

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING AUGUST 22, 2014

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and Crimes Against Children  
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Traffic Safety Resource Prosecutor

**Gary Bergman**  
State Prosecutor

## THIS WEEK:

- **Guilty Pleas; Parol Eligibility**
- **First Offender Discharge; Plenary Power of Court**
- **Jury Questions; Consensual Sodomy**
- **Double Jeopardy; Similar Transactions**
- **Bolstering; Closing Arguments**

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### Guilty Pleas; Parol Eligibility

*Alexander v. State, A14A0190 (7/15/14)*

Appellant pled guilty to multiple counts of sexual offenses involving a child. He contended that the trial court erred in denying his motion to withdraw his guilty plea based on ineffective assistance of counsel. Specifically, that counsel failed to inform him that he would be ineligible for parole. In support of his argument, appellant relied on the U. S. Supreme Court decision in *Padilla v. Kentucky*, 559 U. S. 356 (2010).

The Court stated that under Georgia law, a trial court must advise a defendant of the “direct” consequences of entering a plea, but not of all the potential “collateral” consequences, in order for the guilty plea to be considered knowing and voluntary. Direct consequences may be described as those within the sentencing authority of the trial court, as opposed to the many other consequences to a defendant that may result from a criminal conviction. Consequences over which the trial court has no control are considered collateral consequences. The Court noted that in *Williams v. Duffy*, 270 Ga. 580, 581 (1) (1999), the Supreme Court held that

ineligibility for parole represents a collateral consequence of a guilty plea as “eligibility or ineligibility for parole is not a ‘consequence’ of a plea of guilty, but a matter of legislative grace or a consequence of the withholding of legislative grace” and therefore has “only a collateral effect” on a defendant’s sentence.

The Court found that appellant’s “argument as to the inapplicability of the collateral consequences doctrine to an ineffective assistance of counsel claim has significant support in the law.” But, in *Williams*, the Supreme Court of Georgia held that trial counsel’s failure to inform a defendant entering a negotiated guilty plea that he would be ineligible for parole did not constitute ineffective assistance of counsel, because parole ineligibility was a collateral consequence of the negotiated sentence. And, in the absence of a decision from our Supreme Court overruling *Williams*, the Court remains bound by its holding that trial counsel’s failure to inform a defendant that his guilty plea would render him ineligible for parole cannot constitute constitutionally deficient performance, as a matter of law. Therefore, the Court was “constrained to apply *Williams*” and affirm the trial court.

**NOTE:** The Supreme Court accepted certiorari in this case to consider whether *Williams* “remains good law” *Alexander v. State*, S14C1762 (Sept. 22, 2014).

### First Offender Discharge; Plenary Power of Court

*Pestana v. State, A14A0635 (7/16/14)*

In November 2009, appellant entered a negotiated plea of guilty to aggravated assault and was sentenced under the First Offender Act to confinement for a period of ten years,

which sentence could be served on probation. In July 2013, the superior court signed an order of discharge after appellant's probation officer filed a petition for discharge indicating that appellant had fulfilled the terms of his probation. Probation did not notify the district attorney or the victims (pursuant to O.C.G.A. § 17-17-1 et seq.). In September 2013, the district attorney moved for reconsideration. The court subsequently rescinded the discharge order and reinstated appellant's original sentence.

Appellant argued that the superior court erred because the State's motion for reconsideration, filed 49 days after the court's discharge order was entered, was untimely. The en banc Court noted that because of the unique procedural posture of the case, appellant pointed to no authority requiring a precise time to file such a motion and instead argued that the Court should treat it as a motion for new trial. But, the Court noted, the district attorney did not even have notice of the discharge within 30 days of its filing. Instead, the Court found, the motion was functionally like a motion in arrest of judgment, which must be made during the term at which the judgment was obtained. Also, the motion arose out of a defect appearing on the face of the discharge petition and order. Therefore, the State's failure to take action within thirty days of the discharge order was not fatal to its motion filed in the same term upon becoming aware of the discharge.

The Court noted that courts of record retain full control over orders and judgments during the term at which they were made and, in the exercise of a sound discretion, may revise or vacate them. During the term of court at which a judgment is rendered, the trial court has power, on its own motion, to vacate the same for irregularity, or because it was improvidently or inadvertently entered. The plenary control of the court over orders and judgments during the term at which they were rendered extends to all orders and judgments save those which are founded upon verdicts. Here, the Court found, the superior court revisited a discharge order which, on its face, contained an internal inconsistency based on what the court later learned was an inadvertent data entry error in the probation office. As a result, the discharge order incorrectly stated appellant had "fulfilled the terms" of his ten-year sentence less than

four years into it. This was precisely the type of error that a trial court should have discretion to correct. Further, the discharge order was not a final judgment founded on a jury verdict such that it violated double jeopardy principles or was unreviewable by the trial court absent a timely motion for new trial. The discharge order was part of the procedure effectuating the first offender disposition of appellant's case, and appellant's sentence remained unaltered from that which was lawfully entered pursuant to his guilty plea. Nor did the court change appellant's eligibility for first offender treatment accorded by his original plea and sentence. Accordingly, the Court concluded, the trial court did not err by rescinding the discharge order and reinstating appellant's original sentence.

