



CaseLaw

Update

Prosecuting Attorneys' Council of Georgia

Legal Services Staff

David Fowler
Deputy Director for Legal Services

Chuck Olson
General Counsel

Joseph Burford
Trial Services Director

Glen Hollingshed
Staff Attorney

Fay McCormack
Traffic Safety Coordinator

Tom Hayes
Staff Attorney

Gary Bergman
Staff Attorney

Tom Jones
Staff Attorney

Tony Lee Hing
Staff Attorney

Rick Thomas
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Troy Golden
Staff Attorney

Clara Bucci
Staff Attorney

CaseLaw This Week

Week Ending January 16 & 23, 2004

DNA

Evidence - Flight

Evidence - Relevance

Jury Charges

Motion for New Trial

Prosecutorial Misconduct

Res Gestae

Right to be Present at Trial

Search and Seizure

Severance - Defendants

Severance - Charges

DNA

Shabazz v. State, A04A0021 (1/7/04), 04 FCDR 163, 2003 Ga. App. Lexis 12

Defendant contended that the trial court erred by admitting evidence of an allegedly novel and untested method of DNA identification without a proper determination of the method's reliability. The test at issue, YSTR DNA testing, is specific to male DNA only. Contrary to defendant's contention, **YSTR DNA testing is merely one specific type of STR (short tandem repeats) DNA testing. In turn, STR DNA testing is a form of PCR (polymerase chain reaction) DNA testing, which is accepted as valid in *GeorgiSmith v.***

Evidence - Flight

State, S03A1702 (1/12/04), 04 FCDR 193, 2004 Ga. Lexis 18

The Court rejected defendant's contention that the trial court erred by admitting evidence of his escape from police custody three months after his arrest. **Although, in cases tried after January 10, 1991, the court cannot give a jury instruction on flight, the State still can offer evidence of flight while a defendant is awaiting trial and argue that the evidence of flight demonstrates consciousness of guilt.**

Evidence - Relevance

Crowe v. State, S03G0937 (1/12/04), 04 FCDR 212, 2004 Ga. Lexis 25

Defendant's convictions for **misdemeanor vehicular homicide** and improper backing, arising out of a motor vehicle crash, were reversed. **The trial court abused its discretion in excluding relevant evidence that the other driver's urine tested positive for marijuana metabolites.** The issue of whether the other driver was impaired and whether such impairment contributed to the accident was a matter for the jury to decide. The excluded evidence supported the possibility that the other driver was under the influence of marijuana and was impaired.

Jones v. State, A03A2232 (1/8/04), 04 FCDR 257, 2004 Ga. Lexis 22

Defendant's conviction for involuntary manslaughter was affirmed. Defense counsel attempted to impeach State witnesses by asking a defense witness about the State witnesses' conduct in the hallway during the trial. After the State objected, defense counsel, outside the jury's presence, said that he was trying to show that the prosecution witnesses were laughing and joking in the hallway and generally making light of the proceedings. Defense counsel argued that if the jury could consider a witness' demeanor on the stand, the jury also should be allowed to consider a witness' demeanor off the stand. **The trial court held the defense witness' testimony of the State witnesses' out-of-court behavior insufficiently probative to warrant its admission into evidence. The Court of Appeals found that the trial did not abuse its discretion in determining the evidence's relevance.**

Jury Charges

Horton v. State, A03A2371 (12/22/03), 04 FCDR 150, 2003 Ga. App. Lexis 1610

Defendant's conviction for criminal attempt to obtain marijuana was affirmed. The trial court initially instructed the jury to consider the greater offense before considering a lesser offense. The trial court cured any error when it changed the verdict form, brought the jury back and instructed it that it did not have to consider whether the defendant was not guilty of anything, guilty of criminal attempt, or guilty of criminal solicitation in any type of sequence. **The trial court did not instruct the jury that it had to reach a unanimous verdict on the greater offense before it could address the lesser offense, which has been**

expressly disapproved.

