



CaseLaw

Update

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CaseLaw This Week

Week Ending March 12, 2004

Evidence – Character
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Evidence – Proper Witness
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Evidence – Character

Johnson v. State, A03A2398
(02/23/04), 04 FCDR 822, 2004 Ga. App.
LEXIS 257

Defendant's convictions for armed robbery were affirmed. Defendant complained that the trial court erred in denying his motion to sever the trial of the two armed robbery charges on the grounds that they were joined merely because they were "of the same or similar character," which is not permissible. Defendant's two armed robberies were months apart in time but were (1) "committed in the same neighborhood on Friday evenings;" (2) "in both cases, the robbery showed his gun to a male friend

or acquaintance and announced his intention to get a car, just moments before the crimes were committed;" (3) "both crimes were accomplished by a man wearing a fitted cap or "do-rag," brandishing a handgun, surprising lone women as they got into or out of a sport-utility vehicle, and demanding car keys;" (4) "in each case a second man was involved within moments of the crime being committed, the robber was seen driving the stolen car not far from the crime scene, and the two suspects attempted to flee from police on foot" (5) "evidence of one of the robberies would be admissible in the trial of the other robbery." **The Court of Appeals held that the two armed robberies could be tried together because they were "so similar that they evinced a definite pattern."**

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.

Sealey v. State, S03P1479 (03/01/04), 04 FCDR 769, 2004 Ga. LEXIS 181

The defendant's convictions for malice murder and sentence to death were affirmed. **The trial court did not err in admitting evidence in the sentencing phase showing that Sealey had illegally used a man's credit card shortly after the man's murder. "Reliable evidence of bad character and of past crimes is admissible in the sentencing phase of a death penalty trial."** The evidence of defendant's illegal use of the man's credit card was clearly reliable, and we conclude from our review of the record that **the connection between the defendant and the man's murder was sufficiently reliable to allow evidence of the murder to be presented to the jury.**

Tyler v. State, A04A0270 (02/24/04), 04 FCDR 846, 2004 Ga. App. LEXIS 264

Defendant's convictions for aggravated child molestation were reversed for improper admission of hearsay testimony. Defendant complained that he was entitled to a mistrial when the prosecuting attorney elicited hearsay testimony from the investigating officer that defendant and his wife had been sexually molested as children. **The Court of Appeals held that the defendant was entitled to a mistrial because from that statement "[t]he jury might have inferred that any molestation of [defendant] as a child would have increased his propensity to become a child molester [. . .] even though the testimony may not have constituted bad character evidence, [as being a crime victim is not evidence of bad character,] it placed [defendant's] character in issue in a way that was clearly harmful and irrelevant."** Because **the trial court did not "rebuke counsel and by all needful and proper instructions to the jury endeavor to remove the improper**

impression from their minds" as required by O.C.G.A. § 17-8-75, there was reversible error.

Evidence – Hearsay

Johnson v. State, A03A2398 (02/23/04), 04 FCDR 822, 2004 Ga. App. LEXIS 257

Defendant's convictions for armed robbery were affirmed. Defendant complained that the trial court erred in overruling his double hearsay objection to one officer's testimony regarding what one witness told another officer. Because the witness's veracity was placed in issue **on cross-examination** (the witness admitted that he and defendant did not always get along) **the police officer was permitted to state the witness's double hearsay as evidence of a prior consistent statement. "Admission of a prior consistent statement is permitted where the veracity of a witness' trial testimony has been placed in issue, the witness is present at trial, and the witness is available for cross-examination."**

Search & Seizure

Browner v. State, A04A0062 (02/23/04), 04 FCDR 833, 2004 Ga. App. LEXIS 256

Defendant's convictions for cocaine trafficking and a firearms offense were affirmed. Defendant argued that the warrant issued to search his home was not supported by probable cause because there was no corroborating evidence to support the informant's assertion that cocaine could be obtained at defendant's house. In this case, the police undertook a controlled buy through the informant where the officer searched the informant to ensure he had no drugs or money, then gave the

informant money to purchase drugs from the defendant's home. The officer personally observed the informant enter the defendant's home and then come out with a substance that later field tested positive for crack cocaine. **The Court of Appeals held that "even if the informant had no known credibility, the controlled buy conducted under the observation of the officer, alone, would have been sufficient to establish probable cause."**

Identity of Informant

Browner v. State, A04A0062 (02/23/04), 04 FCDR 833, 2004 Ga. App. LEXIS 256

Defendant's convictions for cocaine trafficking and a firearms offense were affirmed. Defendant complained that the court should have granted his motion to reveal the name of the confidential informant and erred in failing to conduct an in camera hearing to confirm the informant did what the police said he did. The trial court did not grant such motion or hold such hearing because **"the confidential informant was not involved in a buy or transfer of the drugs that are the subject of this prosecution. If the trial court determines that the informant is a tipster who neither participated in or [sic] witnesses the offense, no further inquiry is necessary and the informant's confidentiality should remain privileged."**