### **Jury Questions; Consensual Sodomy**

*Jordan v. State, A14A0643 (7/16/14)*

Appellant was convicted of aggravated assault and sodomy. The trial court instructed the jury that appellant had been charged "with the offense of sodomy for the said accused . . . did perform a sexual act with the person of [the victim] involving the sex organs of the accused and the mouth of said person," which tracked the language of O.C.G.A. § 16-6-2(a)(1). Following the complete charge to the jury, appellant asked that the term "by force" be added to the sodomy charge, citing *Powell v. State*, 270 Ga. 327 (1998). The trial court denied the request. During the deliberations, the jury asked the court about the "legal definition of sodomy. In response, the court simply read to the jury from the statute as follows: "A person commits the offense of sodomy when he performs any sexual act involving the sex organs of one person and the mouth or anus of another." Appellant did not object to the court's answer.

Appellant contended that because consent was argued to the jury as his sole defense, the court's refusal to add the term "by force" to the charge was clearly harmful and erroneous as a matter of law. The Court noted that appellant did not present a written request on *Powell* or consent as a defense of sodomy. Nevertheless, when a given instruction fails to provide the jury with the proper guidelines for determining guilt or innocence, it is clearly harmful and erroneous as a matter of law.

In addition, when the jury is confused and in doubt and requests further instructions on a particular point, it is the duty of the court to further instruct them.

The Court stated that force is not an "element" of the sodomy statute. However, in *Powell*, the Supreme Court decriminalized "private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent" that would otherwise fall under the purview of the sodomy statute. And in *Watson v. State*, 293 Ga. 817, 820 (1) (2013), the Supreme Court stated that "an individual violates the solicitation of sodomy statute if he (1) solicits another individual (2) to perform or submit to a sexual act involving the sex organs of one and the mouth or anus of the other and (3) such sexual act is to be performed (a) in public; (b) in exchange for money or anything of commercial value; (c) *by force*; or (d) by or with an individual who is incapable of giving legal consent to sexual activity." (emphasis supplied)

Here, the Court found, even after the jury's question on the definition of sodomy, the trial court failed to inform the jury that an absence of force was, under the facts of this case and in light of *Powell*, and its progeny, a possible defense to that crime. In short, and although the State put on evidence that appellant forced the victim to engage in sodomy, the trial court should have treated appellant's request that the jury be charged on force "as an element" of the sodomy statute as a request to charge on the category of "private, unforced, non-commercial acts of sexual intimacy between persons legally able to consent" decriminalized in *Powell*, which the record showed was appellant's sole defense to the crime. Accordingly, the Court reversed appellant's conviction of sodomy and remanded for a new trial on that charge.

### **Double Jeopardy, Similar Transactions**

*Frost v. State, A14A0730 (7/15/14)*

Appellant was tried for DUI (less safe), striking a fixed object; and open container. The record showed that during jury deliberations, the jury was deadlocked 5-1 on the DUI, but had reached unanimous agreement on the other two counts. Defense counsel objected to the trial court granting a mistrial on the counts to which the jury had reach a

verdict and asked that the verdict as to these two counts be read into the record. The trial court denied the motion and granted a mistrial on all counts. Appellant then filed a plea in former jeopardy and moved to dismiss the non-DUI counts. The trial court denied the motion, finding a “manifest necessity” for the mistrial absent a completed verdict form signed by the foreperson.

Appellant contended that the trial court erred in granting a mistrial as to the two counts upon which a unanimous verdict was reached. The Court agreed. Jeopardy attached when the jury was seated and sworn and that appellant was entitled to receive any verdict reached by that jury. Thus, unless manifest necessity existed for granting a mistrial as to the counts decided by the jury, double jeopardy bars any retrial on those counts. Furthermore, the Court stated, the State bears the “heavy” burden of showing such manifest necessity where, as here, a mistrial was granted over the defendant’s objection.

Here, the Court found, the trial court could easily have followed the less drastic alternative of accepting the jury’s verdict on the decided counts and declared a mistrial only on the undecided count. Therefore, the Court held, no manifest necessity existed for granting a mistrial as to the counts decided by the jury. Accordingly, as the retrial of the two counts would constitute double jeopardy, the trial court abused its discretion in granting a mistrial on the charges of striking a fixed object and open container. Consequently the Court reversed the trial court’s order as to the denial of appellant’s plea in bar on the striking a fixed object and open container counts.

