

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING AUGUST 8, 2014

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## THIS WEEK:

- **Continuance; Sentencing**
- **Right of Self-Representation; *Faretta v. California***
- **Sentencing; O.C.G.A. § 17-10-6.2(c)(1)(A)-(F)**
- **Ineffective Assistance of Counsel; Prosecutorial Misconduct**
- **Motions to Withdraw Guilty Plea; Timeliness of Motion**
- **Probation Revocation; Sentencing**
- **Civil In Rem Forfeitures; RICO**

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### ***Continuance; Sentencing***

*Murray v. State, A14A0715 (7/10/14)*

Appellant was convicted of burglary. The evidence showed that he broke into a vacant house that had been recently sold and was caught removing a light fixture. He argued that the trial court erred in denying his motion for a continuance after the State violated O.C.G.A. § 17-16-8(a) by giving him the name of a witness less than ten days before trial. The record showed that the State gave appellant the name and contact information of the real estate broker four days before the trial started. Appellant's counsel orally moved for a continuance at the start of the trial, but the trial court denied the motion, telling counsel that she would have a chance to talk to the witness prior to her testimony. The State later called the broker to the witness stand. Before she testified, a bench conference was held at which appellant's counsel indicated that she had not yet talked to the witness. The trial court responded that the State could not prevent her from speaking to any witness, and appellant's counsel agreed. However, counsel

did not request an opportunity to speak with the witness or seek any other relief. The bench conference ended and the witness then testified without objection.

Under O.C.G.A. § 17-16-8(a), the prosecutor is required to furnish to defense counsel a witness list not later than ten days before trial. The purpose of the statute is to prevent a defendant from being surprised at trial by a witness he has not had an opportunity to interview. O.C.G.A. § 17-16-6 sets forth the remedies for a defendant upon the State's failure to comply with O.C.G.A. § 17-16-8, providing that the court may order the State to permit the discovery or inspection, interview of the witness, grant a continuance, or, upon a showing of prejudice and bad faith, prohibit the State from introducing the evidence not disclosed or presenting the witness not disclosed, or may enter such other order as it deems just under the circumstances. Under this statute, there is not an exclusive remedy for a defendant or a fatal consequence to the State for failure to comply with the discovery mandates. Instead, the trial court has the discretion to use its own judgment.

Here, the Court found, the trial court did not abuse its discretion in denying a continuance and instead ruling that appellant would have an opportunity to interview the witness. Thereafter, appellant acquiesced in the lack of an interview prior to the witness' testimony by failing to object or request additional relief. The Court held, therefore, that appellant cannot complain of a ruling his own procedure or conduct aided in causing. Moreover, the Court stated, even if it were to presume error in the denial of a continuance, appellant had shown no harm. To be entitled to a new trial based upon the denial of a

motion for a continuance, appellant had the burden of showing that he was harmed by that denial and here, appellant made no proffer of evidence that he could have introduced had a continuance been granted, nor had he otherwise shown that a continuance would have benefitted him.

Appellant also contended that the trial court erroneously considered his prior guilty pleas in sentencing him as a recidivist because the pleas were not willing and voluntary. The Court stated that when a defendant collaterally attacks the validity of a prior guilty plea being used by the State for recidivist sentencing in a subsequent proceeding, the burden is on the State to prove both the existence of the prior guilty pleas and that the defendant was represented by counsel in all felony cases. Upon such a showing, the presumption of regularity is then applied and the burden shifts to the defendant to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the plea. A defendant can attempt to meet his burden of production with a transcript, with testimony regarding the taking of the plea, or with other affirmative evidence. A silent record or the mere naked assertion by an accused that his prior counseled plea was not made knowingly and intelligently is insufficient. If the defendant is able to present evidence that a constitutional infirmity exists, the burden of proving the constitutionality of the plea then shifts back to the State.

