# CaseLaw Update

Prosecuting Attorneys' Council of Georgia



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## CaseLaw This Week

**Week Ending April 2, 2004**



## *Evidence*
## *Similar Transaction*

*Collier v. State,* A03A1728 (03/18/04), 04 FCDR 1083, 2004 Ga. App. LEXIS 375

Defendant's convictions for two counts of aggravated assault for two separate stabbing incidents were reversed on the grounds of ineffective assistance of counsel. The defendant complained there was error in the trial court's admission of evidence of three separate similar transactions from 1988 where defendant stabbed a man, hit another with his fist, and threatened to kill a third and his family while waving a gun. **The evidence was offered for the purpose of showing defendant's modus operadi, scheme, course of conduct, and bent of mind under particular circumstances. The Court of Appeals held "[w]hen similar transaction evidence is being introduced to prove motive, intent, or bent of mind, it requires a lesser degree of similarity than when such evidence is**

**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.***

**being introduced to prove identity." Further, "while there were dissimilarities between the 1988 acts and the charged offenses, the law does not require that they be identical."**

Defendant also complained that because one of the prior incidents in 1988 resulted in a **grand jury "no bill,"** it should not have been able to be used against the defendant as a similar transaction. **The Court of Appeals disagreed holding that "[u]nlike an acquittal, a "no bill" leaves unresolved the issue of whether the accused committed the offense."**

*Pinson v. State,* A04A0595; A04A0596 (03/12/04), 04 FCDR 1089, 2004 Ga. App. LEXIS 348

Defendants' convictions for false imprisonment, armed robbery, burglary, and possession of a firearm during the commission of a felony were affirmed. Two codefendants were tried at the same trial. Defendant Pinson complained that the trial court erred in admitting evidence of a similar transaction. At a hearing to determine the admissibility of the similar transaction, the State presented testimony of a prior robbery where the defendants robbed the prior victim at night, within a few days of the instant robbery, and in the same general area. Further, in both robberies, defendant Pinson "engaged the victim in conversation until defendant Sigmon could emerge from hiding with a handgun." While defendant Sigmon held the victims at gunpoint, defendant Pinson went through their pockets taking anything of value. **This evidence was admissible to show common plan, scheme and bent of mind.**

## Ineffective Assistance of Counsel – State's Closing Argument

*Collier v. State*, A03A1728 (03/18/04), 04 FCDR 1083, 2004 Ga. App. LEXIS 375

Defendant's convictions for two counts of aggravated assault for two separate stabbing incidents were reversed on the grounds of defense counsel's failure to object to the prosecution's improper arguments in closing. **Referring to similar transaction evidence presented at trial, the Court of Appeals stated "the prosecutor blatantly misused [the similar transaction] evidence by focusing the jury's attention on the fact that he had participated in a negotiated plea with [the defendant in 1988], by then pleading to them for forgiveness for his 'taking that plea bargain,' and finally, by rallying them in what seems to have been his personal campaign to rectify in the instant case his actions in that prior case. ('This is our chance to, I submit, correct the record.')"** The Court of Appeals held that defense counsel's failure to object to this improper argument or to move for a mistrial at the end of it was ineffective assistance of counsel.

## Evidence – Rape Shield Statute

*Osterhout v. State*, A03A2243 (03/17/04), 04 FCDR 1108, 2004 Ga. App. LEXIS 363

The defendant's convictions for false imprisonment, rape, aggravated assault, simiple assault, possession of a knife and a firearms offense were affirmed. Defendant complained that the trial court improperly excluded evidence under the Rape Shield Statute, O.C.G.A § 24-2-3, because the statute only applies to the rape counts, not the aggravated assault counts. **The Rape Shield Statute was applicable because [the defendant] was being prosecuted for aggravated assault in conjunction with a rape charge. The Rape Shield Statute bars the admission of evidence relating to "the complaining witness's marital history, mode of dress, general reputation for promiscuity, nonchastity, [and] sexual mores contrary to the community standards."**

