary manslaughter, felony murder, and aggravated assault. Additionally, the jury found Williams not guilty of malice murder and involuntary manslaughter. The trial court vacated the jury's verdict on felony murder in light of the modified merger rule adopted in *Edge v. State*, 261 Ga. 865 (414 S.E.2d 463) (1992), and it merged the aggravated assault conviction into the voluntary manslaughter conviction under O.C.G.A. § 16-1-7.

The trial court subsequently granted Williams's motion for a new trial because it concluded that the jury had been selected in violation of *Batson v. Kentucky*, 476 U.S. 79 (1986). Before the retrial, Williams filed a plea in bar arguing, among other things, that a second trial on the offenses of felony murder and aggravated assault was barred by double jeopardy. The trial court denied the plea in bar, after which Williams pled guilty to aggravated assault and then appealed the judgment and sentence, as well as the denial of her plea of double jeopardy. The Court of Appeals affirmed, *Williams v. State*, 300 Ga.App. 305 (2009), but the Supreme Court granted certiorari and reversed, *Williams v. State*, 288 Ga. 7 (700 S.E.2d 564) (2010). The Supreme Court concluded that "[c]learly double jeopardy would have allowed Williams to be retried on the charge of voluntary manslaughter after her conviction for that offense in the first trial because her jeopardy for that charge did not come to an end when the first jury was discharged." Nevertheless, the Supreme Court ruled, the State's re-prosecution of Williams for felony murder was barred by double jeopardy after the jury found her guilty of the voluntary manslaughter of the same victim. A second prosecution on the aggravated assault charge was also barred by double jeopardy because it served as the underlying offense to the felony murder charge and is a lesser included offense of felony murder.

Following remittitur to the trial court, Williams moved to dismiss the indictment, arguing that there was no offense remaining in the indictment upon which to proceed to trial because she could not be prosecuted for the charged offenses of malice murder, felony murder, and aggravated assault, and because the indictment did not set forth the elements

of voluntary manslaughter. She also argued that she could not be indicted for voluntary manslaughter because the statute of limitations had run on that charge. The trial court granted the motion, and the State appealed.

The Court of Appeals reversed. The State's position was that the original indictment was sufficient to proceed to a trial on a charge of voluntary manslaughter as the lesser included offense of murder and that a conviction under the original indictment was not barred by the expiration of any statute of limitations. Williams acknowledged that in reversing the decision of the Court of Appeals, the Supreme Court expressly noted that the State remained free to retry her on the voluntary manslaughter charge inasmuch as her jeopardy for that charge did not end. Nevertheless, she argued, the Supreme Court's finding went only to the question of continuing jeopardy and not whether the State could proceed with a prosecution given the form of the indictment and given that the four-year statute of limitations for voluntary manslaughter expired in 2008.

The Court agreed with the State. It noted that an acquittal on a greater offense does not preclude a retrial on a lesser offense to which continuing jeopardy has attached. Here, Williams remained in jeopardy for voluntary manslaughter, and her acquittal on the indicted offense of murder would not bar retrial on the lesser included unindicted offense of voluntary manslaughter using the same indictment, as long as the next jury does not know about the murder charge. Further, the provisions of the statute of limitations applicable to an indictment for voluntary manslaughter will not bar a conviction of that offense under an indictment for murder; there being no statutory limitation as to indictments for murder. Therefore, the Court held, the trial court erred in dismissing the indictment.

Change of Venue; Photographic Line-ups

Bates v. State, A13A0395 (6/18/13)

Appellant was convicted of several crimes committed after appellant broke out of jail. The crimes were committed over a two day period and against three different victims, including one elderly woman. Appellant contended that the trial court erred in denying his motion for change of venue. The record showed that appellant filed a pretrial motion for change of venue on the ground that the jury pool had been tainted by extensive pretrial publicity in local newspapers, radio, and television. Following voir dire, the trial court heard argument on the motion and denied it.

