

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JULY 28, 2006

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## THIS WEEK:

- **Closing Argument– Effective Assistance of Counsel**
- **Search and Seizure– Traffic Stops**
- **Fruits of Defendant's Voluntary Statement**
- **Jury Charges**
- **Juveniles– Restitution**

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### *Closing Argument – Effective Assistance of Counsel*

Hardeman v. State, S06G0019 (07/13/2006)

The appellant was convicted of a number of crimes including kidnapping with bodily injury (hereafter KBI). Because KBI is a capital offense, the appellant was entitled to two hours of closing argument rather than one hour. However, at trial, appellant's attorney did not object when the trial judge limited his closing to one hour. Appellant now appeals, claiming ineffective assistance of counsel.

To establish ineffective assistance, a defendant must show 1) that his trial counsel's performance was deficient, and 2) but for the deficient performance, there is a reasonable probability the trial would have ended differently. Strickland v. Washington, 466 U.S. 668 (1984).

The Georgia Supreme Court found that the trial attorney was defending a client charged with a capital offense and was unaware that, in such a case, defense counsel is entitled to two hours of closing argument. Therefore, trial counsel waived the right to a two hour closing argument as a result of inadequate preparation. The Court held that the appellant

had proven the deficient performance prong of the test.

However, appellant must also show that his lawyer's poor performance prejudiced him to the extent that "there is a reasonable probability that the result of the proceedings would have been different." In some cases, prejudice is "presumed," but in this case appellant had to show a reasonable probability that a two hour closing argument would have changed the outcome of the trial. At the motion for new trial, trial counsel testified that "he could have used more time." However, counsel did not elaborate on how he would have used the additional time. In this case, there was no indication that counsel failed to argue a critical point or that the argument presented, as a direct result of the time limit, was not as effective as it would have been. Furthermore, the case had no complex issues. The victim positively identified appellant as one of her attackers, both pre-trial and in court. The Court held that the appellant failed to establish the second prong of the test and affirmed the judgment of the lower court.

### *Search and Seizure– Traffic Stops*

Salmeron v. State, S0561394 (07/13/06)

An officer observed the appellant following another car too closely and noticed that one of appellant's brake lights did not work. The officer initiated a traffic stop. During the stop, the officer noticed that the interior of appellant's car smelled strongly of air freshener. The officer suspected that the air freshener may have been used to mask the smell of alcohol or narcotics. The officer asked for consent to search the car. At this point, the officer had

neither completed writing the traffic citation nor checked the status of appellant's driver's license. Appellant gave consent and the officer found three kilograms of cocaine in the car. Appellant was subsequently convicted of trafficking in cocaine. The trial court denied appellant's motion to suppress, and the Court of Appeals affirmed. The Georgia Supreme Court granted certiorari to determine whether the Court of Appeals erred by holding that the police did not violate the Fourth Amendment during the traffic stop by asking appellant for consent to search.

Appellant argued on appeal that the detention was unlawfully prolonged by the officer, who asked him to step out of the car and who questioned him about things unrelated to the traffic stop. The record showed that the officer asked appellant to get out of the vehicle and engaged in small talk with the appellant as he filled out the citation. Appellant was questioned about his travel plans. Consent to search was requested and given before the officer completed the citation and checked the status of appellant's license. Police officers may order a driver to get out of a vehicle once a motor vehicle has been lawfully detained for a traffic violation without violating the Fourth Amendment. Pennsylvania v. Mimms, 434 U.S. 106 (1977). The Georgia Supreme Court opined that the dispositive issue was not the nature or subject of the officer's questions, but whether the questioning took place during appellant's lawful detention for committing the traffic violations. In reaching its decision, the Georgia Supreme Court relied on the United States Supreme Court case of Muehler v. Mena, 544 U.S. 93 (2005). In Muehler, the U.S. Supreme Court wrote that "Mere police questioning does not constitute a seizure. Even when officers have no basis for suspecting a particular individual, they may generally ask questions of that individual. Unless the detention was prolonged by the questioning, there is no additional seizure within the meaning of the Fourth Amendment." The Georgia Supreme Court found that the questioning and request for consent to search occurred before the purpose of the traffic stop was fulfilled. An officer conducting a traffic stop may request and examine a driver's license, registration, and run a computer check on the documents. Harris v. State, 269 Ga. App. 48

(2004). The questioning did not prolong the valid traffic stop, and therefore the Court of Appeals did not err.

Justices Sears, Hunstein and Benham dissented. They pointed out that the majority's ruling ignores the Court's prior holding in Daniel v. State, 277 Ga. 840 (2004). In Daniel, the Georgia Supreme Court held that "an officer's continued questioning of a driver and passengers outside the scope of a valid traffic stop passes muster under the Fourth Amendment either when: 1) the officer has reasonable articulable suspicion of other illegal activity; or 2) the traffic stop has de-escalated into a consensual encounter. The dissent wrote that the reasonable standard outlined in Daniel was effectively rendered irrelevant by the majority's opinion, and replaced with a meaningless standard that allows any and all manner of interrogation.

The majority countered by pointing out that the dissent failed to acknowledge that the standard they dismissed as "meaningless" was adopted by the United States Supreme Court in Muehler v. Mena, 544 U.S. 93 (2005), subsequent to Daniel. Thus, Daniel is not viable Fourth Amendment authority to the extent that it conflicts with a controlling decision of the United States Supreme Court. Furthermore, the dissent failed to explain how mere extraneous questioning that did not prolong the valid traffic stop could constitute an independent unreasonable seizure.