## Evidence – Identification

*Miller v. State,* A03A2351 (03/28/04), 04 FCDR 1094, 2004 Ga. App. LEXIS 370

Defendant's conviction for aggravated assault was affirmed. The trial court did not err in admitting testimony about the victim's and his girlfriend's pre-trial identification of defendant as the robber. **Although the one-on-one showup at a Waffle House near the crime scene was inherently suggestive, there was no substantial likelihood of misidentification, because the victim and his girlfriend both had an opportunity to observe defendant during the crimes, they gave accurate descriptions of defendant to police and they unhesitatingly identified defendant during the showup less than one hour after the robbery.**

## Evidence – Character

*White v. State*, A03A2206 (12/10/03), 04 FCDR 1106, 2004 Ga. App. LEXIS 1521

The court reversed defendant's conviction for theft by shoplifting, holding that the trial court erred in admitting evidence of defendant's three prior shoplifting convictions. Defendant was charged with felony shoplifting, which requires proof of recidivism. However, it is error for the jury to be made

aware of prior convictions during the guilt/innocence phase of the trial. **Evidence of defendant's prior convictions for shoplifting were not admissible for any other purpose, therefore it was err for the trial court to read the indictment to the jury without redacting the references to defendant's recidivism and prior convictions.** The Court also held that the error was harmful since the State's evidence was not overwhelming, and that the jury may have been unduly influenced by defendant's prior record.

## Implied Consent

*Shoemake v. State*, A03A1717 (03/18/04), 04 FCDR 1102, 2004 Ga. App. LEXIS 366

The defendant's convictions for DUI and following too closely were affirmed. Defendant contended that it was unclear whether he was given his implied consent warning at the scene of his arrest or later at the hospital and that the results of his blood test were therefore inadmissible. The officer testified that it was **his habit** to **always read the implied consent warning before he transports them from the scene**. **"The officer's testimony about his habit and lack of a specific recollection 'went to its weight and credibility, but does not affect its sufficiency on appeal.'"**

## Indictment Malice Murder

*Mayo v. State*, S03A1467 (03/08/04), 04 FCDR 1016, 2004 Ga. LEXIS 195

Defendant's conviction for malice murder was reversed because the trial proceeded under an accusation rather than an indictment. Defendant stipulated to trial by accusation, however, **O.C.G.A § 17-7-70 requires that capital felony cases proceed under an indictment. Without an indictment, the trial court was without subject matter jurisdiction and its judgment is void.** The State may still elect to indict and try the defendant for malice murder.

## Crawford v. Washington - Confrontation Clause, Hearsay, Harmless Error

*Moody v. State*, S03A1669 (03/22/04), 04 FCDR 1018, 2004 Ga. LEXIS 267

An officer testified to hearsay statement made by the victim during investigation of a prior difficulty between her and the defendant in which he shot into her room. **The Sixth Amendment requires that "testimonial" hearsay in a criminal prosecution is admissible when the declarant is unavailable only if the defendant had a prior opportunity to cross-examine the declarant about the hearsay statement.** Here, there was no such opportunity so admission of the statement was error. However, **its admission was harmless because the statement was cumulative of admissible evidence and reasonably did not contribute to the verdict.** The victim's boyfriend testified to the same facts and evidence showed that defendant had plead guilty to the incident.