Appellant also contended that the trial court erred in admitting two similar transactions relating to the DUI. Specifically, he contended, because in the prior DUI convictions he had also refused sobriety tests, no relevant evidence could be imputed from the similar transactions to the present case. The Court again agreed. First, the Court noted, O.C.G.A. § 24-4-417(a)(1) provides that prior DUI evidence is admissible when the defendant, as was the case here, “refused in the current case to take the state administered test required by Code Section 40-5-55.” It further provides that the evidence must then be “relevant to prove knowledge, plan, or absence of mistake or accident.” Quoting Milich, the Court stated that under this pro-

vision, if “the defendant took and failed the [state-administered] test in the prior DUI and the defendant refused the test in the subject case, [and] if the defendant at trial attempts to suggest that he did not take the test because he did not understand it, or he did not know that he could take a test, or that he would never take such a test, [then] the prior DUI in which the defendant took and failed the test would be admissible to prove knowledge, plan or absence of mistake or accident.” But here, the Court found, appellant did not provide an explanation or excuse at trial for his refusal to take the state-administered tests in the present case. Moreover, appellant refused to take the state-administered tests in the prior DUIs as well. Thus, O.C.G.A. § 24-4-417(a) did not apply under the facts of this case to demonstrate knowledge, plan or absence of mistake or accident.

The Court also found, citing *Jones v. State*, 326 Ga. App. 658, 664 (1) (2014), that the similar transactions are not admissible under O.C.G.A. § 24-4-404(b) either because DUI is a crime of general not specific intent.

**NOTE:** The Supreme Court accepted certiorari in this case to consider whether the Court erred in finding that prior convictions for driving under the influence were inadmissible in a subsequent prosecution for the same offense under the newly-enacted O.C.G.A. § 24-4-417(a)(1). *State v. Frost*, S14C1767 (Oct. 6, 2014). The Supreme Court already accepted certiorari in *Jones v. Jones*, S14C1061 (Sept. 8, 2014).

## ***Bolstering; Closing Arguments***

*Johnson v. State*, A14A0320 (7/15/14)

Appellant was convicted of rape and acquitted of aggravated assault. The evidence showed that he attacked the adult daughter of his girlfriend, who was letting him stay in her home. His defense at trial was that the sex was consensual.

Appellant contended that the trial court erred by allowing testimony of an officer regarding the victim’s out-of-court statements to him. The record showed that during direct examination of the officer, the State asked him whether the victim had told him what happened to her. Defense counsel objected on the basis that such testimony was inadmis-

sible hearsay, but the trial court overruled the objection and permitted the officer to testify that the victim told him that appellant had raped her and to testify as to the details of her version of events. The Court found that the admission of the officer’s testimony was erroneous.

A witness’s prior consistent statement is admissible only where: (1) the veracity of a witness’s trial testimony has been placed in issue at trial; (2) the witness is present at trial; and (3) the witness is available for cross-examination. A witness’s veracity is placed in issue so as to permit the introduction of a prior consistent statement if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination. To be admissible to refute the allegation of fabrication, the prior statement must predate the alleged fabrication, influence, or motive.

Here, although defense counsel argued that the victim had consensual sex with appellant and then immediately fabricated the rape allegation because of guilt and concern about how her mother would feel, there was no affirmative charge of recent fabrication. The State did not elicit testimony from the officer about the victim’s statements to rehabilitate her after the defense attacked her veracity; instead, the State elicited the testimony during its direct examination of the witness simply to bolster the victim’s credibility. Thus, the trial court erred by admitting the officer’s testimony regarding the victim’s prior consistent statements.

Nevertheless, the Court concluded, the admission of the officer’s testimony did not require reversal. The erroneous admission of a witness’s hearsay statement is reversible error if it appears likely that the hearsay contributed to the guilty verdict. And here, the Court found, it was unlikely that the erroneously admitted hearsay contributed to the verdict.

Appellant also argued that the trial court erred by sustaining the State’s objection during defense counsel’s closing statement. The Court again agreed, but found no basis for reversal. The record showed that during closing arguments, defense counsel stated, “Throughout history, there have been numerous famous instances of false cries of rape. We don’t have to look back many years ago to remember when the Duke lacrosse players

were all charged with rape--". The State objected and the trial court sustained it.

The Court stated that analogizing a defendant or a defendant's case to another well-known defendant or case is permissible during argument if the analogy is supported by facts in evidence. Counsel may make use of well-established historical facts in his argument and make full use of illustrations as long as he does not introduce extrinsic and prejudicial matters which have no basis in the evidence in the case.

Here, appellant's defense was that the sex was consensual and that the victim fabricated the rape charges. Thus, defense counsel's analogy of this case to a case involving false allegations of rape was permissible, and the trial court erred by sustaining the State's objection to it.

A presumption of harm requiring the grant of a new trial accompanies the abridgement of the right to make a closing argument, but, that presumption is overcome when the denial of the right is not complete and only in those extreme cases in which the evidence of a defendant's guilt is so overwhelming that it renders any other version of events virtually without belief. Here, the Court found, appellant's right to make a closing argument was not completely abridged; defense counsel repeatedly argued that the victim falsely accused appellant of rape based on her shame and guilt resulting from her voluntary sexual activity with her mother's boyfriend. And the trial court permitted counsel to compare the case with *To Kill a Mockingbird* and a biblical story involving false allegations of rape. Thus, given the evidence in the case and in light of the arguments the court allowed, any error was harmless.