



# CaseLaw

## Update

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#### CaseLaw This Week

Week Ending March 19, 2004

**Jury Charges**  
**Effective Assistance of Counsel**  
**Search & Seizure**  
**Right to Confrontation**  
**Evidence – Character**  
**Evidence – Res Gestae**  
**Evidence – Photographs**  
**Double Jeopardy**  
**Speedy Trial**  
**Sentence**

#### Jury Charges

*Richardson v. State*, A04A0025  
(02/27/04), 04 FCDR 912, 2004 Ga. App.  
LEXIS282

Defendant's conviction for armed robbery was affirmed. Defendant requested a jury instruction to resolve the following questions: "First, was the Defendant warned of his constitutional rights, and did he clearly understand and knowingly give up, such rights? And secondly, was his statement clearly voluntary, and freely and willingly given?" The trial court refused to give the charge. **A trial court is not required to instruct the jury to make an independent determination regarding the voluntariness of custodial statements "where...no evidence of nor claim of**

**involuntariness appears."**

*Harris v. State*, A03A2475 (02/27/04), 04 FCDR 924, 2004 Ga. App. LEXIS 283

Defendant's conviction for robbery by force was affirmed. The trial court charged the jury regarding *Miranda* warnings and the necessity that any post-arrest statement be voluntary. Following the jury charge, defense counsel requested that a clarifying instruction be given because defendant's statement was given prior to arrest. The court was informed that, at the time of his arrest, the defendant was again given *Miranda* warnings, but did not make a statement at that time. Based upon defense counsel's expressed concerns, the trial

#### **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.***

court gave the jurors a clarifying instruction that defendant was stopped on May 3, but not arrested; that he was given *Miranda* warnings “out of precaution”; and that “after he was placed under arrest, the evidence would show that he was given his *Miranda* warnings and did not make a statement at that point. So I wanted to clarify that to you as it may be of some value to you, it may not.” A fair reading of what transpired with regard to this issue shows that defendant got what he requested. Any comment on his right to silence after arrest was induced by defendant’s desire for jury clarification as to the date of his arrest in relation to *Miranda* warnings and his statement, as well as by defendant’s deferment to the trial court as to what form such clarification would take.

*Lyons v. State*, A03A1747 (03/04/04), 04 FCDR 923, 2004 Ga. App. LEXIS 307

Defendant’s conviction for selling cocaine was affirmed. **The trial court was not required to give special instructions to the jury regarding transcripts of the audiotaped transactions between defendant and a confidential informant in the absence of a request to charge or an objection to the failure to charge.**

### Effective Assistance of Counsel

*Harris v. State*, A03A2475 (02/27/04), 04 FCDR 924, 2004 Ga. App. LEXIS 283

Defendant’s conviction for robbery by force was affirmed. Defendant claimed that he received ineffective assistance of trial counsel, and argued that counsel failed to file pretrial discovery or a pretrial motion to suppress evidence. The State had an “open file”

policy, making a formal request for discovery unnecessary. Defendant failed to state what more would have been obtained by discovery motions. Defendant claimed that the stop of his car based on a BOLO for the vehicle issued immediately after the bank robbery was improper. However, other than making this conclusory statement, defendant failed to identify any improper factor in the stop of his vehicle. **“Failure to file a motion to suppress is not ineffective assistance of counsel per se.” Defendant must make a ‘strong showing’ that the evidence would have been suppressed had his trial counsel filed a motion.**

*Martin v. State*, A03A1782 (03/04/04), 04 FCDR 920, 2004 Ga. App. LEXIS 302

Defendant’s convictions for rape, aggravated assault and false imprisonment were affirmed. Defendant’s counsel met with defendant before trial and also at critical stages of his defense and presented discovery to defendant for review, and defendant participated in jury selection and was allowed to meet with counsel before the start of trial. **Counsel’s decision not to call character witnesses, make objections or file requests to charge were matters of trial tactics.** Further, defendant’s counsel was not ineffective for failing to make a meritless motion to suppress an admissible prior difficulty between defendant and the victim.

