



# CaseLaw

## Update

### Prosecuting Attorneys' Council of Georgia

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#### CaseLaw This Week

Week Ending February 6, 2004

#### Evidence – Photographs

#### Evidence – Character

#### Evidence – Chemical Testing

#### Evidence – Chain of Custody

#### Evidence – Sufficiency

#### Ineffective Assistance of Counsel

#### Right to Counsel

#### Statement

#### Speedy Trial

#### Evidence – Photographs

Smith v. State, A03A1675 (01/20/04), 04  
FCDR 382, 2004 Ga. App. LEXIS 67

Defendant's convictions for homicide by vehicle and serious injury by vehicle based upon an underlying reckless driving offense were affirmed. **Admitting a photograph of the victim "while in life" is not unduly prejudicial to the defendant. The fact that such photograph also depicted the victim's sister is also not unduly prejudicial. The admission of a photograph of the defendant's "book-**

**in photograph" is also not unduly prejudicial** as the trial judge was best able to determine if such photo depicted the defendant in an intoxicated state: probative evidence in a reckless driving case.

#### Evidence – Character

Wells v. State, A03A2523 (01/20/04), 04  
FCDR 398, 2004 Ga. App. LEXIS 77

Defendant's conviction for interference with government property was affirmed. The trial court permitted the jury to view videotape of defendant being removed from an isolation cell, where defendant had broken a glass window several hours earlier. **The conduct of a defendant before, during, and after the crime may be considered by the jury in establishing his commission of the crime and criminal intent.**

#### Evidence – Chemical Testing

Ferguson v. State, S03A1527 (11/17/03),  
04 FCDR 346, 2004 Ga. LEXIS 1010

Defendant's convictions for serious injury by vehicle and for three counts of driving under the influence were reversed as trial court erred in denying defendant's motion to suppress. **O.C.G.A. § 40-5-55 requires chemical testing, even in the absence of probable cause, of anyone driving a motor vehicle who is involved in any traffic accident resulting in serious injuries or fatalities. This statute was declared unconstitutional in *Cooper v. State* to the extent it requires testing regardless of any determination of probable cause. 2003 Ga. Lexis 842, at 19-20.** Therefore, it was error for the trial court to admit evidence of chemical blood tests performed without probable cause to believe defendant was driving under the influence.

### Evidence – Chain of Custody

Hancock v. State, A04A0215 (01/22/04), 04 FCDR 396, 2004 Ga. App. LEXIS 80

Defendant's conviction of possession of marijuana with intent to distribute was affirmed. One of the persons in the chain of custody of marijuana evidence in the case did not testify at trial. The investigating officer and the crime lab technician who tested the evidence testified at trial that it was taken into custody, delivered, and tested according to routine procedures. **As a result, the state complied with the requirement that it show with reasonable certainty that the substance tested at the crime lab was the substance seized from the defendant's bedroom. The fact that everyone in control of a fungible substance does not testify does not,**

**without more, make the substance or testimony relating to it inadmissible.**

### Evidence – Sufficiency

Strong v. State, A04A0057 (01/22/04), 04 FCDR 380, 2004 Ga. App. LEXIS 82

Defendant's conviction for selling cocaine in violation of Georgia's controlled Substances Act, and his conviction for selling cocaine within 1000 feet of a school were affirmed. Defendant's challenge of the sufficiency of the evidence was based on conflicts in the testimony. The officer's observation of defendant's participation in the sale conflicted with the testimony of a co-defendant who accepted sole responsibility. The officer also failed to write a report of the events. **As long as there is some competent evidence, even though contradicted, to support each fact necessary to make out the State's case, the jury's verdict will be upheld. Any alleged conflicts in the testimony of the officer and the co-defendant were resolved by the jury.**

### Ineffective Assistance of Counsel

Rollins v. State, S03A1419 (01/12/04), 04 FCDR 344, 2004 Ga. LEXIS 187

Judgment entered on defendant's guilty plea to charges that she violated the Georgia Controlled Substances Act was reversed for ineffective assistance of counsel. Counsel misinformed defendant by telling her that a guilty plea to the drug

charge would have no negative repercussions regarding her goal of becoming a lawyer or her immigration status. **A client who relies upon a lawyer's misinformation about collateral consequences stemming from a guilty plea has grounds to argue that counsel provided ineffective assistance.**

Jones v. State, A03A1969 (01/22/04), 04 FCDR 381, 2004 Ga. App. LEXIS 81

Defendant's convictions for theft by taking, fleeing or attempting to elude and obstruction were affirmed. In order to prevail on his claim of ineffective assistance, defendant must show that counsel's performance was deficient and that the deficient performance so prejudiced the defendant that there is a reasonable likelihood that, but for counsel's errors, the outcome of the trial would have been different. **Counsel was not deficient for failing to recognize that defendant was charged with a felony count of fleeing or attempting to elude a police officer because the defendant could not show that he would have accepted the State's plea offer if counsel had been aware of this fact.** Rather, defendant refused to accept the State's plea offer because he did not want to plead guilty to aggravated assault, not based on the felony count of fleeing or attempting to elude a police officer.

### Right to Counsel

Kane v. State, A03A2436 (01/21/04), 04 FCDR 376, 2004 Ga. App. LEXIS 79

Trial court did not err in failing to appoint counsel to assist defendant with out-of-time appeal. **Defendant was**

not entitled to the assistance of counsel for his motion for out-of-time appeal because an indigent defendant is entitled to representation by counsel only for trial and for the direct appeal from judgment of conviction and sentence.

### Statement

State v. Lucas, A03A2438 (02/20/04), 04 FCDR 390, 2004 Ga. App. LEXIS

The grant of defendant's motion to suppress a pre-Miranda statement was affirmed. The arresting officers testified at the *Jackson-Denno* hearing that Lucas was not free to leave when they questioned him about ownership of marijuana. **The police are permitted to make an initial, on-the-scene inquiry, without administering Miranda rights, solely for the purpose of ascertaining whether or not there currently is any danger to them or to other persons present at the scene. The questioning must not be aimed at obtaining information to establish a suspect's guilt.** The arresting officer's questions here were clearly intended to elicit self-incriminating information from defendant elicit self-incriminating information from defendant.

*As many of you now know, Glen Holingshed has resigned from the Prosecuting Attorneys' Council to become Court Administrator of the Paulding County Superior Court. We all wish Glen continued success in his new venture. However, the loss of Glen has slowed production of the Case Law Update which is currently being compiled by our interns. We ask that you bear with us until we are successful in our search for a replacement for Glen.*

*Your patience is appreciated.*

*J.F. Burford  
Director - Trial Support*

## Prosecuting Attorneys' Council of Georgia

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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](mailto:dfowler@pac.state.ga.us), or Joe Burford at [jburford@pac.state.ga.us](mailto:jburford@pac.state.ga.us) with feedback.**

