



CaseLaw

Update

Prosecuting Attorneys' Council of Georgia

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CaseLaw This Week

Week Ending February 20, 2004

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Sufficiency of Evidence

Clemons v. State, A03A1694 (02/05/04), 04 FC DR 524, 2004 Ga. App. LEXIS 148

Defendant's conviction for armed robbery was affirmed. Defendant challenged the sufficiency of the evidence behind her conviction claiming that the "only evidence connecting her to the armed robbery was the uncorroborated testimony of her alleged accomplice. There was sufficient corroborating evidence along with the accomplice's testimony as "the defendant was driving the getaway car at the time it was stopped by the police and she was in possession of the handgun and the money stolen from the convenience store." **Testimony of an accomplice must be corroborated by either another witness or by corroborating circumstances. Corroboration need not be sufficient to warrant a guilty verdict or prove every material element of the crime. It need only tend to connect and identify the defendant with the crime charged. Circumstantial evidence, when taken with the accomplice**

ALERT:

Please do not attempt to try another case where you intend to use a Hearsay Exception without first reading Crawford v. Washington, 2004 U.S. LEXIS 1839, March 8, 2004, Decided.

testimony, showing guilt beyond a reasonable doubt, is sufficient corroboration.

Effectiveness of Counsel

Marshall v. State, A03A1729 (02/02/04), 04 FCDR 521, 2004 Ga. App. LEXIS 122

Defendant's convictions for aggravated assault were affirmed. **Defendants have no right to have the arguments of counsel recorded**, thus trial counsel's failure to request such record does **not** result in a finding of **ineffective assistance of counsel**.

Pitts v. State, A03A2370 (02/05/04), 04 FCDR 545, 2004 Ga. App. LEXIS

Denial of defendant's motion for an out-of-time appeal was affirmed. **Defense counsel is not ineffective if counsel fails to make a meritless objection or inform defendant of a non-existent right to appeal.**

Evidence – Character

LaCount v. State, A03A1997 (01/30/04), 04 FCDR 529, 2004 Ga. App. LEXIS 112

Defendant's convictions for armed robbery and possession of a firearm during commission of a crime were affirmed. Defense moved for mistrial when the date of prior arrest on finger print card was mentioned during state's examination of the deputy sheriff who lifted prints which were compared with prints lifted at the scene. Jury was instructed to disregard and date was redacted from finger print card

introduced into evidence. **Where the court gives proper instructions to disregard reference to a past arrest, it is not reversible error to deny a motion for mistrial based on such reference.**

Bell v. State, A03A2270 (02/03/04), 04 FCDR 570, 2004 Ga. App. LEXIS 132

Defendant's convictions for attempted armed robbery, possession of a firearm during commission of a crime, and burglary were affirmed. The court denied defendant's attempt to cross-examine the victim with allegations of misconduct based on the conviction of her husband. **Specific instances of misconduct may not be used to impeach a witness's character or credibility, unless the misconduct resulted in a conviction of a crime. The proper method of proving the conviction is by introducing a certified copy**

Joiner v. State, A03A1841 (02/03/04), 04 FCDR 535, 2004 Ga. App. LEXIS 129

Defendant's convictions for child molestation, aggravated child molestation, rape, and statutory rape were all affirmed. **Attempts to hug, rubbing, and in-person statements that make a child "very uncomfortable," are proper for admission as similar transactions in a child molestation case. The similar transaction rule in sexual offenses is to be "liberally construed."**

Allen v. State, A03A2526 (02/02/04), 04 FCDR 561, 2004 Ga. App. LEXIS 126

Defendant's convictions for DUI and related traffic offenses were

affirmed but remanded for re-sentencing. Defendant contended that the trial court erred in admitting evidence of his prior DUI. Because the citation did not state on its face the DUI was from alcohol, Defendant asserted he was not given sufficient notice of a similar transaction involving alcohol. **This argument was without merit because the State had complied with Rule 31.1 (B) and the rule itself does not require the State's notice include the specificity demanded by defendant.**