*Bishop v. State*, A03A2430 (03/05/04), 04 FCDR 907, 2004 Ga. App. LEXIS 321

Defendant’s convictions for aggravated assault and a firearms offense were affirmed. **Defendant’s counsel was not ineffective for failing to request a plea from the district attorney because there was no reasonable basis for counsel to**

**seek a plea when the district attorney informed defendant’s counsel that because of defendant’s prior record, he would not recommend a plea.**

### Search & Seizure

*Bray v. State*, A03A2036 (03/01/04), 04 FCDR 926, 2004 Ga. App. LEXIS 284

Defendant’s conviction for manufacturing methamphetamine was affirmed. The trial court did not err in denying Defendant’s motion to suppress. Pursuant to a divorce decree between defendant and his ex-wife, the ex-wife was entitled to return to the marital residence to retrieve her personal property and defendant was not to interfere with the removal. The ex-wife hired a police officer to accompany her to the residence to remove her personal property. Defendant was not there. The ex-wife was unable to locate all of her property, but noticed that three of the internal doors had been padlocked. A locksmith was called to cut off the padlocks. When the padlocks were cut off of the basement door, the police officer went in, and found a methamphetamine lab. The divorce decree gave the ex-wife the right to unobstructed access to the premises to remove her property. **The officer’s entry into the basement based upon the ex-wife’s consent was therefore authorized and not in violation of defendant’s Fourth Amendment rights. At that point, the evidence sought to be suppressed was in plain view, and the trial court did not err in refusing to suppress it.** Although defendant had manifested an intent not to have the padlocked rooms searched, he was not present.

*Poole v. State*, A03A2545 (03/04/04), 04 FCDR 927, 2004 Ga. App. LEXIS 315

Defendant's conviction for violating the Georgia Controlled Substances Act was reversed. The search warrant did not have a no-knock provision. There were no exigent circumstances to excuse the officers' forceful entry. The only information received while the warrant was being executed was that a person inside the residence had looked out of and then left a window. There was no evidence that the person at the window was defendant or that defendant or the person who peered through the window had a history of violence. There was no evidence that either person had threatened violence if law enforcement officers entered, or that defendant had located the drugs for quick disposal. **While the reasonableness standard for a forceful entry was not high, a person appearing at a window and leaving did not establish exigent circumstances. Moreover, had the affiant believed that it was essential for the officers to reach the apartment undetected, he could have sought approval for a no-knock provision.**

*Underwood v. State*, A04A0046 (03/04/04), 04 FCDR 929, 2004 Ga. App. LEXIS 318

Defendant's conviction for possessing a controlled substance was affirmed. As officers entered the front door to serve the warrant, several males, including defendant, were seen exiting the back door of the apartment in a "hurried manner." Upon searching defendant, officers found contraband in his pocket. The totality of the circumstances, including defendant's presence on the premises being searched, and his subsequent flight, justified defendant's detention and search. An officer testified that he ordered defendant to the ground, and searched him because he was leaving the location of the search warrant, and might be leaving with evidence, or destroying evidence, and that he might

have a weapon. **Defendant's undisputed flight from the premises, coupled with the evidence of his presence at premises being searched pursuant to a lawful warrant, provided probable cause for the officer to believe that he possessed, or was, at least, a party to the crime of possessing, the unlawful contraband specified in the warrant.**

### Right to Confrontation

*Thompson v. State*, A03A2034 (03/03/04), 04 FCDR 910, 2004 Ga. App. LEXIS 290

Defendant's convictions for armed robbery, aggravated assault, kidnapping and a firearms offense were affirmed. **The trial court violated defendant's Sixth Amendment right to confrontation in restricting the cross-examination of the accomplice, as defendant was unable to expose his accomplice's motivation in testifying for the State.** After the trial, it was held to be reversible error to restrict the cross-examination of an accomplice as to his deal with the State, including the disparity between the recommended sentence and the sentence the accomplice would have received without his cooperation. **However, the error was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt.**

### Evidence – Character

*Griffin v. State*, A04A0135 (03/03/04), 04 FCDR 903, 2004 Ga. App. LEXIS 296

Defendant's conviction for cocaine possession was affirmed. **Testimony that the area in which defendant lived, and in which the incident occurred, was a high crime area did not suggest that defendant himself had been involved in any previous**

**criminal conduct at this location.** It did, however, explain why the officer was on patrol in the area, and thus had "at least tangential relevance."

### Evidence – Best Evidence Rule

*Eley v. State*, A03A2415 (03/03/04), 04 FCDR 933, 2004 Ga. App. LEXIS 295

Defendant's convictions for statutory rape, incest, and child molestation were affirmed. The trial court's ruling that the best evidence rule precludes defendant's wife from testifying about the contents of the victim's journal was not erroneous in light of the victim's testimony that she threw the journal away. **The 'best evidence' rule applies only when the contents of a writing are in issue.** When a writing is lost, destroyed, or inaccessible, the party who desires to offer the contents of such writing, must account for his inability to produce it despite the exercise of due diligence. "The question of diligence is one for sound discretion of the court." "Merely asserting the loss, without showing diligence in attempting to provide the [writing], will not do."

