

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING AUGUST 16, 2013

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## THIS WEEK:

- **Show-up Identification**
- **Search & Seizure**
- **Indictments; Fatal Variance**
- **Waiver of Argument**
- **Speedy Trial; Record on Appeal**
- **Ineffective Assistance of Counsel**
- **Conflict of Interest; Rule of Lenity**

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### *Show-up Identification*

*Pullins v. State, A13A0863 (8/8/13)*

Appellant was convicted of burglary and criminal trespass. Appellant contended that the trial court erred in denying his motion to suppress the pretrial show-up identification. The Court stated that although show-up identifications are inherently suggestive, identification testimony produced from a show-up is not necessarily inadmissible. Further, a one-on-one show-up aids speedy police investigations by resolving doubt as to the identification of innocent subjects. Generally, a court must determine whether the identification procedure was impermissibly suggestive. If the show-up was reasonably and fairly conducted at or near the time of the offense, it is not impermissibly suggestive.

The evidence showed that at 1:40 a.m. the victim's neighbor witnessed from his apartment window appellant transporting items from the victim's residence to a nearby truck. The neighbor noticed that the victim's window was broken and he confronted appellant, who had glass in his hair. Appellant claimed that he had permission to enter the victim's apart-

ment; however, he began to put some of the items from his truck back into the victim's residence after the neighbor confronted him. The neighbor reported the burglary. The responding officer canvassed the apartment complex looking for a person who matched the description of the suspected burglar and 15 minutes later, the officer located appellant inside the apartment complex and took him back to the crime scene where the neighbor identified him as the person he saw go into the victim's apartment. Appellant was outside of the officer's police car when the witnesses identified him and the neighbor was positive that appellant was the man who broke into the victim's apartment because he spoke with him face-to-face when he told him that he was going to get the police. Additionally, the neighbor knew appellant because he often hung around the apartment complex, and the neighbor recognized appellant because he had tried to sell him some lamps earlier that day. Thus, the Court concluded, the show-up was reasonably and fairly conducted at or near the time of the offense, and the trial court did not err in finding that the neighbor's identification of appellant was reliable.

In so holding, the Court rejected appellant's argument that because he was handcuffed during the identification, there was a substantial likelihood of irreparable misidentification. To evaluate the likelihood of misidentification, the totality of the circumstances must be considered. Factors include the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation. Because the

neighbor satisfied all the factors to a substantial degree, the Court found no likelihood of irreparable misidentification.

## Search & Seizure

*Rogers v. State, A13A0880 (7/31/13)*

Appellant was convicted of VGCSA. He contended that the trial court erred in denying his motion to suppress because the evidence was seized after an unreasonably prolonged traffic stop. The evidence showed that an officer stopped appellant's vehicle when it failed to maintain a lane. When the officer approached the vehicle, he noticed that the occupants were very nervous in their demeanor and the presence of strategically placed air fresheners within the vehicle. Also, the officer testified that he smelled the faint odor of burning or burnt marijuana coming from inside the vehicle. While completing a written warning citation for the traffic violation, the officer asked appellant for consent to search his vehicle, which appellant granted. The officer searched the vehicle and discovered almost 200 grams of methamphetamine hidden in a container under the front passenger seat. No marijuana was found.

To pass constitutional muster, the duration of a traffic stop cannot be unreasonably prolonged beyond the time required to fulfill the purpose of the stop. A reasonable time to conduct a traffic stop includes the time necessary to verify the driver's license, insurance, and registration, to complete any paperwork connected with the citation or a written warning, and to run a computer check for any outstanding arrest warrants for the driver or passengers. While conducting these tasks, an officer is authorized to question the driver and passengers and even to ask questions wholly unrelated to the traffic stop, so long as the questioning does not prolong the stop beyond the time reasonably required to complete the purpose of the traffic stop. Further, as an extension of the constitutionally valid detention resulting from the traffic stop, an officer can order the driver and passengers out of the vehicle. If an officer prolongs the traffic stop beyond the time reasonably required to fulfill the initial purpose of the stop, then the continued detention of the vehicle and its occupants amounts to a second detention. For an officer's continued detention of the vehicle and its occupants to be constitutionally valid,

the officer must have a reasonable articulable suspicion of other illegal activity.