The Court found that at the sentencing hearing, the State met its initial burden by tendering certified copies of appellant's prior guilty pleas. However, when appellant's counsel indicated that she wanted to attack the prior pleas as having not been knowingly and willingly entered, the trial court did not allow it, telling counsel that "[t]his is not the time or place to do that" and that appellant would have "to go through habeas corpus process" to attack the prior pleas. The Court found that the trial court clearly erred in refusing to allow appellant to challenge the validity of his prior guilty pleas, since, after the State met its burden, he had the burden to produce some affirmative evidence showing an infringement of his rights or a procedural irregularity in the taking of the pleas. Nevertheless, after the trial court's erroneous decision at the sentencing hearing, appellant did not object and made no attempt to proffer the affirmative evidence he

would have introduced if allowed. Moreover, the Court noted, at the motion for new trial, the court asked appellant's counsel to show the affirmative evidence she would have presented at the sentencing hearing. The only evidence she mentioned was that she would have had some of his family members testify about his limited education. She further conceded at the hearing that appellant had been represented by counsel at his pleas. And the Court found, appellant's brief failed to identify any evidence showing an infringement of his rights in the taking of his prior guilty pleas. Consequently, even though the trial court clearly erred at the sentencing hearing by telling appellant that he could not challenge the voluntariness of his guilty pleas at that hearing, such error was not reversible since appellant failed to point to any affirmative evidence showing an irregularity with any of the pleas.

### **Right of Self-Representation; Faretta v. California**

*Bettis v. State, A14A0462 (7/10/14)*

Appellant was convicted of two counts of aggravated assault, and one count each of criminal attempt to commit rape, kidnapping, and possession of a knife during the commission of a crime. Appellant contended that the trial court erred in summarily denying his constitutional right to self-representation without following the procedures contemplated by *Faretta v. California*, 422 U. S. 806 (1975), and its progeny. The State argued that appellant waived the right to represent himself. The Court stated that it was "constrained to agree with [appellant]."

Criminal defendants are guaranteed the right to self-representation under the federal and state constitutions. To represent one's self, a defendant must knowingly and intelligently waive the constitutional right to counsel. *Faretta* requires that the trial court apprise the defendant of the dangers and disadvantages inherent in representing himself so that the record will establish that he knows what he is doing and his choice is made with eyes open. Further, to invoke the right of self-representation, the defendant must make an unequivocal assertion of his right to represent himself prior to the commencement of his trial. Such a request should be followed by a hearing to ensure that the defendant knowingly and intelligently waives the right

to counsel and understands the disadvantages of self-representation.

Here, the Court found, appellant "flatly requested that the trial court allow him to represent himself." The record showed, consistent with this request, that defense counsel, the prosecutor, and the trial court all understood that appellant had asserted his right to self-representation. After appellant unequivocally asserted his right to self-representation, the trial court did not, consistent with the procedure set forth in *Faretta*, apprise appellant of the dangers and disadvantages of proceeding pro se. Rather, the trial court summarily denied appellant's request because "it's always best to be represented by an attorney who is trained and experienced in these matters." The Court stated that while it might agree with the trial court's opinion, whether it was best for appellant to be represented by an attorney was of no consequence. The test of whether a defendant has validly waived his right to be represented by counsel is not whether the accused is capable of good lawyering—but whether he knowingly and intelligently waives his right to counsel. Accordingly, because the record showed that appellant both wished to make and was mentally competent to make a knowing and intelligent waiver of his right to counsel, and the trial court employed the wrong standard for making this determination, the trial court erred.

### **Sentencing; O.C.G.A. § 17-10-6.2(c)(1)(A)-(F)**

*State v. Crossen, A14A0008 (7/11/14)*

Crossen pled guilty to six counts of sexual exploitation of a child, O.C.G.A. § 16-12-100(b), one count of sodomy, O.C.G.A. § 16-6-2(a)(1), six counts of misdemeanor dissemination of pornography to a minor, O.C.G.A. § 16-12-103(a), and one count of interference with custody, O.C.G.A. § 16-5-45(b). After the presentence investigation report was complete, the trial court held a sentencing hearing, during which the State presented no aggravating factors or victim impact testimony. Crossen presented several character witnesses, and also testified. At the end of the hearing, the trial court found that O.C.G.A. § 17-10-6.2 required him to sentence Crossen to serve no less than the minimum statutory sentence on the sexual

exploitation of children and sodomy counts, and sentenced him to seven years to serve five in custody on each of the six sexual exploitation of children counts and on the sodomy count, twelve months to serve on each of the six pornography dissemination counts, and one month to serve on the interference with custody count, all to be served concurrently. Thereafter, however, the trial court held a second sentencing hearing two weeks later and under O.C.G.A. § 17-10-6.2(c)(1)(A)-(F), the court downwardly deviated from the minimum maximum sentences by reducing his sentence on the six charges of sexual exploitation from seven years with five to serve in custody to five years with two to serve in custody. In its order approving the deviation, the trial court explained its reasoning and found as fact that there was no evidence of any of the factors listed in O.C.G.A. § 17-10-6.2(c)(1)(A)-(F) that would prohibit it from exercising its discretion except as to the sodomy count. The State appealed.

