CaseLaw Update

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CaseLaw This Week

Week Ending April 9, 2004

Photograph

Culler v. State, S04A0149; S04A0309; S04A309 (3/29/04), 04 FCDR 1137, 2004 Ga. LEXIS 271

Defendants' convictions for felony murder and aggravated assault were affirmed. Before trial, the State made photographs of the crime scene available during discovery. None of the photographs depicted one of the defendants' hats at the crime scene (ownership proven by DNA evidence). On the day before jury selection, the State informed the court and defense counsel that negatives of photographs of the crime scene had been "cropped" by the photo shop and that in one of the photos the hat was visible. In addition to the photographic evidence, two investigating officers testified that they found the hat at the crime scene. As a result, the Supreme Court held that the redeveloped photograph was admissible because it was only "**upon a showing of bad faith and prejudice," that the State could be prohibited from introducing the evidence. Here, the State told the trial court and defense counsel of the problem "as soon as it became aware of the problem[;]" therefore, there was no evidence of bad faith.**

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.

Search & Seizure

State v. Lejeune, S04A0115; S04A0116 (03/29/04), 04 FCDR 1140, 2004 Ga. LEXIS 270

The trial court's suppression of blood evidence seized from defendant's former apartment was reversed. The State appealed from the trial court's finding that the Fulton County Magistrate who issued the search warranted acted without jurisdiction. Because the case had already been assigned to the trial court, it found that it had exclusive jurisdiction over the case pursuant to Uniform Superior Court Rule 3.3's statement that "the judge to whom a case is assigned 'shall have exclusive control of such action[.]'" **The Supreme Court held that this "ruling was error" because "any rule that would require police officers to seek search warrants from the superior court after indictment would result in different procedures for seeking search warrants depending on the location of the place to be searched." Further, such an arrangement would require the police "to apply for search warrants with judicial officers other than the superior court if the location to be searched is outside the superior court's judicial circuit."**

State v. Lejeune, S04A0115; S04A0116 (03/29/04), 04 FCDR 1140, 2004 Ga. LEXIS 270

The trial court's suppression of blood evidence seized from defendant's parents' home was reversed. The State appealed from the trial court's finding that the warrant to search the defendant's parents' home was not issued on probable cause because the evidence in support of the warrant was stale as the affidavit was based on a witness's statement from 5 years before the warrant was issued. **The Supreme Court held that the trial court erred in suppressing this evidence because "[t]he ultimate criterion in determining the degree of evaporation of probable cause is not case law but reason. The likelihood that the evidence sought is still in place is a function not simply of watch and calendar but of variables that do not punch a clock." Here, the blood evidence was found on a vise in the defendant's parents' basement. Vises are "not perishable or consumable, [. . .] generally affixed to a workbench or table, and [their] placement is usually intended to be permanent."**

State v. Gomez, A03A2347 (03/22/04), 04 FCDR 1231, 2004 Ga. App. LEXIS 394

The trial court's grant of defendant's motion to suppress evidence acquired in the traffic stop of the defendant was reversed. The State complained that defendant's motion to suppress was improperly granted because the motion "was untimely filed and did not raise any legal issues that were relevant to th[e] case." **Defendant's motion asserted "that officers violated his constitutional rights when they searched his home without a valid warrant and asking that the fruits of this search be suppressed." The charges only involved traffic violations. Because defendant's "motion identified the wrong legal issues to be addressed at the hearing, and nothing in the motion to suppress indicated that [defendant] was challenging the legal basis for the traffic stop[, . . .] the State had no notice that it would be expected to address this issue during the hearing.**

State v. Gomez, A03A2347 (03/22/04), 04 FCDR 1231, 2004 Ga. App. LEXIS 394

The trial court's grant of defendant's motion to suppress evidence acquired in the traffic stop of the defendant was reversed. The State complained that defendant's motion to suppress was improperly granted because the officer "had a reasonable, articulable suspicion of criminal activity to justify the traffic stop. [. . .] **A citizen reported that [a car matching the description of defendant's car] was driving 'all over the roadway' and appeared to be intoxicated. [. . .] A police dispatcher transmitted a lookout for the car based upon the citizen's report[. . . .] Under these facts, [the Court of Appeals] conclude[d] that the officer had a reasonable articulable suspicion to justify an investigative traffic stop, and was not required to question the dispatcher about the source of the information or to wait until he actually observed [defendant] committing a crime."**