The Court held that the officer did not unreasonably prolong the duration of the traffic stop before asking appellant for consent to search his vehicle. Only 6 or 7 minutes had elapsed from the time that the officer pulled over appellant to when the officer asked him if he could consent to a search. The actions the officer took to pat down appellant, inquire as to the vehicle's travel, and consent to search the vehicle while writing the ticket did not prolong the stop. Further, the Court noted that even if the stop had been unreasonably prolonged, there was evidence that the officer had a reasonable articulable suspicion of other illegal activity. The smell of burnt marijuana, the "nervous" demeanor of appellant, and strategically placed air fresheners, taken together, provided reasonable articulable suspicion justifying a prolonged duration of the stop. Although marijuana was not found in the vehicle, the Court deferred to the fact finder's assessment of the officer's testimony. Therefore, the Court upheld the trial court's denial of the motion to suppress.

## Indictments; Fatal Variance

*Walker v. State, A13A1308 (8/8/13)*

Appellant was convicted of three counts of VGCSA. The indictment charged appellant with the sale of 1-(3-Trifluoromethylphenyl) piperazine (TFMPP) under O.C.G.A. § 16-13-30(b). At trial, the State's crime lab analyst testified that the pills recovered from the controlled drug buy tested positive for "TFMPP, one three trichloromethylphenelpipraline." Appellant argued that the analyst's description of the drug as "trichloromethylphenelpipraline" demonstrated a fatal variance between the indictment and the evidence and, therefore, the evidence was insufficient to sustain his convictions.

The Court disagreed. First, the Court noted, the issue was waived on appeal because appellant neither raised the issue at the time of his motion for directed verdict nor did he demonstrate that he had raised the issue before the trial court. However, the Court held, appellant's contention was nevertheless, meritless. Although the chemical analyst described the drug as "trichloromethylphenelpipraline," she also clearly identified the pills as TFMPP, which matched the controlled substance listed

in the indictment. Thus, there was no fatal variance between the allegations and the proof.

## Waiver of Argument

*Bacchus v. State, A13A0925 (7/31/13)*

Appellant was convicted on multiple counts of rape, child molestation, incest, and cruelty to children in the first degree. The record showed that following his conviction, the original trial attorney filed a motion for new trial on appellant's behalf but reserved the right to obtain new counsel and amend the motion. Thereafter, an entry of appearance and amended motion for new trial were filed by a second attorney. The amended motion for new trial added an argument that appellant's original trial counsel rendered ineffective assistance. The trial court heard argument on the motion for new trial, at which the second attorney appeared on behalf of appellant and did not call the original trial attorney to testify. The court ultimately denied appellant's motion. After doing so, the court inquired as to whether the second attorney would represent appellant on appeal. The second attorney advised the court that he would not represent appellant on appeal and that he had informed appellant that he would need to retain new counsel within 30 days. The trial court then indicated that the Office of the Public Defender would provide appellate representation for appellant. Thereafter, the second attorney filed a motion to withdraw as counsel, which the trial court granted, and new counsel was appointed to represent appellant on appeal. Appellant's newly appointed appellate counsel then immediately filed a notice of appeal with the trial court. However, six days later, a second notice of appeal was filed on appellant's behalf by the original attorney. Further, the original attorney appeared as the attorney of record for the appeal.

Appellant's sole argument on appeal was that his trial counsel rendered ineffective assistance. The Court stated that because appellant chose to pursue this appeal using the same attorney who defended him at trial (despite having hired new counsel to represent him at the motion for new trial hearing and despite having been initially appointed a public defender to represent him on appeal), appellant waived the issue. Further, the Court noted, appellant's appellate counsel was precluded from presenting a claim of ineffective assis-

tance of counsel concerning a trial in which he participated due to the ethical prohibition of a lawyer acting as a witness.