The Court found that under the statutory scheme set forth in O.C.G.A. § 17-10-6.2, a trial court is prohibited from probating, suspending, staying, deferring, or withholding any of the mandatory term of imprisonment stated for any of the specified offenses. But, the statute permits, at the trial court's discretion, a deviation from the mandatory minimum provided that six factors are found. O.C.G.A. § 17-10-6.2(c)(1)(A)-(F). Thus, the possibility of a less stringent sentence is permitted if Crossen had no prior conviction of any of the specified offenses, did not use a deadly weapon during the offense, there was no evidence of a relevant similar transaction, the victim did not generally physical harm during the crime; there was no transportation of the victim; and the victim was not physically restrained during the offense. To that end, in a presentence hearing, the trial court takes into consideration all aspects of the crime, including the past criminal record or lack thereof to determine a sentence. Thus, in these circumstances, if the trial court determines that the requirements of O.C.G.A. § 17-6-6.2(c)(1)(A)-(F) have been satisfied after the evidence was presented, then it could consider a downward deviation from the mandatory minimum. O.C.G.A. § 17-6-6.2(c)(1) does not require a trial court to procure evidence that is not tendered, and the court certainly cannot force a party to put forth evidence. The

statute permits the trial court in consideration of the evidence presented and in the exercise of its discretion to downwardly deviate if the statutory factors are absent. However, the statute is silent in regard as to who carries the burden of establishing the absence of the factors that would permit a downward departure. This silence creates an ambiguity, and where the language in a criminal statute is ambiguous, it must be construed in favor of the defendant. In other words, it is the State's burden.

Here, the Court found, the trial court did not abuse its discretion in re-sentencing Crossen. In so holding, the Court noted that although fully aware of the trial court's intention to reconsider the O.C.G.A. § 17-10-6.2 provisions at the second sentencing hearing, the State presented absolutely no evidence about the existence of any statutory factors that would prohibit the court from deviating downward on Crossen's sentence.

### ***Ineffective Assistance of Counsel; Prosecutorial Misconduct***

*Mowoe v. State, A14A0595 (7/10/14)*

Appellant was convicted of rape. The victim testified that appellant earlier in the day asked her to charge his cellphone. Later, he forced his way into her apartment, raped her and beat her. When her roommates returned home shortly thereafter, she fled to the bathroom crying. Appellant then took his phone and left the apartment.

Appellant testified that the sex was consensual and that afterwards, his girlfriend, LaToya Wise, called him and he lied and told her he was hanging out with friends. This upset the victim, who ran into the bathroom crying. Appellant explained the victim's bruising by stating that the victim was dancing on top of a car in the apartment complex in which they both lived the previous evening. She fell off the car and "hit the ground, literally." Appellant's girlfriend did not testify but was apparently in the gallery.

During closing arguments, the prosecutor argued: "And this is over a phone call, because he said, ['shhh.'] You don't go through all this over, ['shhh.'] You go up and tell Ms. LaToya Wise, ['Hey,] Ms. Wise, I banged your boyfriend last night.['] Ms. Wise is right here in this courtroom. Ms. Wise, will you stand up,

please?" At that point, an unidentified person stood up in the gallery, and the prosecutor continued, "Why not bring her to the stand, if I'm not telling the truth? Go up and knock on her door." Appellant argued this procedure was improper and that his counsel's failure to object "directly and misleadingly undermined [his] credibility, and at the same time wrongly shored up [the victim's] credibility." The State argued, however, that its demonstration did not constitute any additional factual evidence, but merely showed that Wise was present.

The Court stated that the fact that Wise did not testify was of record and was a proper subject for the prosecutor's argument. And a prosecuting attorney is able to comment on a criminal defendant's failure to produce certain witnesses when the defendant testifies to the existence of a witness with knowledge of material and relevant facts, and that person does not testify at trial.

But the prosecution is not entitled to back up such commentary with evidence not previously introduced at trial. Having Wise stand up during closing argument demonstrated to the jury that she was readily available to testify and could have been called as a witness in the case, facts that were not presented during the evidentiary portion of the trial. This tactic, after the close of evidence, gave appellant no chance to rebut the prosecutor's demonstration with evidence showing the defense's efforts to contact Wise before and during trial.