Carter v. State, A03A2404 (1/7/04), 04 FCDR 253, 2004 Ga. App. Lexis 9

Defendant's conviction for possession of a firearm during the commission of a crime was reversed. The indictment, and the trial court's instruction, defined the crime as possessing a firearm during the commission of murder. The jury, however, acquitted defendant of murder and found him guilty instead of the lesser included offense of voluntary manslaughter. **Where the court's instruction only authorizes a conviction of possessing a firearm during the commission of a murder, but the jury finds the defendant guilty of voluntary manslaughter, rather than murder, the conviction for possession of a firearm during the commission of a crime must be reversed.**

Watkins v. State, A03A2424 (1/7/04), 04 FCDR 259, 2004 Ga. App. Lexis 7

The trial court's use of the word "conscience" during the overall charge did not provide a basis for reversal. The defendant argued that the use of the word impermissibly invoked concepts of morality. The Court held that, **even assuming for the sake of argument that "conscience" invoked "morality," mere use of the word did not warrant reversal, in light of the overall instruction, which repeatedly and accurately dealt with "reasonable doubt" and "presumption of innocence."**

Motion for New Trial

Slack v. State, A04A0081 (1/5/04), 04 FCDR 251, 2004 Ga. App. Lexis 1

Defendant's conviction for child molestation was affirmed. Defendant was not entitled to a new trial based on newly discovered evidence. **Defendant's assertions that two witnesses would testify that the victim told them that the victim had lied at trial would go only to impeach the witness, and thus would not be grounds for a new trial.**

Prosecutorial Misconduct

Wilson v. State, S03A1362 (1/12/04), 04 FCDR 189, 2004 Ga. Lexis 3

Defendant contended that the State engaged in prosecutorial misconduct in paying one of its witnesses. However, **it is not improper for the State to offer and pay monetary rewards for information leading to the arrest and conviction of persons who commit felonies. The State properly disclosed that one witness received a \$300 reward for information and defendant cross-examined the witness about this fact.**

Res Gestae

Rust v. State, A03A2582 (12/19/03), 04 FCDR 163, 2003 Ga. App. Lexis 1594

Codefendants' convictions for armed robbery were affirmed. **The trial court properly admitted evidence of a Monroe County armed robbery which occurred earlier the same night as part of the res gestae against Rust because the Bibb County incident for which he was indicted was a continuation of their crime spree which began in Monroe County.** The events in Monroe County and the armed robbery in Bibb County were approximately an hour apart and

occurred about 10 miles from each other. The Monroe events were necessary to explain the events leading to the interception and arrest of the codefendants. Since Rust was indicted as a party to the Bibb County robbery, evidence of the Monroe robbery was necessary to establish his intent and state of mind.

Right to be Present at Trial

Fuller v. State, S03A1665 (1/12/04), 04 FCDR 199, 2004 Ga. Lexis 24

The Court affirmed defendant's convictions for felony murder and possession of a firearm during the commission of a crime. **The trial judge went to the jury room and communicated with the jury on two occasions after the close of evidence, accompanied both times by the prosecutor and by defense counsel, but without defendant.** One visit was to inform the jury that proceedings would continue beyond 5:00 p.m. and the second was to explain the verdict form. The defendant contended that these discussions denied him the right to be present at all critical stages of the trial. However, **defendant failed to object**, even though he was present when the jury room visits were agreed upon and when the trial court placed an agreed-to summary of the visits on the record.

Search and Seizure

Burke v. State, A03A1740 (1/7/04), 04 FCDR 274, 2004 Ga. App. Lexis 5

Conviction for controlled substance possession was affirmed, the Court holding that the denial of defendant's motion to suppress was proper. **Under the totality of the**

circumstances, the officer's affidavit supporting the search warrant provided a substantial basis for probable cause, even though the confidential informant's name, criminal history, and payment status were not set forth on the affidavit's face. The affidavit did set forth the officer's prior dealings with defendant and described a controlled buy where the confidential informant purchased drugs from defendant.

Severance - Defendants

Rust v. State, A03A2582 (12/19/03), 04 FCDR 163, 2003 Ga. App. Lexis 1594

The trial court did not abuse its discretion in denying defendant Rust's motion to sever defendants because none of the jurors indicated any hesitation or confusion about the law or evidence given the number of jurors and because the codefendant's defense was not antagonistic to that of defendant Rust.

Severance - Charges

Shabazz v. State, A04A0021 (1/7/04), 04 FCDR 163, 2003 Ga. App. Lexis 12

The Court of Appeals affirmed defendant's convictions for rape, false imprisonment, child molestation, aggravated assault, kidnapping and burglary arising out of two separate attacks on consecutive days. The trial court did not abuse its discretion in denying defendant's motion for severance. The attacks on the two victims involved the same modus operandi since defendant followed his victims home from the same bus before attacking them.

Prosecuting Attorneys' Council of Georgia

Atlanta
404-969-4001

Albany
229-430-3818

Macon
478-751-6645

Savannah
912-353-3025

***The Prosecuting Attorneys' Council encourages you to add commentary or creative prosecution suggestions for any of this Caselaw. The responses will be published in a PAC publication, please e-mail David Fowler at dfowler@pac.state.ga.us, or Glen Hollingshed at hollngs@pac.state.ga.us with feedback.**

