Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING AUGUST 5, 2011

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THIS WEEK:

Speedy Trial; Barker v. Wingo

State v. Thaxton, A11A0727 (7/14/2011)

The State appealed from the grant of Thaxton's motion for discharge and acquittal for violation of his constitutional right to a speedy trial. The record showed that Thaxton was arrested on or about October 30, 2008, for dogfighting, cruelty to animals, and possession of more than one ounce of marijuana. On December 3, 2008, Thaxton entered into a consent bond and was released from jail. On January 11, 2010, Thaxton was indicted on one felony count of possession of more than one ounce of marijuana, and three counts of misdemeanor cruelty to animals. A series of continuances to facilitate discovery were thereafter granted at Thaxton's request. On September 27, 2010, the trial court granted the last of Thaxton's requests for continuance and contemporaneously granted appointed counsel's motion to withdraw as counsel, and Thaxton's current counsel was retained to represent him. Thaxton filed a motion for discharge and acquittal on February 15, 2010, pointing to pre-indictment delay following his arrest. The trial court granted Thaxton's motion and the State appealed.

Under *Barker*'s four part balancing test, the Court found that the delay of 23 months was presumptively prejudicial and that the length of the delay was properly weighed by the trial court against the State. The trial court also properly found that the reason for the delay was not the result of any intentional conduct by the State and therefore, this "relatively benign" factor was weighed against the State. However, the Court found, the trial court erred in not weighing the assertion of the right factor heavily against Thaxton. The Court noted that Thaxton waited almost 16 months before asserting this right. Finally, the Court found that the trial court erred in finding that Thaxton suffered prejudice as a result of the delay. Thaxton did not show that his defense suffered any prejudice from the delay and there was no evidence that Thaxton had suffered anxiety or concern due to the delay.

Finally, the Court found that the trial court failed to weigh and balance the four factors. Instead the trial court erroneously determined that the issue "boil[ed] down…. to the length of the delay versus the reason for the delay." The Court therefore, vacated the judgment and remanded for the entry of a proper order pursuant to *Barker*.

State v. Reimers, A11A0004 (July 14, 2011)

The State appealed from the grant of appellant's motion to dismiss based on his constitutional right to a speedy trial. The

record showed that appellant was arrested on child molestation charges on June 4, 2008. He was indicted on Oct. 6, 2009. He provided reciprocal discovery in the nature of witness lists to the State on February 26, 2010, and separately filed a statutory demand for speedy trial pursuant to OCGA § 17-7-170. Appellant announced ready for trial at calendar calls on March 30 and May 25, 2010. Although his case was placed on the criminal jury trial calendar for the week beginning June 14, 2010, it was not reached for trial during that week. On June 11, 2010, he filed the motion for discharge and acquittal, and the trial court granted it on July 6, 2010.

The Court reversed. The Court found that the trial court's order erred in its factual findings regarding appellant's extraordinary anxiety and concern. Additionally, The Court determined that the trial court's order also revealed significant legal errors. Notably, it failed to consider the length of delay as the first of the *Barker* factors. Further, it erred in weighing the reason for delay factor heavily against the State (rather than simply against the State), and in weighing the assertion of right factor heavily in favor of appellant (rather than against, or slightly against, him). Finally, the trial court erred to the extent it did not consider appellant's failure to substantiate presumptive prejudice with any evidence of actual impairment. As a result, the trial court could not properly balance the *Barker* factors, and the trial court's order was vacated and the case remanded "for the trial court to exercise its discretion again using properly supported factual findings and the correct legal analysis, reflected in an adequate written order."

Right to Trial by Jury; Venue

Alexander v. State, A11A1424 (7/18/2011)

Appellant was convicted of terroristic threats and acts. He contended that he did not knowingly waive his right to a jury trial and that the State failed to prove venue. The Court noted with approval that the State, rather than make frivolous arguments, conceded both points. The record showed that appellant did not knowingly and intelligently waive his right to a jury trial because his counsel waived it in his absence during a calendar call. The evidence also showed that while the State proved that the crimes occurred within a city limits, it did not also prove that the city was entirely within the county.

Search & Seizure; Statements

O'Neal v. State, A11A1218 (7/21/2011)

Appellant was convicted of possession of oxycodone, possession of marijuana and two child restraint violations. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant was pulled over when an officer on patrol saw him driving his pickup truck with an unrestrained child in the back seat. After the stop, the officer noted a second child in the vehicle. The officer thought appellant was intoxicated and asked him to perform field evaluations. A consent search of the vehicle was refused. A second officer arrived. While the first officer was checking appellant's driver's license, the second officer asked for consent to perform a pat-down. Appellant reacted by violently grabbing the officer's arm. Appellant was then arrested and the drugs were found in the vehicle. Appellant then admitted to having marijuana and oxycodone in his truck

The Court initially found that the traffic stop was authorized by the officer's observation of a child restraint violation. Although appellant contended that the pat-down was unjustified, the Court noted that no pat-down actually occurred; appellant assaulted the officer upon the request for consent and therefore, the officer had probable cause to arrest him. Moreover, even if an unlawful pat-down had occurred such that, under Georgia law, appellant was entitled to resist, an arrestee is never justified in assaulting an arresting officer unless the officer has assaulted him first. Here, no evidence showed that the arresting officer assaulted appellant first.