## **Speedy Trial; Record on Appeal**

*Smith v. State, A13A0956 (8/8/13)*

Appellant was convicted of VGCSA. The record showed that appellant was arrested by local authorities on November 21, 2008. After appellant's arrest, the State's prosecution was delayed because the United States Attorney's Office took the case with the intent to prosecute appellant. But the federal prosecutors informed the State in March 2011 that it would not be prosecuting appellant and the cocaine had to be sent back to the State Crime Lab for quantitative analysis. Following the analysis, the State submitted the case to the next grand jury, and appellant was indicted on September 1, 2011. Appellant subsequently moved to dismiss his indictment on constitutional speedy trial grounds. The trial court denied appellant's motion, and he was tried on the indictment and convicted in February 2012.

In evaluating a defendant's constitutional speedy trial claim under *Barker* and *Doggett*, a trial court must engage in a balancing test that considers four factors—the length of the delay, the reason for the delay, when the defendant asserted his right, and whether the defendant was prejudiced. The trial court must first consider whether the relevant interval or period of delay is sufficiently long to be considered presumptively prejudicial. If the trial court determines that the delay is presumptively prejudicial, the trial court must then consider whether the delay before trial was uncommonly long, whether the government or the criminal defendant is more to blame for that delay, whether, in due course, the defendant asserted his right to a speedy trial, and whether he suffered prejudice as the delay's result. The trial court's order on a defendant's speedy trial claim must provide sufficient findings of fact and conclusions of law to permit the appellate Court to determine if the trial court properly exercised its discretion.

Despite the more than three year delay between appellant's arrest and his trial, the Court stated that it was unable to provide a proper review because there was no transcript of the motion hearing or order of the trial court in the record. Since the Court could not

ascertain if appellant's right to a speedy trial was violated, it remanded for findings of fact and conclusions of law consistent with *Barker* and *Doggett*.

## **Ineffective Assistance of Counsel**

*Darst v. State, A13A0645 (7/16/13)*

Appellant was found guilty of four counts of aggravated child molestation. The evidence showed that appellant was the foster father of the two female victims. The two victims lived with appellant and his wife for two years, before they were sent to Pennsylvania to live with their biological paternal grandparents.

Appellant contended that his trial counsel provided ineffective assistance by failing to obtain certain records concerning the victims, present expert witness testimony, and object to certain testimony. In order to establish a claim of ineffective assistance of counsel, a criminal defendant must address the two-pronged test enunciated in *Strickland v. Washington*, 466 U. S. 668, 687 (1984). First, the defendant must show that counsel's performance was deficient, by overcoming the strong presumption that trial counsel's conduct fell within the broad range of reasonable professional conduct. Second, the defendant must show that the deficient performance so prejudiced him or her that there was a reasonable likelihood that, but for counsel's errors, the outcome of the trial would have been different. When a defendant establishes that trial counsel's performance was deficient in more than one respect, the court's determination of whether he or she was prejudiced thereby requires consideration of the collective effect of the deficiencies.

Appellant contended that his trial counsel's failure to obtain the children's school, therapy, and DFACS records constituted ineffective assistance because those records demonstrated that the children's documented behavior during the time he and his wife were their foster parents was inconsistent with their allegations of his molestation of them. The Court agreed. The DFACS records revealed incidents where the victim's biological father, who lived in Pennsylvania, had danced naked in front of the younger victim, had slept with her while he was nude, had "made [her] touch him," and had done "secret touching of [her] privates." Further, the DFACS records contained numerous reports that documented

the children's positive social, developmental, and educational progress while the children were living with appellant and his wife, while also showing that the children's behavior and academic performance began to deteriorate shortly after they learned that they would be moving to Pennsylvania to live with their grandparents. Trial counsel admitted that he had not obtained a subpoena for any of the records prior to trial, and he did not offer a strategic reason for failing to do so. Thus, the Court held, appellant demonstrated that the records were favorable to his defense theory that, if the victims had been molested, it was by another individual.

Appellant also contended that trial counsel was ineffective when he failed to consult with and utilize expert witnesses who would have explained the victims' behavior to the jury. The Court agreed again. Such testimony would have shown why the open affection that the victims shared with appellant was inconsistent with behavior of an abused child. Additionally, the expert would have elaborated as to why the victims' behavior may have changed after learning that they would be moving to Pennsylvania to permanently live with the victims' biological grandparents. Also, an expert would have testified about the forensic techniques used by the children's therapist and police investigators. Specifically, about required techniques generally used to prevent suggestive questioning and apparent deficiencies in the process used in appellant's case.

