



# CaseLaw

## Update

### Prosecuting Attorneys' Council of Georgia

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#### CaseLaw This Week

Week Ending February 27, 2004

#### Search and Seizure

##### Speedy Trial

##### Evidence – *Res Gestae*

##### Evidence – Hearsay

##### Evidence – Impeachment

##### Evidence – Character

##### Evidence Character – Guilty Plea

##### Implied Consent Rights

##### Recidivist Sentencing

##### Jury Charges – Defendant's Testimony

##### Jury Charges – Felony Murder

#### Search and Seizure

*State v. Poppell*, S03A1501 (02/16/04),  
04 FCDR 599, 2004 Ga. App. LEXIS 133

The grant of defendant's motion to suppress the results of his blood test was affirmed. **The hospital consent to draw blood form, which the defendant signed, could not serve as defendant's consent for the State to take a sample of his blood to test for alcohol and narcotics.**

*Rucker v. State*, A03A1797 (02/10/04),  
04 FCDR 642, 2004 Ga. App. LEXIS 164

Defendant's convictions for amphetamine trafficking, marijuana possession and possessing drug related objects were affirmed. The car refused to stop immediately after the officer activated his lights. Upon stopping, the driver approached the officer instead of waiting for the officer to approach him. The officer had observed unusual movement in the vehicle before it stopped. The defendant, a passenger, had large bulges in his pocket and crotch.

#### 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.*

The trial court determined that the officer “was authorized to conduct a minimally intrusive pat-down to determine if defendant was armed.” **Under these circumstances, the trial court did not err in denying defendant’s motion to suppress evidence found in the vehicle. The officer acted reasonably and out of concern for his safety when he conducted the pat-down search of defendant.**

*Cook v. State*, A03A2265 (02/10/04), 04 FCDR 646, 2004 Ga. App. LEXIS 161

The denial of defendant’s motion to suppress evidence obtained at a roadblock was reversed. The State presented no probative evidence that a supervising officer authorized the roadblock in question for a valid purpose. Thus the State failed to show that the roadblock in question was constitutional.

*Cartwright v. State*, A03A2422 (02/11/04), 04 FCDR 647, 2004 Ga. App. LEXIS 170

The denial of defendant’s motion to suppress drug evidence was reversed. The officer’s pat-down search of defendant was lawful based on defendant’s specific threat to shoot the tires of her neighbor’s car and defendant’s visible agitation during questioning. While there may be some question as to whether the officer was justified in removing the wooden box from Cartwright’s back pocket, it is clear that the officer was not justified in opening the wooden box found in Cartwright’s back pocket and that such a search exceeded the permissible scope of a Terry pat-down for weapons. **Nothing in Terry can be understood**

**to allow a generalized cursory search for weapons.**

*Strickland v. State*, A04A0526 (02/11/04), 04 FCDR 649, 2004 Ga. App. LEXIS 175

Defendant’s convictions for trafficking in cocaine, misdemeanor possession of marijuana, obstruction of an officer, and operating a vehicle without a license tag were affirmed. The defendant was stopped at a roadblock which the trial court determined served no legitimate purpose. However, after being stopped, defendant shoved the officers involved and fled the scene on foot. The defendant was apprehended after a foot chase and drugs were discovered in the area where the defendant was caught. **The discovery of drugs was sufficiently attenuated from any illegal stop so as to render the drugs admissible. The offense of battery committed on the Toccoa police officers provided not just reasonable suspicion to further detain, but probable cause to arrest. The drugs were admissible since the battery and subsequent flight, even if triggered by the improper stop, provided an independent basis for the admission of evidence uncovered during such lawful apprehension.**

*Land v. State*, A03A1702 (02/12/04), 04 FCDR 641, 2004 Ga. App. LEXIS 193

The defendant appealed from the trial court’s denial of the motion to suppress and grant of the State’s petition to condemn. The trial court found that a reasonable officer would have believed that there was a likelihood that defendant would destroy evidence in defendant’s apartment. **Exigent circumstances will justify a**

**warrantless entry into a residence. An officer may enter an apartment without a warrant if there are exigent circumstances which require the officer to act immediately. A classic example of exigent circumstances is the likelihood that contraband is in danger of immediate destruction.**

*Pike v. State*, A03A2121 (02/12/04), 04 FCDR 644, 2004 Ga. App. LEXIS 189

Denial of defendant’s motion to suppress evidence seized by police was affirmed. Defendant asserted that his brother’s consent to enter the residence did not give officers consent to enter the defendant’s bedroom. Information available to officers at the time of the search justified one of reasonable caution to believe that the consenting party had authority over the entire premises. **“A warrantless search of a residence may be authorized by the consent of any person who possesses a sufficient relationship to the premises to be inspected.”**

## Speedy Trial

*Smith v. State*, A03A1804 (02/09/04), 04 FCDR 654, 2004 Ga. App. LEXIS 158

The statutory protections conferred by O.C.G.A. § 17-7-170 and O.C.G.A. § 17-7-171 attach with formal indictment or accusation. **The Sixth Amendment provides constitutional protection over and above the statutory provisions and thereunder the right to a speedy trial attaches upon arrest and can be asserted any time thereafter.**