Appellant also claimed that the search was made illegally because there were no exigent circumstances. However, the Court explained, under the automobile exception to the warrant requirement imposed by the Fourth Amendment, a police officer may search a car without a warrant if he has probable cause to believe the car contains contraband, even if there is no exigency preventing the officer from getting a search warrant. Because there is no exigency requirement in this context, the warrantless search of an automobile will be upheld so long as there was probable cause to suspect it contained contraband, even if the driver was arrested and handcuffed and the keys were taken from him before the car was searched.

Finally, the Court found that the statements made by appellant were properly admitted. The statements made by him were custodial, but were not in response to any questioning by the officers.

Right to Trial By Jury

Ealey v. State, A11A0050 (7/14/2011)

Appellant was convicted of two counts of VGCSA. He contended that his waiver of jury trial was coerced and involuntary. The Court agreed and reversed. The record revealed a motion to suppress was heard right before trial. After the trial court denied the motion, defense counsel told the court that the defendant wanted a bench trial. While discussing other pre-trial matters, appellant then told the judge he misunderstood and wanted a jury trial. A long colloquy ensued, but essentially, the trial court seemed to promise appellant the minimum sentence and a supersedeas bond on appeal if he chose a bench trial and that if he chose a jury trial, it was possible he might get the maximum sentence. The trial court never threatened appellant, but essentially, it was a promise of the minimum on a bench trial conviction and a "who knows" on a conviction after a jury trial. Appellant chose the bench trial. The trial court convicted him and gave him the promised minimum sentence.

The Court stated that this precise issue appears to be one of first impression. Analogizing these facts to cases involving trial court involvement in plea negotiations, the Court found that the waiver was involuntary. Here, the trial court went beyond ascertaining whether appellant's waiver of the constitutional right to a jury trial was knowing and intelligent, and involved itself in a process that should have been between appellant and his attorney. The court participated in the decision-making process, invoking "the force and majesty of the judiciary." Viewing the comments made by the trial court in the context of the circumstances under which appellant made his decision, the Court concluded that there was a substantial likelihood that appellant was unduly influenced by the court's comments to waive his right to a jury trial. Because a harmless error analysis cannot be applied to the waiver of a jury trial,

reversal was required. However, appellant may be retried.

Search & Seizure; Thermal Imaging

Brundige v. State, A11A0165 (7/14/2011)

Appellant was charged with manufacturing marijuana and other charges. The Court granted his interlocutory appeal from the denial of his motion to suppress two search warrants. The evidence showed that officers looked in appellant's garbage can and found marijuana in a size consistent with a grow operation. The officers used that information to obtain a search warrant in order to use an electronic thermal detection and imaging device which was used to detect heat loss patterns, including "hot spots" that are consistent with the use of high-intensity lights to grow marijuana indoors. The officers trained the device at the garage door of the home and detected "hot spots." A copy of the warrant was delivered to the residence the next day or the day after. A second warrant was then obtained based on the thermal imaging and the evidence found in the garbage can. Marijuana was found inside the residence.

Appellant argued that anomalous heat loss is not "tangible evidence" and contended that, because OCGA § 17-5-21 (a) (5) authorizes a search warrant only for tangible evidence, the first search warrant was not authorized under that Code section and the second warrant was thus illegal as fruit of the poisonous tree. The Court disagreed. Under *Kyllo v. United States*, 533 U. S. 27, 38-40 (III) (2001), government agents must obtain a search warrant before aiming a thermal scanning device at a residence to detect relative amounts of heat emanating from the home. Georgia's search warrant statute provides, inter alia, that an appropriate judicial officer "may issue a search warrant for the seizure of . . . [a]ny item, substance, object, thing, or matter, other than the private papers of any person, which is *tangible evidence* of the commission of the crime for which probable cause is shown." OCGA § 17-5-21 (a) (5) (emphasis supplied). The Court concluded heat radiating from a building is not simply testimony or verbal evidence; it is definable and measurable; it is real and substantial, rather than imaginary; it is capable of being clearly grasped by the mind; and it can, at least in some cases, be perceived through the sense of touch. Therefore, heat loss that is measured and recorded by a thermal scanner fits within the scope of "tangible evidence" as that term is used in OCGA § 17-5-21 (a) (5).