## Out-of-Time Appeal

*Dykes v. State*, A03A2053 (03/12/04), 04 FCDR 1073, 2004 Ga. App. LEXIS 353

Defendant appealed denial of his motion for out-of-time appeal filed sixteen years after his conviction. Defendant initially plead guilty pursuant to a negotiated plea agreement. After release, he took steps to have his civil and political rights restored, but took no steps to pursue his appellate rights. Defendant himself admits that he seeks an out-of-time appeal in order to avoid sentencing as a fourth time recidivist. **The facts of this case demonstrate sufficient evidence that the defendant by his own conduct waived or slept on his appellate rights. Thus, no hearing was required and the trial court did not abuse its discretion in denying the motion.**

## Psychiatric Evaluation Defendant

*Fox v. State*, A03A1880 (03/17/04), 04 FCDR 1100, 2004 Ga. App. LEXIS 369

Defendant's convictions for aggravated rape and sodomy were affirmed. Defendant argued the trial court erred in denying his request for funds to conduct an independent psychiatric evaluation. **The defendant presented no evidence to rebut the state ordered evaluation finding that he had no mental disorder and was competent to stand trial. Therefore, defendant failed to show that his sanity would be a significant factor at trial, and the trial court did not abuse its discretion.**

## Search and Seizure

*Shoemake v. State*, A03A1717 (03/18/04), 04 FCDR 1102, 2004 Ga. App. LEXIS 366

Defendant appealed his conviction for DUI alleging the trial court should have suppressed the test of his BAC because his due process rights were

violated when the sample was destroyed before he could independently test it. The defendant presented no evidence that the sample would have been exculpatory and evidence showed that the sample was destroyed as a normal process more than a year after it had been taken. Thus, **the conviction was upheld because the defendant failed to show the evidence was material and that the police acted in bad faith in failing to preserve it.**

## Jury Charges

*Skaggs-Ferrell v. State*, A04A0221 (03/12/04), 04 FCDR 1074, 2004 Ga. App. LEXIS 349

Defendant's convictions for aggravated assault, burglary, and attempted armed robbery were affirmed. Defendant complained that trial court erred in not giving the jury instruction that "neither presence, nor flight, nor both together, without more, is conclusive of guilt." The Court of Appeals held that "while this is a correct statement of the law, we find no abuse of the court's discretion in refusing to give the requested charge." Because **the Supreme Court has abolished the jury instruction stating that flight in criminal cases may constitute an inference of guilt**, as it "carries with it the potential of being interpreted by the jury as an intimation of opinion by the court that there is evidence of flight and that the circumstances of flight imply the guilt of the defendant[;]" the **Court of Appeals found the "same logic applicable" to the defendant's requested jury instruction on flight**.

## DUI

*Totino v. State,* A04A0171 (03/15/04), 04 FCDR 1078, 2004 Ga. App. LEXIS 356

Defendant's conviction for DUI was affirmed. Defendant complained that it was error for the trial court to deny his motion for a directed verdict on the per se charge of DUI because given the 0.010 margin of error associated with the Intoxylizer 5000, defendant's blood alcohol level may not have been 0.10. **The Court of Appeals held, "an Intoxylizer's margin of error relates to the weight given to the test results rather than to their admissibility, and the results are direct evidence of guilt."**

## Evidence
## Pretrial Identification

*Pinson v. State*, A04A0595; A04A0596 (03/12/04), 04 FCDR 1089, 2004 Ga. App. LEXIS 348

Defendants' convictions for false imprisonment, armed robbery, burglary, and possession of a firearm during the commission of a felony were affirmed. Two codefendants were tried at the same trial. Defendant Sigmon argued that the trial court erred in admitting evidence of a pre-trial identification and denying his motion to suppress because the photographic lineup that was used was impermissibly suggestive. **The Court of Appeals held that the instant photographic lineup was not impermissibly suggestive under the totality of the circumstances because the line-up showed persons who "were of similar physical appearance;" did not "highlight" defendant Sigmon; defendant's picture was "not noticeably different" from other pictures; nor was his "picture positioned differently."** Plus, **"there was no indication that the identification was not based solely upon the recognition of the appellant by the victim during the actual robbery."**

## Evidence

## Best Evidence Rule

*Pinson v. State*, A04A0595; A04A0596 (03/12/04), 04 FCDR 1089, 2004 Ga. App. LEXIS 348

