CaseLaw Update

Prosecuting Attorneys' Council of Georgia

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Deputy Director for Legal Services

Chuck Olson
General Counsel

Joesph Burford
Trial Services Director

Fay McCormack
Traffic Safety Coordinator

Patricia Hull
Traffic Safety Prosecutor

Tom Hayes
Staff Attorney

Gary Bergman
Staff Attorney

Tom Jones
Staff Attorney

Tony Lee Hing
Staff Attorney

Rick Thomas
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Troy Golden
Staff Attorney

Clara Bucci
Staff Attorney

CaseLaw This Week

Week Ending May 28, 2004

Search & Seizure

State v. Dixon, A04A0841 (05/07/04), 04 FCDR 1680, 2004 Ga. App. LEXIS 621

The Court of Appeals reversed the trial court's grant of the defendant's motion to suppress DUI evidence. The court held that the trial court erred in finding that the defendant was in custody when the officer administered an alco-sensor test. "**Under Georgia's protections against the State compelling an arrestee to give evidence against himself, the result of a field sobriety test performed when a suspect was 'in custody' will be admissible only if the request to perform the field sobriety test was preceded by *Miranda* warnings.**" The court found that there was no evidence that the defendant was handcuffed, in the back of a patrol car or had any other reasonable basis to form an objective belief that he was in custody. The officer did not communicate an intention to place the defendant in custody until after the alco-sensor test had been performed.

Burglary

Joyner v. State, A04A0207 (05/07/04), 04 FCDR 1667, 2004 Ga. App. LEXIS 631.

Defendant's convictions for burglary and sexual battery were affirmed by the Court of Appeals. The defendant entered the victim's home around 1:30 a.m. The victim was awakened by a cold hand on her pubic area and asked who was there. The defendant identified himself and told the victim that he "wanted to wish her a merry Christmas." The victim chased the defendant out of her home with scissors and later discovered that some prescription medications and cash were missing. This discovery was made after she examined her home and informed the responding deputy that nothing had

PAC Summer Interns

Logan Butler
404-969-4001

Erin O'Mara
404-969-4001

been stolen.

On appeal, the defendant argues that the State failed to prove that he entered the victim's home with the intent to commit a theft claiming that the victim's testimony about the missing drugs and money is conjecture or negative testimony, citing to O.C.G.A. § 24-4-7 which states, in pertinent part, "The existence of a fact testified to by one positive witness is to be believed, rather than that such fact did not exist because many other witnesses who had the same opportunity of observation swear that they did not see or know of its having existed." The defendant is claiming that the victim cannot testify positively to the fact that he stole the drugs and money; rather, she can only testify that they were missing at some point after the defendant entered her home. However, the court held that the victim's testimony was more accurately described as circumstantial evidence, not negative evidence. Citing O.C.G.A. § 24-4-6, the court states that convictions may be based on circumstantial evidence "if the proved facts are not only consistent with the hypothesis of guilt, but exclude every other reasonable hypothesis but the guilt of the accused." Furthermore, **the intent necessary to support a burglary conviction does not have to form at the time of entry; rather, it can be formed after entry while the perpetrator is still on the premises.**

Jury Charges

Walker v. State, A04A0191 (05/07/04), 04 FCDR 1676, 2004 Ga. App. LEXIS 627.

The defendant was convicted of voluntary manslaughter and two firearms offenses. The defendant told a friend that he was tired of people treating him wrong and that he was going to "take care of business." The defendant then left his home with a gun and went looking for the victim where witnesses heard him say "I'm going to get him." The defendant found the victim and began shooting at close range as the victim pled for the defendant to stop. On appeal, the defendant challenges the trial court's jury charge which instructed the jury that intent could be inferred from the use of a deadly weapon. At the time of this trial this type of jury charge was considered proper. However, in November 1998 the Georgia Supreme Court ruled that such jury charges were error and the ruling would apply to any cases pending on direct review. Although the charge was error, the court decided that the evidence of malice was overwhelming in this case and that it was "highly probable that the error did not contribute to the judgment and the error is harmless." Judgment affirmed.

Disorderly Conduct

Delany v. State, A04A0414 (05/12/04), 04 FCDR 1671, 2004 Ga. App. LEXIS 658.

The defendant was found guilty of disorderly conduct for asking a police officer what she was doing parked in the middle of the road while screaming and throwing his hands in the air. The court stated that O.C.G.A. § 16-11-39, which defines disorderly conduct, must be narrowly construed in order to protect the constitutional rights of the accused. The court recognized that the circumstances surrounding the utterance of the words can be crucial; but, **circumstances cannot change harmless words into "fighting words."** Under these circumstances, the judgment was reversed.

Search & Seizure

State v. Harden, A04A0674 (05/12/04), 04 FCDR 1679, 2004 Ga. App. LEXIS 660.

The trial court granted the defendant's motion to suppress in his DUI trial. This court reversed the order. The defendant was stopped after police dispatch issued a lookout for an intoxicated white male wearing a white ball cap leaving a particular bank parking lot in a white van. The deputy spotted a white van leaving that bank's parking lot. There was a white male wearing a white ball cap driving the van. The officer stopped the van based on the dispatch report. The defendant claims there was no reasonable articulable suspicion for the officer to stop his van. The court disagrees, finding that **the dispatch report was specific enough to warrant the officer stopping the van without having to wait until the defendant actually committed a crime.**

Search & Seizure

Slocum v. State, A04A1067 (05/10/04), 04 FCDR 1681, 2004 Ga. App. LEXIS 626.

The defendant was convicted of DUI. The defendant appeals claiming that the trial court should have granted his motion to suppress. This court agrees and reverses the conviction. The defendant was stopped after an unidentified person called 911 from a payphone stating that she had been assaulted by a white male in a dark colored SUV. The woman was not at the payphone when police arrived to investigate the report. However, the police noticed a dark SUV heading down the street, a major thoroughfare. Although the police had no information as to the identity of the woman or man, when or where the assault occurred, how the SUV was involved, or any other identifying information they stopped the dark SUV driving down the road. The police did not observe any traffic offenses. Evidence gathered after the stop was used in the defendant's DUI conviction. **A general suspicion or a mere hunch is not sufficient to support an investigative stop. Here, the information given to the police by the 911 caller was insufficient, without more, to provide the police with reasonable suspicion to stop the SUV driven by the defendant.** Judgment reversed.