Evidence – Proper Witness

Browner v. State, A04A0062 (02/23/04), 04 FCDR 833, 2004 Ga. App. LEXIS 256

Defendant's convictions for cocaine trafficking and a firearms offense were affirmed. Defendant argued that the

trial court erred in refusing to grant his motion for a mistrial in connection with the state's use of an improper witness. In order to prove defendant owned or leased the home in which drugs were found, the state brought forth a witness from the city water department who was familiar with the department's application for water service process. On direct examination the witness explained the water application process and that copies of such were kept in the ordinary course of business. **On cross examination the witness admitted he was only a meter reader with the water department and "was not personally involved in receiving water service applications or maintaining records for the department."** The trial court then denied the entry of the application into evidence and instructed the jury to disregard the witness' testimony. **The Court of Appeals held "that the trial court's remedial instructions were sufficient to cure the harm resulting from the testimony," and that the "granting of a motion for a mistrial is within the discretion of the trial court."**

Evidence – Privileged Testimony

Blocker v. State, A03A2149 (02/25/04), 04 FCDR 819, 2004 Ga. App. LEXIS 819

Defendant's convictions for armed robbery, aggravated assault and a firearms offense were affirmed. Defendant complained that it was error for the trial court to admit a confession he made to a police chaplain. Six days after the armed robbery occurred, defendant approached a policeman and told the officer that his life would be in jeopardy once they talked and that he also wanted to speak to a chaplain. At the time, the police had no knowledge of defendant's involvement in a crime.

When defendant spoke to the chaplain, the chaplain reported that defendant told him "some things" and in the presence of the chaplain confessed to the crime to the policeman. The chaplain adamantly denied that he repeated defendant's confession to the police. At the Jackson-Denno hearing the policeman testified that the chaplain had told him about the defendant's confession; however, at trial the same policeman testified only that the chaplain had told him that the chaplain was worried for the defendant's safety. **The trial court reasoned that the policeman was simply confused by the fact that defendant confessed to the crime in the chaplain's presence. The Court of Appeals could not conclude that the trial court's conclusion was clearly erroneous.**

Merger

Blocker v. State, A03A2149 (02/25/04), 04 FCDR 819, 2004 Ga. App. LEXIS 273

Defendant's convictions for armed robbery, aggravated assault and a firearms offense were affirmed. Defendant argued that the aggravated assault and possession of a firearm charge should have merged with the armed robbery charge. **The aggravated assault charge does not merge with the armed robbery charge because different facts prove the separate charges as the aggravated assault occurred when defendant pointed a gun at the victim while the armed robbery occurred when as the defendant continued to point the gun at the victim as he took the victim's cell phone. The possession of the firearm charge during the commission of an aggravated assault does not merge with the armed robbery because there is express legislative intent to impose double punishment for this conduct.**

Pettiford v. State, A04A0704 (02/26/04), 04 FCDR 844, 2004 Ga. App. LEXIS 844

Two of defendant's three convictions for Theft by Deception were vacated due to merger. Defendant used deceitful means to "obtain from the rightful owner three pieces of earth moving equipment." Specifically, defendant "agreed to buy the three pieces of equipment, [. . .] took possession of the equipment" to inspect it, and told the owner "he had a loan from a bank for the purchase price[.]" Defendant "kept the equipment without paying for it, [. . .] and did not have a bank loan for the purchase price." **The Court of Appeals held that "the same evidence was used to prove [defendant's] guilt on the three counts each alleging in identical terms theft by deception[.]" As a result, "the three charged offenses merged as a matter of fact into one theft by deception offense for purposes of conviction and sentencing."**

Farley v. State, S04A0017 (03/01/04), 04 FCDR 772, 2004 Ga. LEXIS 180

Defendant's convictions for malice murder, aggravated assault, and possession of a firearm during the commission of a crime were affirmed. Defendant argues that the trial court erred in failing to merge his aggravated assault conviction into his malice murder conviction. **If the same evidence used to prove the aggravated assault is also used to prove the malice murder, then the aggravated assault conviction merges into the malice murder conviction as a matter of fact.** Here, however, the forensic pathologist testified that it was the later shots to Pollard's back that caused her death. Therefore, the earlier, non-fatal shot to Pollard's arm was sufficient to support the aggravated assault conviction, and thus there is no merger.