The Court stated that to prevail on a motion to change venue, the petitioner must show (1) that the setting of the trial was inherently prejudicial or (2) that the jury selection process showed actual prejudice to a degree that rendered a fair trial impossible. The Court found that although appellant showed that the events surrounding his escape from the Hancock County jail and the subsequent robbery of the elderly third victim were widely publicized in the Baldwin County area, he failed to show that the trial's setting was inherently prejudicial, i.e., that any publicity was factually incorrect, inflammatory, or reflective of an atmosphere of hostility. Rather, the predominant, if not exclusive, character of the media relied on by appellant consisted of facts which were established by evidence admitted at trial. There was "no evidence of a total inundation of the judicial process by the media at this trial." Thus, appellant failed to show that the trial's setting was inherently prejudicial as a result of pretrial publicity.

Moreover, the Court found, appellant failed to establish that the jury selection process showed actual prejudice. At the hearing, appellant showed that 20 potential jurors (of 43 questioned) had some prior knowledge of the case. However, the Court stated, the determinative issue was not the number of jurors who had heard about the case, but whether the jurors who had heard about the case could set aside their opinions and render a verdict based on the evidence. See *Walden v. State*, 289 Ga. 845, 849(2) (717 S.E.2d 159) (2011). Upon review of the voir dire transcript, particularly those portions relied on by appellant, the Court found that it could not say that the trial court abused its discretion in qualifying those veniremen who did ultimately testify that they could lay aside their opinions and render a verdict based on the evidence. Furthermore, the fact that six potential jurors were struck for cause due to their fixed opinion or independent knowledge of the case, did not require a finding that the jury selection process showed actual prejudice. Therefore, the trial court did not abuse its discretion in denying appellant's motion for change of venue.

Appellant also contended that the pretrial photographic lineup and in-court identification of him by the second victim violated the requirements of *Neal v. Biggers*. Specifically, appellant contended that the detective who conducted the photographic lineup tainted the identification when he told the second victim "that's him" after the victim picked appellant's photograph from the array. The State conceded that the detective should not have affirmed to the second victim that he had picked the correct suspect, but argued that under the totality of circumstances there was no substantial likelihood of irreparable misidentification as would require appellant's convictions be set aside. The Court agreed with the State.

In determining whether there was a very substantial likelihood of irreparable misidentification, factors to be considered include: (1) the witness's opportunity to view the accused at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the accused; (4) the witness's level of certainty at the confrontation with the accused; and (5) the length of time between the crime and the confrontation. The question is ultimately whether under the totality of the circumstances, the identification is reliable. In evaluating the factors, the trial court is the trier of fact and must judge the credibility of the witnesses and the weight and conflict in the evidence. Here, the Court found, the evidence showed that when the second victim arrived at his house with his son he realized that the door was unlocked and so he immediately pushed his son aside. He also noticed that the door jamb had been broken loose. After he stepped inside he saw appellant standing approximately 25 feet away. The second victim and appellant stood and looked at each other, face to face, between three and five seconds before appellant turned around and ran. There was "plenty of light," as it was daytime and there were windows on the side of the house where appellant was standing. Although the second victim picked appellant's picture from the photographic lineup approximately six months after the burglary, the second victim confirmed that he chose appellant's photograph from observing the intruder at the time of the burglary, explaining that "when you come face to face . . . there's certain features that . . . stand out in your mind." Moreover, the second victim testified that during the course of his 19 years

of work as a banker he had received training to recognize facial profiles.

The Court found that under the totality of circumstances, including that the second victim had the opportunity to focus on appellant's face for several seconds in good light and then maintained that his identification was based on this encounter and consistent with his training, the evidence supported the conclusion that, notwithstanding that the detective improperly indicated to the second victim that he had chosen the correct suspect from the photographic array, the pretrial identification procedure did not give rise to a very substantial likelihood of irreparable misidentification. Accordingly, the Court held that the trial court did not err in denying appellant's motion to exclude the second victim's pretrial and in-court identifications.