Appellant also contended that evidence from the first warrant should have been suppressed because of the failure of the officer who executed the search warrant to contemporaneously leave a copy either with someone or in a conspicuous place on the premises, as required by OCGA § 17-5-25. The Court found that as with other statutory warrant requirements, a violation of OCGA § 17-5-25 does not necessarily authorize evidence suppression. On the contrary, OCGA § 17-5-31 provides that "[n] o search warrant shall be quashed or evidence suppressed because of a technical irregularity not affecting the substantial rights of the accused." Therefore, absent some showing of prejudice by the defendant, the failure to leave a signed and dated copy of the warrant is an omission that is technical in nature and not grounds for suppression. Here, the record showed that there was merely a one- or two-day delay after the execution of the first warrant before the officer left a copy at the residence. Further, the only thing seized in the execution of the first search warrant was a thermal image, and not the personal property of any resident of the house. Appellant failed to specify any harm that he suffered as a result of the officer's delay in complying with OCGA § 17-5-25. Under these circumstances, the Court concluded, appellant did not show that he was prejudiced by the short delay in his receipt of a copy of the first warrant. Consequently, the trial court did not err in denying his motion to suppress on this basis.

Finally, appellant contended that he had a subjective reasonable expectation of privacy in his garbage because a local ordinance which prohibits the unauthorized rummaging through trash in his community shows that society accepts his expectation of privacy as objectively reasonable. The Court again disagreed. In reviewing the ordinance, the Court determined that even if it protects garbage placed for collection on county streets from snoops, thieves, and vandals, such trash is still subject to inspection by county employees. Since nothing in the record showed that appellant made any special arrangement for the disposition of his garbage inviolate, but rather, placed his garbage in a can and put the can near the curb so that the trash collector would take the garbage and dispose of it, the trial court did not err in denying his motion to suppress.

Merger

Garland v. State A11A0431 (7/14/2011)

Appellant was convicted of burglary, attempted armed robbery, aggravated assault, and attempted possession of marijuana. This case was an appeal after remand for claims of ineffective assistance of counsel to be heard. *Garland v. State*, 283 Ga. App. 622 (2007). Nevertheless, appellant also contended that the aggravated assault count should have been merged under OCGA § 16-1-6 into the attempted armed robbery count. The Court found that consideration of this contention is required even though appellant failed to raise the claim in the trial court, or to challenge the sentence for aggravated assault on appeal when the case was first before this court. The indictment alleged that aggravated assault had been committed by "an assault upon [the homeowner], with a certain firearm, a deadly weapon." Another count in the indictment alleged that appellant, with the intent to commit armed robbery, attempted to take marijuana from the homeowner "by use of an offensive weapon," a gun, asserting further that appellant had performed acts constituting a substantial step toward commission of armed robbery: breaking into a residence, "pull[ing]" a firearm, and demanding drugs.

Applying the *Drinkard v. Walker* test, the Court found that the aggravated assault count should have been merged into the attempted armed robbery count. Although the attempted armed robbery statutory provision required proof of a substantial step of a taking, which was not a required showing under the applicable aggravated assault provision, the latter provision did not require proof of any fact that was not also required to prove the attempted armed robbery, as that offense could have been proved under the indictment in this case. Thus, those convictions and the sentences entered for them were vacated and the case remanded to the trial court for resentencing.

Aggravated Stalking

Keaton v. State, A11A0566 (7/14/2011)

Appellant, a police officer, was convicted of rape, aggravated assault, burglary, aggravat-

ed stalking and kidnapping in connection with an incident involving his estranged wife. He contended that the evidence was insufficient to support his conviction for aggravated stalking. A person commits the offense of aggravated stalking when he or she, in violation of an order, a peace bond, an injunction or a probation, parole or bond condition "*in effect prohibiting the behavior described in this subsection*, follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person." OCGA §16-5-91 (a) (Emphasis supplied.). The evidence showed that an interim order in the divorce proceedings relied upon by the State in this case provided, in pertinent part, that "the [victim] is awarded the exclusive use and possession of the marital home of the parties and [appellant] is enjoined from going to the home except to exercise his visitation rights with the children of the parties." Appellant went to the residence to speak with his wife. She refused him entry. He then came in through a back window and attacked her.

A divided Court (three justices concurring; three concurring in judgment only; and one dissenting) found that the interim order only kept appellant away from a place, not a person. But, the Court reasoned, Georgia's stalking laws were drafted to protect people not places. The trial court previously had issued an order that prohibited "contact" with the victim, and that order in effect prohibited the behavior proscribed under the stalking laws, but that order had expired. Although the interim order may have incidentally kept appellant from face-to-face contact with the victim while she was at home, except for periods connected to visitation, it imposed no further limitations on his contact with the victim. So long as he did not physically go to the marital home, he could call the victim at any time, could be anywhere near or in sight of the marital home, or could use any other method to harass and intimidate the victim inside the home or outside the home without violating the order. And significantly, appellant would violate the order even if he went to the home when his wife was not there. Thus, the Court concluded, it could not say that an order that limited appellant's presence at the marital home, but otherwise allowed unfettered contact with the victim, "in effect" prohibited him from engaging in the behavior prohibited by the statute. His aggravated stalking conviction was therefore reversed.