Turley v. State, A03A2242 (02/02/04), 04 FCDR 573, 2004 Ga. App. LEXIS

Defendant's conviction for aggravated assault was affirmed. The court admitted the bar fight the defendant instigated without provocation from 1998 as a similar transaction to establish "course of conduct and bent of mind." Defendant claimed in the instant case that he acted in self-defense when he hit the victim in the face with a glass. **The failure of the trial court to expressly balance the probative value of the evidence against its prejudicial effect presents no basis for reversal as a trial court is not required to fully articulate its reasoning in this regard.**

Evidence – Opinion

Lanwehr v. State, A03A203 (01/30/04), 04 FCDR 542, 2004 Ga. App. LEXIS 113

Defendant's conviction for DUI was affirmed. **A police officer, through education in DUI detection and experience in over 100 DUI, arrests may be qualified as an expert and render an opinion as to the effect**

of alcohol consumption on a person's body.

Evidence – Hearsay

Holmes v. State, A03A2519 (02/03/04), 04 FCDR 571, 2004 Ga. App. LEXIS 135

The defendant's conviction for burglary was affirmed. Defendant sought to introduce a letter she claimed to have received from the co-defendant in which co-defendant took sole responsibility for the burglary. **Declarations to third persons to the effect that the declarant and not the accused was the actual perpetrator are, as a rule, inadmissible even though the statement is against the declarant's interest. Only under exceptional circumstances, when the statement is shown by defendant to contain considerable assurances of reliability and necessity similar to evidence proffered and analyzed under the necessity exception of OCGA § 24-3-1 (b), may such evidence be admissible**

*****(See: *Crawford v. Washington*, 2004 U.S. LEXIS 1838, March 8, 2004, Decided for current law on use of the necessity option.)

Right to Remain Silent

Ellison v. State, A03A1973 (02/05/04), 04 FCDR 549, 2004 Ga. App. LEXIS 140

Defendant's conviction for marijuana possession with intent to distribute was affirmed. During closing argument, the prosecutor commented that no one had contradicted the testimony of defendant's accomplice.

Defendant appealed contending this was an improper comment on his silence. **Where the prosecutor's comments are not directed at the defendant's decision not to testify but are directed at defense counsel's failure to rebut or explain the State's evidence, the comments are permissible.**

Search and Seizure

In the Interest of A.A., A04A0002; A04A003 (01/30/04), 04 FCDR 558, 2004 Ga. App. LEXIS 120

The juvenile court's adjudication of the defendants was affirmed. Defendant appealed denial of his motion to suppress all evidence as the result of an illegal detention. **An officer's approach to a stopped vehicle and inquiry as to what is going on does not constitute a "stop" or "seizure" under the Fourth Amendment and does not require reasonable, articulable suspicion.**

Anderson v. State, A03A2237 (02/04/04), 04 FCDR 555, 2004 Ga. App. LEXIS 146

Defendant's convictions for armed robbery, possession of a firearm by a convicted felon, and possession of a firearm during the commission of a felony were affirmed. **If the police have an articulable suspicion to stop the defendant, yet the defendant refuses to stop and flees into a dwelling, this flight, combined with the articulable suspicion, is sufficient for probable cause to enter a dwelling and undertake warrantless arrest.**

Merger

Dorsey v. State, A03A2124 (02/03/04), 04 FCDR 569, 2004 Ga. App. LEXIS 137

Defendant's convictions for burglary, child molestation, rape, kidnapping, false imprisonment, pimping, theft by taking, and statutory rape were affirmed in part and reversed in part. **A defendant may be convicted for both statutory rape and child molestation based upon the same conduct, but he may not be sentenced for both. When based on the same transaction, a conviction for child molestation merges into a conviction for statutory rape.**

Ellison v. State, A03A1973 (02/05/04), 04 FCDR 549, 2004 Ga. App. LEXIS 140

Defendant's conviction for marijuana possession with intent to distribute was affirmed. The jury found the defendant guilty of possession of marijuana and guilty of intent to distribute marijuana. **When a defendant is found guilty of multiple offenses arising from the same conduct, the court may merge the lesser offenses into the greater offense and then sentence the defendant on the greater offense.**

Circumstantial Evidence

Miller v. State, A03A2030 (02/03/04), 04 FCDR 523, 2004 Ga. App. LEXIS 134

Proper use of Georgia's circumstantial evidence rule, OCGA § 24-4-6, presumes the evidence in the case IS ENTIRELY circumstantial.

