



CaseLaw Update

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CaseLaw This Week

Week Ending February 18, 2005

- **Evidence – Character**
- **Right to Remain Silent**
- **Sentencing**

Evidence – Character

Lewis v. State, S04A2006, 05 FCDR 355
(02/07/05)

The defendant appealed his conviction for malice murder resulting in a life sentence. The defendant was convicted of shooting the victim twice at point-blank range with a rifle. At trial the defense put up a witness who testified as to facts he witnessed after the shooting. On cross-examination the State asked the witness whether he was aware that the defendant had admitted to shooting the victim twice. The defense objected on the grounds that the State's question violated OCGA § 17-8-75 which prevents counsel from making prejudicial statements about matters not in evidence while in the presence of the jury. The State argued that the witness was a character witness and therefore the question was proper because it is permissible for the State to explore specific bad acts on cross-examination to test the witness' knowledge. The state further argued that the question was based upon admissible evidence that although not ultimately admitted, provided a good-faith basis for the question. The Supreme Court held that the witness was not a character witness, he was a fact witness and therefore the State's question was improper under OCGA § 17-8-75 and the trial court abused its discretion

in allowing the question. Because the Court found that the evidence of the defendant's guilt was overwhelming and therefore it was unlikely that the error contributed to the verdict, the verdict was affirmed.

Right to Remain Silent

Lewis v. State, S04A2006, 05 FCDR 355
(02/07/05)

The defendant appealed his conviction for malice murder resulting in a life sentence. The defendant alleged that during closing arguments, the prosecutor asked the jury twice to consider why the defendant never told the investigating officers he was innocent, which amounted to an improper comment on the defendant's right to remain silent. The Supreme Court held that the prosecutor's comments were improper but that the defendant had failed to properly preserve the error. Judgment affirmed.

Sentencing

Woods v. State, S05A0448, 05 FCDR 353
(02/07/05)

The defendant appealed his conviction for criminal attempt to possess marijuana with intent to distribute. The defendant filed the motion that resulted in the instant appeal after verdict but before sentencing in an effort to have OCGA § 16-13-33 declared unconstitutional. The defendant also asserted that the sentencing scheme under

OCGA § 16-13-33 violates the rule of lenity. After disposing of the constitutional challenge as having been abandoned, the Court reached the lenity argument. The defendant's argument centered around the fact that OCGA § 16-4-6 prescribes the maximum penalty for attempt as one-half of the maximum penalty for the underlying crime which was the basis of the attempt, while OCGA § 16-13-33 provides for a maximum sentence prescribed for the Georgia Controlled Substances Act offense, the commission of which was the object of the attempt or conspiracy. The defendant contended that the rule of lenity requires that where there is uncertainty as to which penal clause is applicable; the accused is entitled to sentencing under the lesser of the two penalties. The Supreme Court found that the two sentencing statutes are mutually exclusive and no certainty exists as to which one applies. The provisions of OCGA § 16-13-33 makes the provisions of OCGA § 16-4-6 inapplicable to prosecutions falling under the GCSA. **“Where a crime is penalized by a special law, the general provisions of the penal code are not applicable.”** Sentencing affirmed.