The Court also added that the prosecution could easily have used a similar demonstration at trial during the cross-examination of appellant, but if the State had done so, appellant could have asked for the opportunity to rebut it by putting Wise on the stand. Alternatively, the State could have made the same point in other ways. In fact, the prosecutor asked appellant if he knew where to find a number of people, whom he had identified as having knowledge of the events on or about the day of the incident. And although earlier in the cross-examination, the prosecutor asked appellant to identify Wise, by name, as his girlfriend, he did not ask him if he knew where to find her. Instead, the prosecutor chose to wait until the defense could not counter his presentation of Wise with evidence of its own. Thus, the Court found, this demonstration should have taken place during trial or not at all.

Moreover, the Court noted, in our criminal justice system, the district attorney represents the people of the State in prosecuting individuals who have been charged with violating our State's criminal laws. The responsibility of a public prosecutor differs from that of the usual advocate; his duty is to seek justice, not merely to convict. The failure of appellant's trial counsel to object to this violation of appellant's Sixth Amendment right to confrontation prevented the trial court from taking any corrective action and waived the issue for appellate review. Thus, the Court concluded, his trial counsel was deficient in failing to object to the prosecution's demonstration and in failing to preserve his appellate rights. And, this failure did not arise out of a planned trial strategy but rather occurred simply because counsel was shocked at Wise's appearance during closing argument.

Finally, the Court found, that because the evidence was not overwhelming the error was not harmless. The prosecution's production of Wise at the trial suggested that she was ready, willing and able to testify, but that the defense made the conscious choice not to call her as a witness, thus raising an inference that her testimony would have been unfavorable to the defense. But, Wise testified at the motion for new trial and could have corroborated appellant's version of events and the bruising on appellant. Therefore, there was a reasonable probability that the demonstration affected the jury's consideration of the witnesses' credibility and thus affected the outcome at trial.

### **Motions to Withdraw Guilty Plea; Timeliness of Motion**

*Young v. State, A14A0540 (7/9/14)*

Appellant pled guilty to robbery during the May term of Court. The Court orally sentenced him at that time. However, the actual sentence was not filed until the following August term of court. Appellant filed a motion to withdraw his plea during the August term. The trial court dismissed the motion as untimely.

The Court stated that an oral declaration as to what the sentence shall be is not the sentence of the court; the sentence signed by the judge is. Indeed, the criminal proceedings against appellant were still pending in the

trial court until such time as his sentence was entered in writing and became final. Because the judge did not sign and enter the written sentence until the end of August, appellant was not sentenced pursuant to the guilty plea until the August term of court, which began on the first Monday of that month. It is well-settled that a motion to withdraw a guilty plea must be filed within the same term of court as the sentence entered on the guilty plea. Therefore, appellant's motion to withdraw his guilty plea was timely in that it was filed during the same term of court that the sentence was entered, and the trial court therefore had jurisdiction to entertain the motion. Accordingly, the trial court therefore erred in dismissing the motion to withdraw his guilty plea on the basis that it lacked jurisdiction to rule on the motion.

### **Probation Revocation; Sentencing**

*Hoosline v. State, A14A0570 (7/10/14)*

In 2007, appellant entered a negotiated plea to possession of cocaine under O.C.G.A. § 16-13-2(a), and she was sentenced to confinement for a period of five years to be served on probation. In 2011, following appellant's failure to comply with the terms of her probation, the trial court revoked her probation and sentenced her to ten years, with five months to serve. She contended that the trial court erred by resentencing her to a term longer than her initial five-year sentence. The Court agreed and reversed for resentencing.

The Court noted that O.C.G.A. § 16-13-2(a) provides that in certain drug cases, a trial "court may—without entering a judgment of guilt [—] defer further proceedings and place [the defendant] on probation." Under the statute, the defendant is not sentenced at the time the plea is entered, but is instead placed on probation. If the defendant fulfills the terms of her probation, she will be discharged, without an adjudication of guilt, and the proceedings against her will be dismissed. If the defendant violates the terms of her probation, however, the trial court may enter an adjudication of guilt and sentence the defendant.

But here, the Court found, despite accepting appellant's plea under O.C.G.A. § 16-13-2(a), and instead of placing her on probation and deferring sentencing as contemplated by that Code section, the trial court *adjudicated* her guilty and sentenced

her to five years to be served on probation. Once a defendant begins serving her sentence, that sentence can only be increased through resentencing where (a) such resentencing is allowed by law, and (b) the defendant has no reasonable expectation in the finality of the original sentence. Absent these circumstances, the resentencing constitutes a double punishment that runs afoul of the Fifth Amendment prohibition against double jeopardy. If the resentencing is not legislatively authorized or the defendant has a reasonable expectation in the finality of her sentence, the trial court may not increase the defendant's sentence once she has begun serving it.