## Evidence – *Res Gestae*

*Moore v. State*, A03A1792 (02/11/04), 04 FCDR 639, 2004 Ga. App. LEXIS 166

Defendant's conviction for robbery by sudden snatching was affirmed. **Evidence that defendant was uncooperative, verbally abusive, tried to remove some items from his pocket, and smelled like alcohol at the time of his arrest were admissible as part of the *res gestae*. All circumstances connected with a defendant's arrest are considered proper evidence to be submitted to the jury.**

## Evidence – Hearsay

*Kennedy v. State*, S03A1378 (02/16/04), 04 FCDR 596, 2004 Ga. LEXIS 140

The defendant's conviction for felony murder with cruelty to children underlying was affirmed. It was error for the trial court to keep the defendant from introducing a letter he had written that was illustrative of his state of mind at the time of the funeral of the victim because the defendant took the stand. Such an error was not reversible because the letter was cumulative of the testimony of the defendant and others. **"Self-serving declarations are inadmissible hearsay unless the declarant testifies and is subject to cross-examination."**

## Evidence – Impeachment

*Armour v. State*, A03A2042 (02/12/04), 04 FCDR 658, 2004 Ga. App. LEXIS 192

Defendant's convictions for burglary, arson, and making terroristic threats were affirmed. At trial the court properly disallowed the use of the police summary of a witness' statement to impeach the witness/declarant because the witnesses' testimony did not contradict the officer's summary of their earlier statements. Instead, the testimony was more detailed than the summary compiled by the officer. **Before one may impeach with a prior inconsistent statement, the statement must contradict or be inconsistent with the witness' in-court testimony.**

## Evidence – Character

*Robinson v. State*, A03A1940 (02/09/04), 04 FCDR 661, 2004 Ga. App. LEXIS 160

*Lockaby v. State*, A04A0233 (02/11/04), 04 FCDR 660, 2004 Ga. App. LEXIS 174

Defendant's conviction for possession of amphetamine was affirmed. During trial the defendant offered an unsolicited assertion that the drug screen, which was the basis of his prosecution, was his only positive drug screen. To impeach, the prosecution questioned the defendant about prior positive drug screens. **"Testimony may be admissible for the purpose of impeaching the veracity of a witness even if it would be impermissible if offered for the purpose of impeaching the defendant's character."**

## Implied Consent Rights

*State v. Chun*, A04A0343 (02/11/04), 04 FCDR 638, 2004 Ga. App. LEXIS 173

The State of Georgia appeals from the trial court's grant of a defendant's motion in limine regarding evidence "that defendant refused to submit to state-administered chemical testing." The defendant argued that the police officer gave "technically correct" but misleading information in addition to the implied consent notice in that he suggested that defendant's license would be suspended whether or not she chose to take the chemical test. The officer advised the defendant that if she refused the test, or if the test were .08 or greater, her license would be suspended. He further advised, even if the test were below .08 and she was convicted at trial, her license would be suspended. **The Court of Appeals held that under the circumstances of this case, there was no substantial basis that the officer's statements were so misleading that they rendered Chun incapable of making an informed decision about whether to submit to chemical testing.**

## Recidivist Sentencing

*State v. Jones*, A03A2320 (02/10/04), 04 FCDR 653, 2004 Ga. App. LEXIS 163

Defendant's sentence for his second conviction for possession of cocaine with the intent to distribute was reversed. The trial court sentenced the defendant to 12 years, to serve 7 years, balance on probation. O.C.G.A. § 16-13-30(d) states that upon a second or subsequent conviction for VGCSA, the defendant shall be imprisoned for not less than ten years nor more than 40 years or life imprisonment. O.C.G.A. § 17-10-7 (c) requires that the time be served without parole. **The Court of Appeals held that the decision to**

probate a portion of the sentence is in direct contravention to O.C.G.A. § 16-13-30 (b), and O.C.G.A. §17-10-7 (c). By the plain reading of these statutes, the defendant must serve at least ten years in prison.

### Jury Charges – Defendant’s Testimony

*Kennedy v. State*, S03A1378 (02/16/04), 04 FCDR 596, 2004 Ga. LEXIS 140

The defendant’s conviction for felony murder with cruelty to children underlying was affirmed. The giving of the instruction, “**When Defendant testifies, he becomes the same as any other witness . . . you have the right to take into consideration the fact that he is interested in the outcome of the prosecution**” is not error since the instruction merely states the self-evident fact of defendant’s interest in the outcome of the case.

### Jury Charges – Felony Murder

*Kennedy v. State*, S03A1378 (02/16/04), 04 FCDR 596, 2004 Ga. LEXIS 140

The defendant’s conviction for felony murder with cruelty to children underlying was affirmed. The judge charged the jury that defendant was charged with committing murder while in the commission of the felony; that a person commits murder when, in the commission of a felony, that person causes the death of another human being; that cruelty to children was a felony; and that cruelty to children was committed when a person maliciously caused a

child under the age of 18 cruel or excessive physical or mental pain. Defendant claimed error in that the charge did not explain the phrase, “...in commission of a felony ...” and the legal relationship that must exist between the felony and the death.” **The charge as given was not reversible error because while it did not explain the phrase “in commission of a felony” it did correctly set forth the elements of the crimes involved and their relationship to one another.**

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