Search & Seizure

Howard v. State, A03A1915 (02/25/04), 04 FCDR 836, 2004 Ga. App. LEXIS 276

The defendant's conviction for DUI was affirmed. Defendant complained that the trial court should have granted his motion to suppress the evidence supporting the guilty verdict because the officer who stopped defendant's vehicle did so without any reasonable basis under the Fourth Amendment. While attempting to serve a domestic violence warrant police observed "a pickup truck driven by a man stop on the road directly in front of the driveway to the house. [The driver of the pickup truck] looked up and saw [the police] and kind of took off." The police then followed the pickup to see if the driver was the person named in the domestic violence warrant. Upon stopping the truck, the driver was not the suspect but during their conversation, "the officer noticed a strong odor of alcohol coming from the truck." After the driver (defendant) failed to pass field sobriety tests, the officer arrested him on DUI charges. **"It was reasonable under the Fourth Amendment for the officer to stop the truck to identify the driver. After making a valid stop to check the driver's identity, the officer's detection of the strong odor of alcohol made it reasonable for him to continue the detention to ask [defendant] if he had been drinking."**

Grand Jury

Sealey v. State, S03P1479 (03/01/04), 04 FCDR 769, 2004 Ga. LEXIS 181

The defendant's convictions for malice murder and sentence to death were affirmed. Defendant argued that his "indictment was invalid under Georgia statutory law because the jury commissioners excluded some persons

from grand jury service based on their levels of education in an attempt to comply with the statutory directive that grand jurors be selected from the most experienced, intelligent, and upright citizens of the county." The testimony indicated that each prospective grand juror removed as a candidate for the grand jury source list was replaced with a candidate from the same race and sex categories. Aside from these facts, **"the statutory procedures for creating the grand jury list are merely directory, and do not create a basis for sustaining challenges to the array."**

Sealey v. State, S03P1479 (03/01/04), 04 FCDR 769, 2004 Ga. LEXIS 181

The defendant's convictions for malice murder and sentence to death were affirmed. Defendant complained that the source lists from which his grand and traverse juries were drawn unlawfully under-represented Hispanic persons. The jury commission relied on the most recently published census in creating its source lists as the Unified Appeal Procedure directs. **The Supreme Court held that this argument failed because defendant "failed to present evidence showing Hispanic persons constituted a cognizable group in the county or any evidence establishing either the existence of actual under-representation or the degree thereof."**

Disqualification

Sealey v. State, S03P1479 (03/01/04), 04 FCDR 769, 2004 Ga. LEXIS 181

The defendant's convictions for malice murder and sentence to death were affirmed. Defendant argued that the "entire office of the district attorney should have been disqualified because one assistant district attorney, while previously in private practice, had

represented defendant in two unrelated criminal cases. **Because the record confirms that the assistant district attorney was properly 'screened from any direct or indirect participation' in [defendant's] prosecution," it was not error for other members of the district attorney's office to continue in the case.**

Evidence – Relevance

Sealey v. State, S03P1479 (03/01/04), 04 FCDR 769, 2004 Ga. LEXIS 181

The defendant's convictions for malice murder and sentence to death were affirmed. The trial court did not err in excluding evidence regarding a polygraph examination administered to a witness, an accomplice's aunt. **The fact that the witness entered into a stipulation with the State as to the admissibility of the results of her polygraph examination in any proceeding against her is irrelevant to the admissibility of those results in defendant's trial, and defendant had no similar stipulation with the State of his own regarding those results.**

Statute of Limitations

Tompkins v. State, A03A1714 (02/23/04), 04 FCDR 840, 2004 Ga. App. LEXIS 252

Defendant's convictions for two counts of child molestation were reversed. The trial court should have found that a portion of the two child molestation counts was barred by the four-year statute of limitations. The alleged crimes took place when the victim was between the ages of 13 and 15. Defendant argued that his indictment was defective because the rule in Georgia is that any exception to the applicable statute of limitations must be alleged in the indictment. Based on this rule,

defendant claimed that the seven-year statute of limitations was an exception to the four-year statute of limitations and thus had to be so alleged in the indictment but was not. **Because defendant had no prior child molestation convictions, the maximum sentence he faced pursuant to statute was 20 years imprisonment. Since he did not face a possible punishment of life imprisonment or death, the applicable statute of limitations was O.C.G.A. § 17-3-1 (c). That statute provides that crimes committed against victims who are under 14 at the time of the crime will have a seven-year statute of limitations while crimes against victims who are over 14 at the time of the crime will have a four-year statute of limitations. The seven-year period established by the statute “is not a mere exception to the four-year period also contained in that code section. Rather, it is, in and of itself, a general statute of limitations.”**

The Court of Appeals noted that because some of the indicted acts of child molestation could have occurred when the victim was 13, the victim would have been under 14 when those acts of molestation occurred mandating that the seven-year statute of limitations be applied to those crimes. **Further, because the indictment stated that the victim was under 16, the statute of limitations tolling provision was also invoked under O.C.G.A. § 17-3-2.1. Such code section provides that if a victim of child molestation, or various other crimes, is under 16 years of age on the date of the offense, then the period within which the prosecution must be commenced under O.C.G.A. § 17-3-1 shall not begin to run until the victim has reached the age of 16. The date of prosecution for the purposes of the statute of limitations is the date the indictment is filed.**

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
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 with feedback.