### ***Fruits of Defendant's Voluntary Statement***

State v. Woods, S06A1115 (07/13/06)

Appellee was arrested for financial transaction card fraud because he had used a credit card belonging to James Price, who had been missing for three months. Appellee was brought to the DeKalb County police department for an interview. After an officer read the Miranda warnings to the appellee, he invoked his right to counsel. One hour later, a Sergeant entered the room and stated that he was aware that the appellee had requested an attorney. The Sergeant urged the appellee not to say anything and told appellee that everyone should have the opportunity to bury their loved ones, as did the Sergeant himself recently when his father and brother died. As

the Sergeant was leaving the room, appellee began to cry and confessed to killing Price. Appellee also revealed where he disposed of the body. The body was located and appellee was subsequently indicted for murder.

At a Jackson-Denno hearing, the State conceded that appellee's statements were inadmissible, but contended that the fruits of the statement (victim's body and any evidence obtained from it) were admissible because the statements were voluntarily made and were not the product of coercive police activity. The trial court suppressed the fruits of appellee's statements, concluding that the State failed to show that the statements were voluntary. The State appealed pursuant to O.C.G.A. § 5-7-1 (a) (4).

The fruit of a voluntary statement obtained in violation of a defendant's prior unambiguous request for an attorney is not subject to the exclusionary rule. Thus, the Supreme Court concluded that the dispositive issue in this case was whether appellee's statements were voluntary. "Police appeals to the defendant's sympathies, such as the 'Christian burial speech' ploy do not automatically render a confession involuntary." An emotional appeal similar to the foregoing does not make a confession involuntary if the means employed are not calculated to procure an untrue statement. Further, absent any evidence that the investigative techniques were designed to induce the slightest hope of benefit or fear of injury, the resulting statements are not involuntary under O.C.G.A. § 24-3-50.

The Court found that the State presented unrefuted evidence that appellee was neither threatened with the remotest fear of injury, nor promised any hope of benefit. The Court also looked to other jurisdictions and found persuasive authority which recognized that an officer's statements regarding a family's need to bury the victim, though likely to have an emotional effect on the defendant, are not sufficient to make an otherwise voluntary statement involuntary.

The Court concluded that the Sergeant's speech did not constitute any evidence of coercive police activity. Coercive police activity is a necessary predicate to a finding that a confession is not voluntary. The Court held that, although the police failed to honor appellee's request for counsel, they did not

violate his Fifth Amendment right against coerced self-incrimination. Therefore, the trial court erred in suppressing the fruits of appellee's voluntary statements.

## ***Jury Charges***

Walker v. State, A06A0632 (July 11, 2006)

Appellant was convicted of DUI and Improper Lane Change. The traffic citation charged appellant with Failure to Maintain Lane, O.C.G.A. 40-6-48. However, the accusation charged appellant with Improper Lane Change. Both Improper Lane Change and Failure to Maintain Lane require that the driver change lanes without being able to do so safely. However, Improper Lane Change requires the additional element that the driver failed to give an appropriate and timely signal. During jury instructions, the judge stated that appellant was charged with Improper Lane Change, but gave instructions on the elements of Failure to Maintain Lane. During deliberations, the jury asked for the instructions again. The trial court once again gave instructions on Failure to Maintain Lane. The Court of Appeals found that the instruction given was inconsistent and likely confused the jurors to the extent that they could not render an intelligent verdict on the charge alleged in the accusation. The Court of Appeals reversed appellant's conviction for Improper Lane Change.

## ***Juveniles– Restitution***

In the Interest of C.S., A06A0237 (07/11/06)

In July, 2004, C.S. was adjudicated delinquent for two acts that, if he had been an adult, would have constituted felony theft by receiving. The juvenile court judge entered an order that C.S. and an accomplice make restitution in the amount of \$2,638.82 at \$200/month, and placed C.S. on probation for six months. One of the conditions of probation was that C.S. repay half of the restitution. None of the judge's orders contained written findings of fact as required by O.C.G.A. § 17-14-10, which governs restitution. C.S. did not pay the restitution, and in January 2005 the court extended probation for six months. The court's order provided that C.S.

pay \$10.00 a week, to be applied against the restitution previously ordered. The court's order contained no findings of fact as required by O.C.G.A. § 17-14-10.

In June 2005, the court scheduled a hearing to determine if probation should be extended again to provide C.S. an opportunity to pay restitution. At the hearing, C.S., through counsel, argued that 1) he was not, and never had been capable of paying the money; 2) there were no findings of fact as required by §17-14-10; and 3) a juvenile court judge has no authority to extend probation for the purpose of restitution, citing O.C.G.A. § 15-11-70(a)(30). Yet again, the court extended C.S.' probation and C.S. appealed.

The Court of Appeals rejected the argument that a juvenile court judge may not extend probation to permit the payment of restitution. The Court determined that the code section cited by the appellant did not apply. Rather, O.C.G.A. § 15-11-70(b) expressly permits the extension of juvenile probation if the hearing is held before probation expires. Moreover, under O.C.G.A. § 17-4-5, "For purposes of ensuring compliance with the restitution order, the juvenile courts are authorized to retain jurisdiction over a juvenile subject to such restitution order for a reasonable period after the juvenile reaches the age of majority."

However, the Court of Appeals remanded due to the juvenile court's failure to include findings of fact and to consider the present financial status of the appellant. The Court of Appeals found that the extension order constituted a "restitution order" as contemplated by O.C.G.A. § 17-14-2. Thus, written findings of fact addressing the factors provided in O.C.G.A. § 17-14-10 was required. Further, the order to pay restitution should have been based on C.S.' present financial status. The court relied on stale information which had been presented to the court a year before.