Wiretaps; Federal and State Requirements

State v. Harrell, A13A0203 (6/19/13)

The State appealed from the grant of a motion to suppress filed by Harrell, who was indicted for illegally using a communication facility, possessing marijuana, and possessing cocaine. The State contended that the trial court erred by concluding that the wiretap was unlawful. The record showed that Frank Green, a POST-certified investigator with the Bainbridge Public Safety Department, who was also deputized by the United States Drug Enforcement Administration, was participating in a federal drug investigation. As part of that investigation, Green prepared an application for a federal wiretap on a suspected drug dealer named Hodge. The application was presented to a U. S. District Court by an Assistant United States Attorney, while Green was present in district court, and the judge approved the application and signed an order authorizing a 30-day wiretap pursuant to 18 USC § 2518. Harrell was arrested as a result of information gathered through the use of the wiretap. The trial court granted Harrell's motion to suppress.

The State contended that the trial court erred by ruling that the wiretap authorization was unlawfully obtained. Specifically, the trial court ruled that the wiretap application was deficient because (a) it was not obtained by the prosecuting attorney before a superior court judge, (b) it did not show whether it was sealed or properly unsealed, and (c) the required notice to Harrell listed the wrong issuing judge.

The Court noted that the general legal framework governing wiretap authority involves both federal and state law. Moreover, wiretapping and surveillance are the subjects of federal and state law, and both must be complied with where applicable and when a state or federal agent has improperly procured a wiretap order, or there has been any failure to precisely comply with applicable requirements, the taped evidence is inadmissible, regardless of the good faith of the government agents. Thus, no evidence obtained in a manner that violates the wiretapping statutes is admissible to show guilt.

Under O.C.G.A. § 16-11-64(c), "[u]pon written application, under oath, of the prosecuting attorney having jurisdiction over prosecution of the crime under investigation, or the Attorney General, made before a judge of superior court, said court may issue an investigation warrant permitting the use of such [wiretapping] device, as defined in Code Section 16-11-60, for the surveillance of such person or place *to the extent the same is consistent with and subject to the terms, conditions, and procedures provided for by Chapter 119 of Title 18 of the United States Code Annotated, as amended*. (Emphasis supplied). Thus, the Court noted, the Code section makes it clear that Georgia's substantive requirements for obtaining a wiretap incorporate the federal requirements.

Under Georgia law, the written wiretap application must be submitted, under oath, "by the prosecuting attorney having jurisdiction over the prosecution of the crime under investigation . . . and must be made before a judge of superior court." O.C.G.A. §16-11-64(c). The trial court granted the motion to suppress because here, neither had been done. However, the Court concluded, the trial court misread the wiretap statute. O.C.G.A. § 16-11-64(c) merely provides authority to superior court judges to issue wiretap warrants upon proper application by the prosecuting attorney. The statute contains no prohibition against evidence gathered as part of a *federal* investigation in compliance with the federal warrant process. Thus, the record showed that the wiretap was obtained from a federal judge to whom an assistant United States attorney made a proper application. Investigator Green was working with federal officials in a multi-jurisdictional drug investigation, and the application materials, along with Green's testimony, demonstrated that the requirements outlined in the applicable federal code section were met. Thus, the fact that the warrant was not initially issued by a Georgia superior court judge did not violate the requirements for obtaining a warrant codified in O.C.G.A. § 16-11-64(c), and this fact did not require suppression of evidence gathered pursuant to the warrant.

The State also contended that the trial court erred in determining whether the wiretap was properly sealed and unsealed. The record showed that the trial court summarily concluded that the State "failed to show that the Order was properly sealed or that it was properly, subsequently unsealed," citing 18 USC § 2518(8)(b). This federal subsection provides as follows: "Applications made and orders granted under this chapter [18 USC §§ 2510 et seq.] shall be sealed by the judge. Custody of the applications and orders shall be wherever the judge directs. Such applications and orders shall be disclosed only upon a showing of good cause before a judge of competent jurisdiction and shall not be destroyed except on order of the issuing or denying judge, and in any event shall be kept for ten years." The Court found that the trial court's order did not provide further explanation nor did it assert that any improper disclosure had been made. Instead, the Court found, the record clearly demonstrated that the application and order were filed under seal, and the only disclosure of record was the disclosure to the trial court for purposes of the motion to suppress. Accordingly, the Court found no violation of 18 USC § 2518(8)(b), and therefore, the trial court erred by suppressing the evidence on this ground.

