



CaseLaw

Update

Prosecuting Attorneys' Council of Georgia

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CaseLaw This Week

Week Ending March 26, 2004

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Forfeiture
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Jury Charges
Search & Seizure
Evidence – Hearsay
Evidence – Similar Transaction

Merger

State v. Fuller, A03A1918 (03/09/04), 04 FCDR 329, 2004 Ga. App. LEXIS 329

The trial court's grant of defendant's plea in bar based on the theory of mutual exclusion was reversed. Pursuant to several counts arising from one act of kidnapping with theft of the victim's vehicle occurring at the same time, defendant was charged and pled guilty to theft by taking the victim's vehicle, theft by receiving the stolen vehicle, and driving without a license in Cobb County, where he was found driving the stolen car. The act of kidnapping took place at Lenox Mall in Fulton County where the victim was followed to his car, then ordered at gunpoint to drive the defendant to

DeKalb County where he was ordered out of the car. At the Fulton County trial for kidnapping, the defendant complained that the conviction for kidnapping would be void as mutually exclusive of his conviction for theft by receiving stolen vehicle. "**Mutual exclusion means that a finding of guilt on the essential elements of one count by definition excludes a finding of guilt based on an essential element of another count [. . .] A conviction for kidnapping would not preclude a conviction for theft by receiving the automobile.**" While **theft by receiving includes an essential element that someone other than the accused stole the property; the crime of kidnapping contains no element that the accused either stole property or received stolen property.**

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.

Forfeiture

Johnson v. State of Georgia, A03A1974, 04 FCDR 972, 2004 Ga. App. LEXIS 330

The trial court's decision to allow a forfeiture of his car was affirmed. Defendant complained that because the state did not initiate the instant forfeiture action within 60 days of the date of the seizure of defendant's car that the action was barred. The state admitted that it had not brought the instant forfeiture action within 60 days of the seizure of defendant's car. While, **the State is required to initiate forfeiture proceedings within 60 days from the date of seizure, the statute states that "the property must be released on request of an owner or interest, holder pending further proceedings pursuant to this Code section[. . . .] Although the State failed to timely initiate forfeiture proceedings and failed to return the property in response to defendant's request, the property was always subject to further forfeiture proceedings."**

Media Statements

Atlanta Journal-Constitution and WSB-TV v. State, A03A0695 (03/09/04), 04 FCDR 973 2004 Ga. App. LEXIS 331

The trial court's restrictive order preventing the prosecution and the defense, including parties, counsel, experts, witnesses, and investigators from saying anything to the press but "no comment" or "whatever we have to say will be [or has been] said in court" was reversed on the grounds that the trial court did not properly apply the legal standard for restricting such speech. **Precedent supported the trial court's order to the extent that it prohibited counsel from making comments**

regarding the accused's character, reputation or prior criminal record; the possibility of a plea; the existence or contents of any confession; the results of any examinations; the identity of a prospective witness; or any opinion as to the guilt of the accused. "The real question is whether the trial court properly applied **the correct standard in determining whether the pre-indictment publicity justified restraining the non-lawyers.**" As reason for the restraint on the non-lawyers the **trial court stated** that "there is a reasonable likelihood that each defendant's right to a fair trial could be prejudiced by pretrial publicity." **The Court of Appeals held that the proper standard was Rule 3.6 of the State Bar of Georgia Rules of Professional Conduct which provides that extrajudicial statements to the media are to be restrained when such statements "to the media will have a substantial likelihood of materially prejudicing the trial."**

Jury Charges

Hughes v. State, A04A0119 (03/10/04), 04 FCDR 966, 2004 Ga. App. LEXIS 326

Defendant's conviction for aggravated assault was affirmed. The trial court did not err in instructing the jury that hands may be considered deadly weapons. **While hands are not deadly weapons per se within the meaning of OCGA §16-5-21, the factfinder may find them to be so depending on the circumstances surrounding their use, including the extent of the victim's injuries.**

The trial court did not err in instructing the jury on the full definition of aggravated assault under OCGA § 16-5-21 (a)(2). In order to prove the aggravated assault charge under the

indictment in this case, the State was required to show that defendant used his hands in a manner that actually resulted in serious bodily injury. A determination by the jury that defendant used his hands in a manner that actually resulted in serious bodily injury to the victim would encompass a finding that he had used his hands in a manner likely to cause serious bodily injury.

Search & Seizure

Akins v. State, A03A2452 (03/11/04), 04 FCDR 974, 2004 Ga. App. LEXIS 343

Defendant's conviction for cocaine possession was affirmed. The trial court did not err in denying defendant's motion to suppress the cocaine found in his car and mouth after an officer approached the stopped car, asked defendant's female passenger to roll down her window and ask her what was going on. The officer did not need probable cause to approach the stopped car and inquire about the passenger's well being.

In so holding, **the court overruled *State v. Smith*, 137 Ga. App. 101 (1975), in which it held that the officer seized the defendant by instructing him to either roll down his window or open the car door. The court now holds that officers may approach citizens, ask for identification, ask them to roll down a window or step out of a car and freely question them without any articulable suspicion, as long as the officers do not detain the citizen or create the impression that the citizen may not leave.**

Evidence – Hearsay

McMillan v. State, A03A2202 (03/11/04), 04 FCDR 977, 2004 Ga. App. LEXIS 344

The Court of Appeals partially reversed defendant's convictions for violating the RICO Act, theft by taking, forgery, false statements and practicing dentistry without a license due to the expiration of statute of limitation periods. It was not reversible error for the trial court to overrule defense counsel's hearsay objection to a line of questions in which the witness had some personal knowledge. The court held that, even assuming, without deciding, that the witness' testimony regarding the contents of the account records was hearsay, there was other evidence that also showed these facts. To the extent that a best evidence objection might have been available to defendant, any such objection was waived by failure to make it.

Evidence – Similar Transaction

Bradford v. State, A03A2442 (03/10/04), 04 FCDR ___, 2004 Ga. App. LEXIS 341

Defendants' convictions for three counts of theft by taking was affirmed. **Evidence of defendants' similar transactions were sufficiently similar to the charged offenses to show, not the defendants' character, but their scheme, motive, bent of mind and course of conduct in "flipping" newly purchased homes after acquiring financing by fraudulent means.** In all of the similar transactions introduced by the State, the defendants' targeted investors, prepared false and fraudulent loan application documents, and then bought and sold property on the same day. The trial court did not abuse its discretion in admitting the similar transaction evidence.

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, or Joe Burford at jburford@pac.state.ga.us with feedback.