State v. Gooch, A04A0792 (03/19/04), 04 FCDR 1233, 2004 Ga. App. LEXIS 388

The trial court's grant of defendant's motion to suppress "drugs located during a consent search of his person" was reversed. The State complained that defendant's motion to suppress was improperly granted because police officers who legitimately stop a car "may request consent to search from the driver and passengers." **The Court of Appeals agreed with the State stating, "An officer who has legitimately stopped a car may request consent to search from the driver and passengers."**

Res Judicata

State v. Lejeune, S04A0115; S04A0116 (03/29/04), 04 FCDR 1140, 2004 Ga. LEXIS 270

The trial court's denial of defendant's plea in bar based on the

doctrines of res judicata, collateral estoppel, and law of the case were affirmed. Defendant argued that the Supreme Court had already affirmed the suppression of blood evidence taken from the defendant's former apartment and former car, which meant that the State was precluded from relitigating the legality of those past searches. **Because the State had "an independent source" for new searches of the same places already searched the trial court's denial of defendant's plea in bar was affirmed.**

Hearsay – Confrontation Clause

Demons v. State, S04A0413 (03/29/04), 04 FCDR 1144, 2004 Ga. LEXIS 274

Defendant's convictions for felony murder aggravated assault, and two counts of possession of a weapon during the commission of a felony were affirmed. Defendant complained that the trial court improperly admitted some of the victim's statements to a co-worker under the necessity exception that "he told her where the bruises had come from [. . .], and that he said that [defendant] was going to kill him." **Defendant complained that such testimony from the co-worker violated his Confrontation Clause rights under the 6th Amendment of the U.S. Constitution and *Crawford v. Washington*, a recent U.S. Supreme Court case, which prohibited the use of "prior testimony at a preliminary hearing, before a grand jury, or at a former trial; and [. . .] police interrogations" without giving the defendant "prior opportunity for cross-examination."** The Georgia Supreme Court held that "**the victim's hearsay statements were not remotely similar to such prior testimony or police interrogation, as they were made in a conversation with a friend, before the commission of any crime, and without any reasonable expectation that they would be used at a later trial. [. . .] Therefore, the hearsay statements were not 'testimonial,' and indicia of reliability other than the opportunity for cross-examination, [. . .] are constitutionally permissible considerations in applying the necessity exception to Georgia's hearsay rule in this case."**

Hearsay – Child Hearsay

Fiek v. State, A03A2576 (03/24/04), 04 FCDR 1209, 2004 Ga. App. LEXIS 418

Defendant's convictions for child molestation and aggravated child molestation were affirmed. Defendant argued that the trial court erred by admitting testimony of the victims' parents about statements their children made to them about the molestations, as well as the videotaped interviews of the victims made by law enforcement investigators. The Court of Appeals held that admission of the child hearsay was proper because the statements fit "a number of factors" under the Child Hearsay Statute. Further, **"the record shows the victim(s) testified at trial and (were) subject to examination and cross-examination. Thus, [defendant] had every conceivable opportunity to examine and cross-examine the [children] in the presence of the jury[. . . .] This procedure provided an additional safeguard to [defendant's] right of fair trial, and provided [defendant] full opportunity of confrontation.**

Severance

Evans v. State, A04A0287 (03/19/04), 04 FCDR 1211, 2004 Ga. App. LEXIS 387

Defendant's convictions for aggravated sodomy, terroristic threats, and rape were affirmed. Defendant argued that his right to sever a false imprisonment count for one victim from trial for the aggravated sodomy of another victim was violated. The incidents surrounding the two different victims occurred around the same time and in one of defendant's homes and demonstrated **"a common scheme by [defendant] to obtain sexual services from teenaged girls through threats and to keep those girls under his control, possibly for prostitution. Under these circumstances, [defendant] had no right to a severance [. . .] because where the offenses are so similar that they show a common scheme or plan or have an identical modus operandi, severance is discretionary with the trial court."**