Defendant's State of Mind; Violent Acts of Victim

Hodges v. State, A11A0720 (7/14/2011)

Appellant was convicted of misdemeanor involuntary manslaughter as a lesser included offense of felony murder, aggravated assault, and possession of a firearm during the assault. The evidence showed the victim was a friend of the appellant who allegedly had a violent past and was looking to use force to collect on debts owed to the victim. Appellant allegedly shot the victim when the victim came downstairs with a large knife and "went berserk." The shooting occurred in the home of appellant after appellant let the victim stay with him the night before. Prior to trial, appellant sought to introduce evidence that the victim had previously shot at a woman and her daughter to prove his state of mind at the time he shot the victim. The court held that appellant's state of mind testimony was inadmissible because appellant did not present independent evidence the victim had shot at the friend and her daughter. Appellant's statement regarding the victim's attack on the wife and daughter was therefore hearsay and inadmissible.

Appellant argued that the trial court erred by excluding evidence regarding his state of mind when he shot the victim. Because the exclusion of this evidence was harmful error, the Court reversed. The Court found that appellant's entire defense was justification. He wanted to testify that he shot the victim because he was afraid of him. One reason he was afraid was because, in addition to knowing about the victim's other acts of violence, he thought the victim had shot at a woman and her daughter less than a year before. That belief, combined with the victim's erratic behavior, explained appellant's state of mind. His testimony in this regard was not hearsay, as it was not offered to prove that the victim shot these other people but to explain his conduct. Therefore, it was original, admissible, competent evidence of his state of mind which went to the heart of the matter being tried.

Moreover, cases addressing the procedures and evidence required to establish the victim's state of mind or character or prior acts or propensity toward violence do not answer the questions in this case, as they do not address the evidence in terms of establishing the defendant's state of mind. The Court found that there is a difference between evidence offered to prove a victim's state of mind, prior acts of violence, or reputation for violence and evidence offered to prove the defendant's state of mind, a difference that is not clearly explained in our State's case law, leaving the trial court's task in ruling on these issues a difficult one.

Here, appellant claimed he shot the victim because he was defending himself. Under our law, he was justified in using force against the victim that was likely to cause death or great bodily harm if he reasonably believed such force was necessary to defend himself against death or great bodily injury. OCGA § 16-3-21 (a). If he was only justified in using deadly force if he "reasonably believed" he had to defend himself against deadly force, he must be permitted to introduce original evidence explaining the basis for his reasonable belief. The evidence excluded from this case was not hearsay, but original evidence which appellant should have been allowed to introduce to explain his state of mind. Thus, the trial court erred in excluding it.

Video Recordings; OCGA § 16-11-62

State v. Madison A11A0593 (7/14/2011)

Madison was charged with child molestation and related crimes. He filed a motion to suppress. The evidence showed that the victim made two video recordings of interactions between herself and Madison, an attorney, in his law office and without his consent. At the motion hearing, the parties stipulated that the videos were made in a private place, Madison's office, without his consent. The trial court entered an order granting the motion to suppress the video recordings because (1) the recorded activity occurred in a private place and (2) Madison did not consent to being recorded. The State appealed.

The State contended that OCGA § 16-11-62 (2) must be read in conjunction with OCGA §16-11-66 (a), which would render the video recordings admissible because the victim was a participant. OCGA §16-11-62 (2) provides that "[i]t shall be unlawful for [a]ny person, through the use of any device, without the consent of all persons observed, to observe, photograph, or record the activities

of another which occur in any private place and out of public view," Relying on *Gavin v. State*, 292 Ga. App. 402 (2008), the Court held that trial court properly held that the evidence was inadmissible because Madison did not consent. However, the Court was not willing to state that *Gavin* stands for the proposition that there is no participant exception under §16-11-62. In fact, the Court noted that nothing in §16-11-62 shall prohibit a person from intercepting a wire, oral, or electronic communication where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception. In fact, the Court commented, "if the video recordings made by the victim had actually captured audible oral communications or inaudible but otherwise discernible oral communications (e.g. , in which the speaker's words could be discerned from reading his or her lips), and if the State were seeking to admit such communications, this might require a different result. However, we leave the consideration of this question for another day or for our General Assembly." The State also contended that Madison's office was not a 'private place" as contemplated by the statute. However, the Court noted that because the State stipulated in the trial court that the office was a "private place" it was prohibited from arguing otherwise on appeal.