### Evidence – Res Gestae

*Lyons v. State*, A03A1747 (03/04/04), 04 FCDR 923, 2004 Ga. App. LEXIS 307

Defendant's conviction for selling cocaine was affirmed. **Res gestae declarations are those "accompanying an act, or so nearly connected therewith in time as to be free from all suspicion of device or afterthought."** O.C.G.A. §23-3-3. The encounters between defendant and confidential informant were part of the res gestae where the defendant's

statements to the confidential informant within seconds of the incidents charged were recorded on an audiotape and transcripts were later shown to the jury.

### Evidence – Photographs

*Miller v. State*, S03A1749 (03/08/04), 04 FCDR 862, 2004 Ga. LEXIS 200

Defendant's convictions for felony murder and aggravated battery in the death of defendant's 22-month-old foster child were affirmed. **Photographs taken at the hospital that showed tubes, cardiac leads, and tape applied by medical personnel to the victim's body were "standard treatments and procedures initiated to attempt resuscitation of the child," and therefore were not improperly inflammatory. Photographs taken immediately prior to the autopsy incisions were material, relevant and admissible to show the extent and nature of the victim's wounds, even if they were to some degree duplicative. Post-incision autopsy photographs "are admissible if necessary to show some material fact that becomes apparent only due to the autopsy." The post-incision photographs of the victim showed injuries under the scalp, to the brain, and to the interior of the torso, and demonstrated the extent of trauma to the child's head and the force with which he had been held.**

### Double Jeopardy

*Paul v. State*, A04A0579 (03/04/04), 04 FCDR 918, 2004 Ga. App. LEXIS 317

Denial of defendant's double jeopardy plea in bar made prior to defendant's retrial for aggravated assault and possession of a knife was affirmed. While the need for a retrial in the face of the trial judge's misconduct was arguably

foreseeable, no evidence suggested that retrial was an intended consequence of the judge's misconduct. **Since the record supported a finding that the trial judge did not engage in misconduct with the intent to prevent defendant's acquittal, or that acquittal was more likely to occur in the absence of the misconduct, double jeopardy did not prevent a retrial.**

The primary purpose underlying the Double Jeopardy Clause is to prohibit the retrial of a criminal defendant where the prosecution has, at the initial trial, produced insufficient evidence to sustain a conviction. The Supreme Court of Georgia rejects the argument that the double jeopardy bar should be expanded to become a type of exclusionary rule, to exclude retrial whenever intentional governmental misconduct is so egregious and prejudicial that it denies the defendant a fair trial. Thus, a defendant can be retried if the record did not show the prosecutor's conduct was for the purpose of aborting the trial and securing an opportunity to retry the case.

### Speedy Trial

*State v. Byrd*, A04A0430 (03/04/04), 04 FCDR 931, 2004 Ga. App. LEXIS 316

Defendant's dismissal of her indictment for aggravated assault and the granting of defendant's motion to suppress were reversed. **Defendant's indictment more than one year after the incident was not a speedy trial violation, as defendant was not arrested until one year after the incident.** As defendant was out on bond, her indictment four months after her arrest was timely. There was no unconstitutional delay in the appointment of counsel as defendant had legal representation two months after the indictment. **The State's acquiescence in defendant's attempt for a mental health**

**placement and the resultant delay also did not constitute a speedy trial violation.** This Court will not uphold the suppression of identification testimony based upon a hearsay recounting that "something along the lines" of an improper show up occurred, "or something like that." **Even if a pretrial identification is tainted, an in-court identification is not constitutionally inadmissible if it does not depend upon the prior identification but has an independent origin."**

### Sentence

*Smith v. State*, A03A2396 (03/04/04), 04 FCDR 930, 2004 Ga. App. LEXIS 312

Defendant's convictions for theft by taking were affirmed but his recidivist sentence was vacated. Defendant complained that one the prior felonies taken into account for recidivist purposes were not valid under the Georgia recidivist sentencing statute. One of the three prior felonies used by the trial court was a 1975 guilty plea to five counts of burglary. In the superior court's "Order of Commitment" on that plea, Smith was convicted on those counts and ordered committed to the Department of Family and Children Services. **Because defendant was 16 at the time, Georgia's Youthful Offender Act did not apply to make his conviction a valid felony conviction for recidivist purposes, as the Act applies to those aged 17 to 25.** Also, under the commitment order, the superior court adjudicated Smith guilty as an adult and convicted him of felonies; however, under Georgia law, **the superior court has concurrent jurisdiction over juvenile defendants where a child commits a delinquent act that would be considered a crime if tried in a superior court and "for which the child may be punished by loss of life or**

confinement for life in the penitentiary.”  
Burglary is not a crime punishable by loss of life; therefore, the superior court did not have jurisdiction over Smith’s case when it convicted him of the burglaries.

*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.**

## **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.