

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 3, 2006

Legal Services Staff Attorneys

David Fowler
Deputy Executive Director
for Legal Services

Bob Keller
Executive Counsel

Chuck Olson
General Counsel

Joe Burford
Trial Services Director

Lalaine Briones
Trial Support

Laura Murphree
Capital Litigation

Fay McCormack
Traffic Safety Coordinator

Patricia Hull
Traffic Safety Prosecutor

Tom Hayes
Regional Offices Director

Gary Bergman
Staff Attorney

Tony Lee Hing
Staff Attorney

Rick Thomas
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Brad Rigby
Staff Attorney

THIS WEEK:

- **Motions to Suppress**

Motions to Suppress

Fleming v. State, A06A2130

Appellant was convicted in a bench trial of trafficking in cocaine and possession of a firearm as a convicted felon. On appeal, appellant argues that the trial court erred in denying his motion to suppress. Appellant asserts that the key evidence admitted at trial was discovered as a result of his consent to search his hotel room, which consent arose from his illegal warrantless arrest. Before his arrest, an informant identified appellant to the police as a drug supplier and asked him to come down from his third floor balcony where he was standing. The appellant was arrested immediately after coming out onto the entry level, and after again being identified by the informant. Appellant consented to a search of his person and then led police back to his hotel room, where he consented to a search of the room after he was given a *Miranda* warning. To make a legal warrantless arrest, the police were required to have probable cause that appellant had committed or was committing a felony. At the moment of arrest, the facts and circumstances within an officer's knowledge, and which he reasonably believes to be trustworthy, must be sufficient to warrant a prudent man in believing that a suspect had committed or was committing an offense. McDaniel v. State, 263 Ga. App. 625, 627 (1). Here, regardless of the reliability

of the informant, police independently heard another individual on the telephone with the informant say that he had a kilogram of cocaine in his room, and that he intended to sell it to the informant if he would come to that certain hotel at a certain time, where the individual would be waiting on the third floor balcony to throw the informant a key. Thus, probable cause existed, as the informant only corroborated what the police had heard during the phone call.

Green v. State, A06A2108

Appellant was convicted of possession of cocaine and marijuana with intent to distribute. Appellant appealed the denial of his motion to suppress, arguing that the search of his residence was illegal. Investigators in the sheriff's department had been investigating appellant for several months based on information from concerned citizens and a confidential informant that appellant was conducting illegal drug activity at his residence. A confidential informant notified police that appellant was en route to his residence with cocaine in his vehicle and would arrive at approximately 12:30-1:00 pm. The officers set up surveillance at appellant's residence, and at 12:45 pm, a car matching the description of the vehicle for which they were waiting approached the residence. The vehicle displayed an invalid drive-out tag. Thus, the police activated their emergency equipment as appellant pulled into the driveway. Appellant exited the car and began walking away and the officers approached the front passenger side of the vehicle, where they smelled a strong odor of marijuana and observed smoke inside the vehicle. The passenger told the police that she

was appellant's girlfriend, that she had just smoked a marijuana cigarette, that there was marijuana on a dresser inside the residence that belonged to her, and that "anything else" found in the house belonged to the appellant. The police then obtained a search warrant based on the passenger's and the confidential informant's assertions that appellant lived at the residence. Inside, the officers found marijuana, cocaine paraphernalia and a large amount of cash on appellant's person. At the motion to suppress hearing, the officer explained the irregularity of the drive-out tag on appellant's car, and a proper looking tag was admitted into evidence. The Court of Appeals found that the officer stopped the car because of a reasonable suspicion that appellant was driving with an invalid drive-out tag. Thus, the trial court did not err in denying the motion to suppress.

Edwards v. State, A06A2491

Appellant was convicted of trafficking in methamphetamine, and argued that the trial court erred in denying her petition to file an out of time motion to suppress. After filing a motion to suppress and an amendment thereto, appellant failed to appear at the hearing on the motion. Appellant's counsel stated that he did not have specific authority from appellant to waive her appearance, and thus asked the court to grant a contingent dismissal to allow appellant the opportunity to explain her absence. The court then dismissed the motion for failure to appear. Upon appointment of new counsel, appellant filed a motion to set aside the order dismissing the motion to suppress, and a petition to file an out of time motion to suppress. The petition provided no explanation as to appellant's earlier failure to appear. Thus, the trial court denied the petition. Because appellant gave no explanation as to her absence from the first hearing, the Court of Appeals could not say that the trial court erred in dismissing her motion, or in denying her subsequent attempt to renew the motion. Therefore, the judgment was affirmed.

State v. Carden, A06A1223

The State appealed the sentence imposed on appellee for trafficking methamphetamine,

contending that it is void. The state has only a limited right of appeal in criminal cases, and OCGA § 5-1-7 (a) enumerates the circumstances when the State may appeal. One such circumstance is to contest a void sentence. A sentence is void if the court imposes punishment that the law does not allow. The sentence appellee received was below the mandatory minimum set by law for her offense. OCGA § 16-13-31 (g)(2) allows the trial court to impose a reduced or suspended sentence upon any person who is convicted of a violation of OCGA § 16-13-31, and who provides substantial assistance in the identification, arrest, or conviction of any of his accomplices, accessories, coconspirators, or principals. In this case, the trial court reduced the sentence because it found that the appellant had rendered substantial assistance in the identification of her supplier. Because the finding and reduction by the trial court were authorized, they did not result in an illegal departure from the law. Therefore, the appeal was dismissed because it was not within any other circumstance listed in OCGA § 5-1-7 (a).