Jury Deliberation

Miller v. State, A03A2030 (02/03/04), 04 FCDR 523, 2004 Ga. App. LEXIS 134

Defendant's conviction for aggravated battery was affirmed. **If during the polling of a jury after a verdict a juror admits his or her vote for the verdict was not given freely, the jury is to return to deliberation until a fully unanimous and free verdict can be rendered. The court is not required to inquire further as to the basis of the initial dissent from the verdict.**

Smith v. State, A04A0008 (02/06/04), 04 FCDR 540, 2004 Ga. App. LEXIS 153

Defendant's conviction for DUI was affirmed. **It was not error for the trial court to tell the jury that the issue of probable cause was not for the jury to decide. Such a statement did not give the jury an impermissible impression of the court's opinion of the defendant's guilt or innocence.**

Golden Rule

Shaw v. State, A04A0068 (02/05/04), 04 FCDR 534, 2004 Ga. App. LEXIS 141

The "Golden Rule" ban in closing arguments that prohibits putting the jury in the shoes of the victim is not violated when the state argues in a drug case that if the jury finds the defendant guilty the jury can help fight drug addiction in its community.

Double Jeopardy

Kinchen v. State, A03A2570 (02/06/04), 04 FCDR 539, 2004 Ga. App. LEXIS 152

Defendant's indictment for possession of marijuana with the intent to distribute was affirmed. Defendant pled guilty to possession of marijuana with the intent to distribute after attempting to sell marijuana to an undercover police officer. Defendant was later indicted for possession of marijuana with the intent to distribute after a search of defendant's home for marijuana revealed more marijuana. Defendant was not in possession and control of all the marijuana at the time each incident took place. Each incident represented a separate act. **The principle of Double Jeopardy precludes multiple convictions or punishment for crimes arising from the same criminal conduct. OCGA '16-1-7(a) precludes conviction or punishment for more than one crime if one crime is included in the other as a matter of law or fact. Conviction and sentencing for crimes which occur at different times or in different locations does not violate the principal of Double Jeopardy.**

Inconsistent Verdict Rule

Smith v. State, A04A0008 (02/06/04), 04 FCDR 540, 2004 Ga. App. LEXIS 153

Defendant's conviction for DUI was affirmed. **Georgia does not recognize the inconsistent verdict rule. A conviction on one count and acquittal on another related count**

may reflect a compromise, not inconsistent factual conclusions.

Right to Counsel

Sims v. State, A04A0223 (02/06/04), 04 FCDR 553, 2004 Ga. App. LEXIS 150

Defendant refused a public defender. He stated that he would acquire his own lawyer and refused the aid of a public defender until he found a lawyer. Defendant proceeded pro se with a request for help from an attorney. Defendant's third refusal of a public defender amounted to dilatory conduct that constituted "the functional equivalent of a knowing and voluntary waiver of appointed counsel."

Sentencing

Allen v. State, A03A2526 (02/02/04), 04 FCDR 561, 2004 Ga. App. LEXIS 126

Defendant's convictions for DUI, disobedience of a traffic control device, and violation of Georgia's open container law were affirmed but remanded for resentencing due to questions regarding the voluntariness of defendant's waiver of right to counsel. **It is error for a court to use a prior no contest plea in aggravation of a sentence if there is evidence of such prior plea being involuntary. Once a defendant shows evidence indicating that a prior plea may not have been made voluntarily, the burden shifts to the state to present evidence that the plea was made voluntarily.**

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*

Please visit the bottom right hand corners of each page of the *Case Law Update* and notice our new numbering system. We hope this helps you file the updates. We encourage you to keep sending in suggestions. Thank you.

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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**