Defendants' convictions for false imprisonment, armed robbery, burglary, and possession of a firearm during the commission of a felony were affirmed. Two codefendants were tried at the same trial. Defendant Sigmon complained that it was error for the trial court to admit a photocopy of a photographic lineup that was used to identify defendant Sigmon before trial. **The state did not introduce the original photographic lineup because it was "missing from the file. The exhibit, although a copy of the original photographic lineup, was not subject to a best evidence rule objection because it was primary evidence of the fact to be proved, that the victim was shown a photographic display from which he identified [defendant] Sigmon's picture as that of the person committing the crimes against him."** Further, the **photocopies were "clear enough to be recognizable." Thus, the jury "could easily satisfy themselves that the likeness of the defendant along with that of others composed a fair test of the witness' ability to identify the defendant."**

## Brady

*Pinson v. State,* A04A0595; A04A0596 (03/12/04), 04 FCDR 1089, 2004 Ga. App. LEXIS 348

Defendants' convictions for false imprisonment, armed robbery, burglary, and possession of a firearm during the commission of a felony were affirmed. Two codefendants were tried at the same trial. Defendant Sigmon contended that the trial court erred in failing to require the State to meet its discovery obligation to supply him with the address, date of

birth, and telephone number of Cassie Hammond in violation of the defendant's right to a fair trial under Brady v. Maryland. **In order to demonstrate a *Brady* violation, defendant must show (1) that State possessed information favorable to defendant; (2) defendant did not possess the evidence nor could he obtain it with due diligence; (3) the prosecution suppressed the evidence; and (4) a reasonable probability exists that the outcome of the trial would have been different had the evidence been disclosed.** All prongs must be satisfied to demonstrate a violation of the defendant's right to a fair trial. Defendant satisfied none of them. Specifically, **Defendant claimed that the requested information "could have led to exculpatory evidence," but the Court of Appeals held that "mere speculation that there may be exculpatory information is insufficient."**

## *Search & Seizure*

*State v. Pierce*, A03A24457 (03/12/04), 04 FCDR 1104, 2004 Ga. App. LEXIS 346

The State trial court's order granting defendant's motion to suppress evidence and statements obtained at the time of his arrest for speeding, and DUI was reversed. The State complained that the trial court erred in granting defendant's motion to suppress the results of the field sobriety tests and certain statements due to lack of a Miranda warning. The defendant was stopped for driving over 100 miles per hour when the arresting officer observed "a moderate odor of alcohol. [. . . ] Here, defendant was detained outside of his car while the arresting officer summoned an officer from the DUI task force. When the DUI task force Officer arrived, he asked a few preliminary questions then walked over to close Pierce's car door explaining that he was doing so before **"some other drunk took it off. [. . .] The test for determining whether a person is under arrest at a traffic stop is whether a reasonable person in the suspect's position would have thought his detention would not be temporary. [. . .] After a DUI suspect is arrested, Miranda warnings must precede further sobriety tests in order for evidence of results to be admissible. [. . . ] When all the surrounding circumstances are considered, the DUI task force Officer's off hand comment, though ill-advised, was insufficient to cause a reasonable person to believe that his detention would not be temporary**" because when the statement was made the officer was walking away from the defendant, and that later the officer said that the wanted to administer field sobriety tests to make sure he was safe to drive.

## *Evidence – Admissibility*

*State v. Pierce*, A03A24457 (03/12/04), 04 FCDR 1104, 2004 Ga. App. LEXIS 346

The State trial court's order granting defendant's motion to suppress evidence and statements obtained at the time of his arrest for speeding, and DUI was reversed. The state argued that the trial court erred in excluding the results of the horizontal gaze nystamus test based on the officer's testimony. The trial court suppressed the results of the test "due to **improper administration of the test which the officer stated would compromise the results**." While **a defendant may challenge [. . .] the method by which the test is administered [, . . .] such a challenge goes to the weight of the evidence and not its admissibility.**

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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.