



CaseLaw

Update

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CaseLaw This Week

Week Ending April 30, 2004

- Evidence – Character
- Indictment – Fatal Variance
- Burglary
- Right to Self Representation
- Effective Assistance of Counsel
- DUI
- Evidence – Similar Transaction
- Sentencing – Prior pleas in aggravation

Evidence – Character

Johnson v. State, A04A0578 (04/09/04), 04 FCDR 1443, 2004 Ga. App. LEXIS 488.

Defendant's conviction of armed robbery by using a BB gun was affirmed. The defendant contends that the trial court erred in permitting the victim to testify to defendant's description of himself as a 'fiend', which the victim took to mean that the defendant was a drug fiend and needed to steal money to support his habit. The Court held that the trial court did not abuse its discretion in allowing the testimony because the evidence was relevant in explaining the defendant's motive even though it may have incidentally placed the defendant's character in issue. **"Evidence which is relevant to an issue in a case is not**

rendered inadmissible by the fact that it incidentally puts the defendant's character in issue."

Indictment – Fatal Variance

Johnson v. State, A04A0578, 04 FCDR 1443, 2004 Ga. App. LEXIS 488.

Defendant's conviction of armed robbery where he used a BB gun was affirmed. The indictment alleged that defendant used a "handgun." The evidence established that the defendant actually used a "BB gun." The defendant argued fatal variance between the indictment and the evidence. **The Court held that whether the handgun used shot bullets or BBs was not essential to establish the crime.** The court found no risk that the defendant was not informed under the indictment of the charges against him or that the defendant risked being prosecuted twice for the same

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Burglary

Newman v. State, A04A0149 (04/14/04), 04 FCDR 1445, 2004 Ga. App. LEXIS 536.

The defendant confessed to the burglary during a videotaped interview conducted by the police investigator. The defendant argues sufficiency of the evidence because the only evidence connecting her to the burglary is her confession. O.C.G.A. § 24-3-53 provides, in part, that “a confession alone, uncorroborated by any other evidence, shall not justify a conviction.” The fact of the crime was established through testimony of the victim and the police officer responding to the crime scene. The court held, “[t]he corroborating evidence or circumstances need not connect the defendant definitely with the perpetration of the offense. Corroboration in any material particular satisfies the requirements of the law. The finder of fact must determine the amount of evidence necessary to corroborate a confession.”

Right to Self Representation

Stewart v. State, A04A0486 (04/14/04), 04 FCDR 1457, 2004 Ga. App. LEXIS 538.

The defendant was convicted of battery, false imprisonment, simple assault, and two counts of criminal trespass. Defendant appealed alleging he was denied his constitutional right to self representation. In the middle of the second day of trial and after the State had presented its first witness, the defendant stated that his attorney failed to ask questions of the witness that he thought should have been asked and that he would rather proceed without his counsel. The trial court refused this request finding that the request was not timely and the defendant was not competent to represent himself. **The Court held that where a defendant unequivocally asserts his right to self representation before trial, the court should hold a hearing to ensure that the defendant knowingly and**

intelligently waives his right to counsel and that he understands the potential disadvantages of self representation. The court is under no such obligation where the defendant makes a self representation request after trial has begun. Judgment affirmed.

Effective Assistance of Counsel

Collier v. State, A03A2159 (04/05/04), 04 FCDR 1450, 2004 Ga. App. LEXIS 465.

This opinion vacates the opinion in *Collier v. State*, A03A2159 (12/22/03) which held that failure to move to suppress the results of a DUI blood test was not ineffective assistance of counsel. The defendant claims that he initially refused to submit to the blood and urine tests but later agreed to the testing after the police threatened to obtain a search warrant and obtain the samples by force. The court found that the defendant made the requisite strong showing that a motion to suppress the results of the blood test would have been granted. **The court held that, under these circumstances, defense counsel was deficient for not moving to suppress the blood test results on the ground that the defendant’s consent to the test was coerced.**

The court distinguishes *Buchanan v. State*, 264 Ga. App. 148 (589 S.E.2d 876)(2003) where the court stated that testing may be authorized without an accused’s actual consent, by clarifying that such a situation exists where the accused is unconscious and cannot give actual consent.

DUI

Partridge v. State, A03A1679 (03/17/04), 04 FCDR 1458, 2004 Ga. App. LEXIS 367.

The defendant was convicted, following his bench trial, on two counts of DUI. Count 1 was for being in actual physical control of a moving vehicle while having an alcohol concentration of

0.10 or more. Count 2 was for driving under the influence to the extent it was less safe for the defendant to drive. Separate sentences were imposed for each conviction. The court held: **It was error to convict the defendant for two DUI offenses, reasoning that O.C.G.A. § 40-6-391(a) establishes the single crime of driving in a prohibited condition and the other subsections merely define different ways of committing that one crime.** The court upheld the conviction on Count 1 and reversed the defendant’s conviction on Count 2. The court also vacated the sentences imposed for both violations and remanded for resentencing on the one DUI count.

Evidence – Similar Transaction

Allen v. State, A03A2526 (04/14/04), 04 FCDR 1460, 2004 Ga. App. LEXIS 544.

On motion for reconsideration, the court vacated its original opinion, 2004 Ga. App. LEXIS 126, and affirmed defendant’s conviction and sentence for DUI, disobedience of a traffic control device, and violation of Georgia’s open container law.

The defendant argued that the trial court should not have admitted evidence of his 1997 DUI offense as a similar transaction because he was not given sufficient notice under Superior Court rule 31.3 that the similar transaction involved alcohol. The citation did not state on its face that the DUI involved alcohol. **The court held that rule 31.3 does not require the level of specificity demanded by the defendant.**

Sentencing – Prior Pleas in Aggravation

Allen v. State, A03A2526 (04/14/04), 04 FCDR 1460, 2004 Ga. App. LEXIS 544.

On motion for reconsideration, the court vacated its original opinion, 2004 Ga. App. LEXIS 126, and affirmed

defendant's conviction and sentence for DUI, disobedience of a traffic control device, and violation of Georgia's open container law.

The defendant argues that the trial court committed error by considering his 1997 DUI nolo plea in aggravation of his current sentence because the portion of defendant's plea form dealing with his voluntary waiver of his right to counsel is blank, thus showing that the State failed to prove the plea was freely and voluntarily given. In the original opinion, the Court agreed and reversed.

On reconsideration, the court reasons that O.C.G.A. § 40-13-33 (a) which states that "[a]ny challenge to a misdemeanor conviction of any of the traffic laws of this state or to the traffic laws of any county or municipal government which may be brought pursuant to Chapter 14 of Title 9 must be filed within 180 days of the date the conviction becomes final," controls. Citing *Earp v. Brown*, 260 Ga. 215 (391 S.E.2d 396)(1990), the court found **O.C.G.A. § 40-13-33 provides a limited and procedural exception to the general law that a defendant can collaterally attack void judgments at any time as codified at O.C.G.A. § 19-9-4.** Judgment and sentence affirmed.

**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.*