Indictment

Collins v. State, A04A0362 (03/23/04), 04 FCDR 1216, 2004 Ga. App. LEXIS 406

Defendant's convictions for aggravated child molestation, sexual battery, and three counts of child molestation were affirmed. Defendant complained that he was convicted on an invalid indictment. Specifically, defendant was indicted on 10 criminal counts ranging from child molestation to aggravated sexual battery. Thereafter, 4 of the 10 counts were redacted with trial taking place subsequently. At no time did defendant object to the redacted indictment. A jury found the defendant guilty on all 6 counts but the defendant was granted a new trial for error in the jury charge. After the new trial, the jury reached the instant verdict. At no time until after sentence did defendant complain of error regarding the use of the redacted indictment. **The Court of Appeals, implying procuration of this error, if any, through inaction, held that defendant's "acquiesance to not one but**

two trials on such indictment—require[d] a reiteration of the principle that, 'One cannot complain on appeal of a result that he procured or which his own conduct or procedure aided in causing.'"

Double Jeopardy

Collins v. State, A04A0362 (03/23/04), 04 FCDR 1216, 2004 Ga. App. LEXIS 406

Defendant's convictions for aggravated child molestation, sexual battery, and three counts of child molestation were affirmed. After one trial, and without objection the State prosecuted defendant on the same 6 count indictment resulting in the instant conviction. Defendant averred that the aggravated child molestation count was barred by double jeopardy, since the jury verdict finding him guilty of a lesser included offense of attempt constituted an implicit acquittal on the greater offense. **"By brief, the State concede[d] this issue. But 'the State cannot concede error where there is none. This court must determine for itself whether error exists.' [. . .] A conviction on a lesser included offense does not necessarily foreclose retrial on the greater offense. [. . . r]etrial on the greater offense [i]s not barred unless two prerequisites [a]re established: (1) an unambiguous conviction on the lesser included offense and (2) a full opportunity for the jury to consider the greater offense.**

It was not disputed that, in the first trial, the court's charge to the jury on the greater offense of aggravated child molestation was error to the extent that a new trial was required. A jury verdict returned on an instruction sufficiently erroneous so as to demand retrial cannot be deemed an "unambiguous" verdict. In light of this error, the court could not say that defendant was impliedly acquitted of aggravated child molestation.

Implied Consent

Howell v. State, A03A2059 (03/24/04), 04 FCDR 1221, 2004 Ga. App. LEXIS 413

Defendant's convictions for driving under the influence were reversed. Defendant argued that he was administered an Intoxilyzer 5000 test without his consent; therefore, the results of the test were improperly admitted at trial. After one of the arresting officers read defendant implied consent warnings, defendant "unequivocally revoked his implied consent." Thereafter, defendant was arrested and taken to a police station where another police officer administered the breath test. "**There was no evidence that defendant was asked a second time whether he would consent to a state-administered test and no evidence that he rescinded his refusal and thereafter consented. He was thus administered a breath test simply because he did not refuse to cooperate." The trial court erred in denying defendant's motion to suppress the results of the breath test.**

Sentencing

Headspeth v. State, A04A0865 (03/19/04), 04 FCDR 1234, 2004 Ga. App. LEXIS 381

The trial court's sentence on defendant's convictions for aggravated assault, kidnapping, theft by receiving stolen property, possession of a firearm during the commission of a felony, and obstruction of an officer was vacated and remanded for resentencing. Defendant complained that he was sentenced as a recidivist when he was not a recidivist for the purposes of Georgia law. The law requires that "any person convicted of three prior felonies, upon conviction of a fourth felony, must serve the maximum time provided in the sentence of the judge." **One of defendant's prior felonies was a first offender sentence. Because, "at the time of sentencing in this case, the period of probation imposed under [defendant's] first prior first offender sentence had expired[, . . .] discharge was automatic upon the expiration of the probationary period. Accordingly, [defendant's] prior first offender sentence was not a felony 'conviction' and could not be used to support the imposition of a recidivist sentence."**

State v. Villella, A03A2345 (03/24/04), 04 FCDR 1235, 2004 Ga. App. LEXIS 422

Defendant's sentence to probation for a DUI conviction was reversed. The State complained that the Georgia statute on second DUI convictions required that as a condition of probation "an ignition lock order" be made. **The Court of Appeals held that "the trial court erred in not including the ignition lock order as a condition of probation" after a second or subsequent DUI conviction within 5 years of the prior DUI conviction.**

**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.*