Finally, the State argued that the trial court erred in suppressing the evidence based on a finding that Harrell failed to receive proper notification. The trial court noted that the notice provided by Green to Harrell mistakenly listed the wrong judge as the issuing judge. The trial court concluded that this was a violation of 18 USC § 2518(8)(d), which, in relevant part, provides as follows: "Within a reasonable time but not later than ninety days after the filing of an application for an order of approval under [18 USC § 2518(7)(b)] which is denied or the termination of the period of

an order or extensions thereof, the issuing or denying judge shall cause to be served, on the persons named in the order or the application . . . an inventory which shall include notice of–(1) the fact of the entry of the order or the application; (2) the date of the entry and the period of authorized, approved or disapproved interception, or the denial of the application; and (3) the fact that during the period wire, oral, or electronic communications were or were not intercepted."

Here, Investigator Green conceded that he did mistakenly list the wrong judge in the inventory provided to Harrell, but, the Court noted, Harrell did not dispute that he was notified of the items enumerated in 18 USC § 2518(8)(b). The Court concluded that the statute's intent is to provide notice of the fact that the government sought a wiretap warrant, whether a warrant was issued and for what duration, and whether any communications were intercepted. Moreover, a scrivener's error in the judge's name does not frustrate the purpose of the statute, and if Congress or the Georgia General Assembly had intended to make the name of the judge a required part of this notice, they could have included them in the enumerated items. Because there was no mention of such a requirement, the Court declined to infer such a rule. Therefore, the Court held, the trial court incorrectly applied the wiretap statutes, erred in concluding that the wiretap evidence did not satisfy Georgia law, and reversed the order suppressing the evidence against Harrell.

Due Process; Speedy Trial

Jones v. State A13A0273 (6/18/13)

Appellant was convicted of armed robbery in November of 2005. In February 2011, newly appointed appellate counsel filed an amended motion for new trial asserting, among other things, that appellant's right to appeal had been frustrated because of the loss of his case file and the time taken to appoint appellate counsel. The trial court denied the motion after a hearing.

The Court stated that the appropriate analysis of claims asserting due process violations based on inordinate appellate delay is the application of the four speedy trial factors set forth in *Barker v. Wingo*, i.e., the length of the delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant. Here, the Court found, the trial court's order only made a "cursory" and conclusory analysis of the *Barker* factors. Although the State claimed that appellant had not shown prejudice for the delay, the Court held that the record affirmatively showed that appellant attempted to show prejudice when he explicitly argued to the trial court that the appellate delay caused the loss of his case file. Moreover, the Court criticized the trial order for making no findings concerning the two remaining *Barker* factors, including the length of delay and appellant's assertion of his right to timely appeal. Therefore, the Court vacated and remanded the trial court's order for entry proper order utilizing the four *Barker v. Wingo* factors.

Waiver of Jury Trial

Overcash v. State, A13A0627 (6/20/13)

After a bench trial at which appellant represented himself, he was convicted of speeding. He argued that the record did not show that he voluntarily, knowingly, and intelligently waived his right to a jury trial. The Court noted that the right to a jury trial is a fundamental constitutional right, and the burden is on the State to show that appellant made a knowing, intelligent and voluntary waiver of that right.

Here, the State argued that because appellant indicated by check mark on the arraignment form a request for a nonjury trial, he had effectively waived his right. However, the Court faulted the State because it was not clear from the document that appellant had checked the box himself and that he had knowing, intelligent, and voluntary done so. Moreover, the Court suggested that the trial court should have engaged in a colloquy with the appellant to memorialize the record as to whether he had waived his right to jury trial. Because harmless-error analysis does not apply to waiver of right to jury trial, the Court reversed appellant's conviction.