Thus, the Court determined, although O.C.G.A. § 16-13-2 authorizes a trial court to place a defendant on probation and thereafter, upon proof that she failed to comply with the terms of probation, adjudicate the defendant guilty and sentence her as provided by law, the statute does not authorize a trial court to sentence a defendant and then "resentence" her more severely, as the trial court did here. Because appellant was sentenced in 2007 and had begun serving her sentence, the trial court erred by sentencing her again in 2011. Therefore, the Court vacated appellant's sentence and remanded for proceedings consistent with its opinion.

### **Civil In Rem Forfeitures; RICO**

*Ali v. State of Ga., A14A0047; A14A0048; A14A0070; A14A0410 (7/11/14)*

The State filed four civil in rem RICO forfeiture actions under O.C.G.A. § 16-14-7 following a lengthy federal undercover operation involving the trafficking of untaxed cigarettes which culminated in a final transaction during which large sums of currency were seized. Appellants filed pleas in bar and motions to dismiss the forfeiture complaints, arguing that the complaints were not actually civil proceedings against the money but were criminal proceedings against the appellants personally that were barred by previous criminal prosecutions arising from the same transactions. The trial court denied the motions, and the Court granted the appellants' applications for interlocutory review.

Appellants argued that the currency itself must be "guilty" of the RICO offense, and that construing O.C.G.A. § 16-14-7(a)

and O.C.G.A. § 16-14-3(8)(A) together, the State had to allege and prove that the currency subject to forfeiture was “used in the course of engaging in at least two (2) acts of racketeering activity.” Here, they argued, the State did not even allege that the subject currency was involved in more than one act of racketeering activity, which was the transaction during which it was confiscated.

First, the Court noted, it did not believe that O.C.G.A. § 16-14-7 requires the State to show that the bills seized were the exact bills used in previous alleged acts. The Court found that it is sufficient for the State to allege that the same type of fungible property was used in a pattern racketeering activity as was seized. Second, the Georgia RICO Act provides that the “pattern of racketeering activity” means engaging in at least two incidents of racketeering activity. O.C.G.A. § 16-14-3(8)(A). And further, “racketeering activity” is defined to mean the commission of a crime in any of a specified categories of offenses, including “[a]ny conduct defined as ‘racketeering activity’ under [18 USCS §§ 2431-2346 (relating to trafficking in contraband cigarettes)].” O.C.G.A. § 16-14-3(9)(A)(xxix). These categories of offenses are also known as the predicate offenses. Thus, contrary to the appellants’ contention, the Georgia RICO Act contemplates the performance of two or more predicate offenses to establish a pattern of racketeering, rather than requiring that the object of the forfeiture committed two or more predicate offenses.

Here, the Court found, appellants were alleged to have committed federal RICO crimes relating to trafficking in contraband cigarettes, an allegation that is set forth under the list of predicate offenses in O.C.G.A. § 16-14-3(9)(A)(xxix) and conduct that is defined as “racketeering activity” by O.C.G.A. § 16-14-4(A). Additionally, these offenses were alleged to have occurred at least twice in that appellants committed the predicate offenses—trafficking in contraband cigarettes—multiple times. While the forfeiture complaints alleged that appellants committed numerous criminal transactions involving contraband cigarettes, a civil in rem forfeiture depends not upon a property owner’s culpability but, instead, upon the property’s being connected to some criminal act. And for RICO purposes, the “pattern of racketeering activity” means engaging in at least two incidents of

racketeering activity. O.C.G.A. § 16-14-3(8)(A). Moreover, in an in rem proceeding, unlike an in personam proceeding, the property itself can be seized merely because it has been used by someone, not necessarily just the owner, in connection with a criminal enterprise. Thus, despite the appellants’ contention otherwise, any “punishment” in this forfeiture proceeding was against the property, not the owner as a criminal defendant. It in no way equates to a criminal prosecution or to punishment for a criminal offense by the defendant or owner of the property forfeited, and the fact that the appellants may feel they are being punished by a civil forfeiture does not render the civil forfeiture a proceeding putting them in jeopardy. Accordingly, the trial court was authorized to conclude that the RICO forfeiture actions were not criminal in personam actions and therefore, did not violate any constitutional or statutory provisions prohibiting double jeopardy.