



CaseLaw

Update

Prosecuting Attorneys' Council of Georgia

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CaseLaw This Week

Week Ending January 30, 2004

Closing Argument

Equal Access Rule

Evidence - *Res Gestae*

Foundation for Audio &

Video Recordings

Implied Consent

Merger

Search and Seizure

Sentencing

Closing Argument

***Lewis v. State*, S03P1825 (1/20/04), 04 FCDR 291, 2004 Ga. Lexis 28**

The prosecutor's closing reference to divine law, although improper in a death penalty case, did not require reversal where trial court sustained defendant's objection in part, instructed jury at length to disregard the comments, instructed the jurors that they should decide the sentence based only on the law from the trial court and asked jurors if they understood and could follow curative instructions.

Equal Access Rule

***Dilley v. State*, A03A1727 (1/15/04), 04 FCDR 318, 2004 Ga. App. Lexis 48**

Defendant's convictions for methamphetamine trafficking, possession of controlled substances with intent to distribute and misdemeanor marijuana possession affirmed. **The jury was permitted to infer that defendant possessed cash and contraband found in his vehicle since the vehicle was registered to defendant and he was alone in it when arrested.** Defendant based his equal access argument on evidence that he was assisting a drug-addicted friend move from her apartment. The friend, however, testified that she had not stored money or contraband in her apartment and denied that the items in the vehicle belonged to her.

Evidence - *Res Gestae*

***White v. State*, A03A1958 91/9/04), 04 FCDR 333, 2004 Ga. App. Lexis 27**

Convictions for battery and obstruction were affirmed. **The trial court did not err in admitting victim's written statement and officer's testimony regarding victim's oral statements under the res gestae exception to the hearsay rule.** The statements were relevant and made without premeditation. The victim was

visibly shaken and had red marks on her neck when she told the officer that the defendant pushed her down and threatened her, and she gave her written statement about 30 minutes after police arrived at her apartment.

Foundation for Audio & Video Recordings

Cooper v. State, A03A1748 (1/12/04), 04 FCDR 313, 2004 Ga. App. Lexis 35

The trial court did not abuse its discretion by admitting videotape of cocaine transactions, even though the recorder was not functioning perfectly. The informant testified that the tape accurately depicted events and flaws in the tape were explained to jury.

Implied Consent

Brown v. State, A03A2528 (1/9/04), 04 FCDR 320, 2004 Ga. App. Lexis 30

Defendant's DUI conviction was affirmed because the trial court did not err in denying defendant's motion to suppress breath test results. A four minute and 47 second delay between the arrest and the reading of the Implied Consent warning was not unreasonable because the officer was searching for weapons on defendant's motorcycle and was questioning bystanders to ensure that they did not pose a threat. The defendant did not show how an earlier reading of the Implied Consent warning would have benefitted him.

Merger

Perkinson v. State, A03A2406 (1/15/04), 04 FCDR 321, 2004 Ga. App. Lexis 50

Defendant argued that being sentenced for both armed robbery and robbery by intimidation constitutes double jeopardy because the latter is a lesser included offense of the former. Although robbery by intimidation may be a lesser included offense of armed robbery in some cases, this case involved two separate incidents with separate victims. Therefore, defendant was properly convicted of two separate counts, which do not merge as a matter of law.

Green v. State, A03A2224 (1/9/04), 04 FCDR 328, 2004 Ga. App. Lexis 31

Defendant's armed robbery convictions did not merge because defendant took money from the immediate presence of two grocery store employees, each of whom was a victim, because they were both responsible for and had possession of the store's receipts.

Search and Seizure

State v. Benjamin, A03A1670 (1/13/04), 04 FCDR 321, 2004 Ga. App. Lexis 41

The grant of defendant's motion to suppress was reversed. The trial court erred by excluding contraband found during consent search of defendant's vehicle after police stopped defendant for a tag light violation. The officers' request for consent to search did not prolong, continue or otherwise extend defendant's lawful detention and no evidence contradicted the officers' testimony that defendant voluntarily consented to the search

after being informed that he was free to leave.

Morris v. State, A04A0241 (1/15/04), 04 FCDR 326, 2004 Ga. App. Lexis 53

The denial of defendant's motion to suppress evidence of intoxication in connection with traffic stop at roadblock was reversed. The State failed to meet its burden of proving that the roadblock was constitutional. The Court found that the State presented no probative evidence that police supervisor properly established the roadblock for a legitimate purpose because the supervisor did not testify and field officers' testimony was hearsay.

Anderson v. State, A04A0410 (1/12/04), 04 FCDR 322, 2004 Ga. App. Lexis 32

Conviction for cocaine possession was affirmed. The trial court did not err in denying defendant's motion to suppress digital scales containing cocaine residue found in his car after a consent search. The standard for a traffic stop is "reasonable articulable suspicion" and officer had reasonable suspicion because he had personal knowledge that defendant's driver's license was suspended. The fact that the license had been reinstated two weeks earlier did not negate the validity of the officer's suspicion. The defendant's consent to the search was valid because officer's request, which came immediately after returning defendant's license to him, did not extend detention beyond conclusion of traffic stop, and defendant was not prevented from leaving.

Sentencing

Perkinson v. State, A03A2406 (1/15/04), 04 FCDR 321, 2004 Ga. App. Lexis 50

The Court of Appeals affirmed the denial of defendant's motion to modify his life sentence for armed robbery, which was imposed in 1993. **Defendant contended that OCGA §§ 16-8-41 and 17-10-7(a) conflict, citing *State v. Baldwin*, 167 Ga. App. 737, 739(3) (1983).** That case addressed the differences between 16-8-41(b), which at the time required a judge to sentence a defendant convicted of a second armed robbery offense to serve a minimum of ten years in jail, and 17-10-7(a), which required a judge to sentence a defendant convicted of a second felony to the longest period of time prescribed for the punishment of the second offense. The point of *Baldwin* was that the judge had to sentence the defendant to serve a life sentence under the recidivist statute. **The current version of 16-8-41 no longer addresses the sentencing requirements for a subsequent offense, but refers to the recidivist statute, 17-10-7, under which defendant was sentenced.**

****** After 10 years with PAC, Glen Hollingshed has left, and is now working in Paulding County. He will be missed. Due to Glen's absence, the PAC interns will be taking over the responsibly of the CaswLaw Update. Please be patient as we catch up on our updates.***

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***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 Joe Burford at jburford@pac.state.ga.us with feedback.**