Finally, appellant contended that his counsel was provided deficient performance by failing to object to repeated hearsay testimony. The Court agreed once more. The testimony concerned a caseworker stating that the victim's biological father, and another male with a close relationship to the father and his parents, passed psycho-sexual evaluations. Specifically, the case worker testified there were "no red flags" regarding these tests.

Having found that trial counsel provided deficient performance, the Court addressed whether the collective effect of trial counsel's deficient performance prejudiced appellant's defense. The Court found that it did. Since the trial court therefore erred in holding that trial counsel provided effective assistance, the Court reversed appellant's convictions and ordered a new trial.

## **Conflict of Interest; Rule of Lenity**

*Davis v. State A13A0703 (7/16/13)*

Appellant was convicted of aggravated sexual battery and child molestation. As to the aggravated sexual battery conviction, he was sentenced to 40 years to serve with life on probation pursuant to O.C.G.A. § 16-6-22. He contended that his counsel was ineffective due to an actual conflict arising from his representation of the Department of Family and Children's Services (DFACS) during the same period in which DFACS was involved in the placement of appellant's children pending a law enforcement investigation of the victim's allegation that she was pregnant with appellant's child. The evidence showed that at the time counsel was representing appellant, counsel was also a special assistant attorney general representing DFACS. In the course of discovery, the victim was found to have alleged that she was pregnant by appellant. Following a DFACS investigation, no evidence of pregnancy was discovered and counsel did not introduce the evidence at trial.

The Court stated that generally, defense counsel has an ethical obligation to avoid conflicting representations and to advise the trial court promptly when a conflict of interest arises during the course of trial. Absent special circumstances, a trial court may assume either that multiple representation entails no conflict or that the lawyer and his clients knowingly accept such risk of conflict as they exist. Unless the trial court knows or reasonably should know that a particular conflict exists, the court need not initiate an inquiry. Further, a defendant asserting ineffective assistance of counsel based on an actual conflict of interest must demonstrate that 1) an actual conflict of interest existed and 2) the conflict significantly affected counsel's performance.

Here, the Court found, the record showed that counsel discussed his dual representation of appellant and DFACS with appellant and his wife and that the dual representation had no effect on any decision he took at trial, including his decision not to introduce evidence of the victim's pregnancy allegation for purposes of impeaching her. In light of the record, the Court could not say that the trial court erred when it concluded that appellant waived any conflict. Further, counsel testified that his representation of DFACS amounted to

only a potential conflict, and that his strategic decision not to impeach the victim's credibility by means of the false pregnancy accusation was reasonable. Thus, the Court determined, appellant failed to show that any actual conflict between his and DFACS' interests caused divided loyalties or compromised trial counsel's representation of him.

Appellant also contended that because the dates charged in the indictment for aggravated sexual battery spanned from December 2004 through December 2006, he should have been sentenced under the rule of lenity to the 10 to 20 year period provided by the version of O.C.G.A. § 16-6-22.2(c) in effect before July 1, 2006, rather than the 25-year-to-life period provided by the same statute as effective July 1, 2006. The Court agreed. The rule of lenity applies where two or more statutes prohibit the same conduct while differing only with respect to their prescribed punishments. According to the rule, where any uncertainty develops as to which penal clause is applicable, the accused is entitled to have the lesser of the two penalties administered.

The Court stated that it could not determine from the general verdict form the date of the act upon which the jury pronounced guilt—that is, whether it found appellant guilty of an act committed before July 1, 2006, or guilty of an act committed after that date. Thus, under the rule of lenity, appellant could not be given the higher sentence imposed for the offense of aggravated sexual battery by the version of O.C.G.A. § 16-6-22.2(c) applicable after July 1, 2006. Accordingly, the Court vacated appellant's sentence and remanded for resentencing under the version of O.C.G.A. § 16-6-22.2(c) in effect between 2004 and July 1, 2006.