CaseLaw Update

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CaseLaw This Week

Week Ending June 4, 2004

Identification

Ivey v. State, S04A0785 (05/24/04), 04 FCDR 1714, 2004 Ga. LEXIS 407

The defendant's convictions for malice murder and armed robbery were affirmed. The defendant asserted that the trial court erred in allowing an in-court identification of him by a victim, who was an employee of the business the defendant robbed. The identification occurred when the victim was recalled specifically for identification purposes. The trial court overruled the defense's objection to recall. The Supreme Court held "**[a] trial judge has broad discretion to allow the recall of a witness.**" Determining that the in-court identification was reliable the court stated that the identification was "**subject to the same rules of evidence, witness credibility, and cross-examination as all testimony in a criminal trial.**"

At trial the victim testified that he was unable to identify the defendant from a photographic lineup because the photographs were dark and blurry. The defendant contended that this made the in-court identification invalid. The Court determined that "**[a] witness' failure to make a pretrial identification of the accused is not grounds for striking a subsequent in-court identification. A lineup identification, or identification from a group of photographs, is not a prerequisite to every in-court identification.**"

Statement

Bell v. State, S04A0064 (05/24/04), 04 FCDR 1728, 2004 Ga. LEXIS 417

The defendant appealed the admission of out-of-court statements made by the victim to police officers. The defendant and the victim were married but estranged. The defendant was charged with and convicted of his wife's murder. At trial, the State introduced out-of-court statements the victim had made to police officers during prior difficulties between the defendant and victim. Citing

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Crawford v. Washington the Court held, "**[t]hese out of court statements are considered to be testimonial in nature, and were inadmissible since Ms. Bell was unavailable to testify at trial and Mr. Bell did not have a prior opportunity to cross-examine the victim about the statements.**"

The Court however, determined that due to the overwhelming evidence against the defendant admission of the victim's statement was **harmless error.**

Search & Seizure

Daniel v. State, S03G1172 (05/24/04), 04 FCDR 1731, 2004 Ga. LEXIS 415

The defendant was convicted of trafficking in cocaine. The defendant appeals the denial of a motion to suppress and contends that the officer improperly expanded the scope of the traffic stop and that the defendant's consent to search his vehicle was the coerced result of an illegal seizure. The defendant was stopped for weaving within his own lane. The defendant could not produce a driver's license but his passenger was able to do so. The officer issued a warning citation to the driver, returned the passenger's license and advised the defendant that his passenger should drive the car. The police officer then asked to speak with the defendant but reminded him that he was free to go. The defendant agreed to speak with the officer then consented to a search which produced drugs.

The Court found the conduct to be a result of a consensual encounter. "**Thus, we hold that a law enforcement officer's continued questioning of a vehicle's driver and passengers outside the scope of a valid traffic stop passes muster under the Fourth Amendment either when the officer has a reasonable articulable suspicion of other illegal activity or when the valid traffic stop has de-escalated into a consensual encounter.**"

State v. Gray, A04A1099 (05/17/04), 04 FCDR 1788, 2004 Ga. App. LEXIS 682

The State appealed suppression of the results of a breath test administered while the defendant was in custody. The Court of Appeals affirmed the suppression. An officer came upon a single-car accident allegedly caused when another car forced the defendant off the road, causing her to hit the guardrail, and then careen to the other side of the highway and strike the concrete median. The officer observed that the defendant was calm but that she had bloodshot eyes, was unsteady on her feet and appeared dazed; all of which could have been caused by the impact and deployment of the defendant's airbags. The officer also smelled alcohol and the defendant admitted to having had a couple of drinks so the officer performed the HGN test and an alco-sensor test, which was positive. The officer placed the defendant in custody and later performed a breath test. The Court of Appeals held, "**[i]f the evidence shows only that the driver is intoxicated but does not show that such has impaired him, the evidence is insufficient to show probable cause for DUI.**"

Double Jeopardy

Payne v. State, A04A1163 (05/19/04), 04 FCDR 1777, 2004 Ga. App. LEXIS 691

Defendant appeals from reversal of his plea in bar on grounds of double jeopardy. Defendant was charged with rape, aggravated child molestation, child molestation and incest. The victim, his stepdaughter, recanted her allegations stating she was angry with the defendant for disciplining her and that she obtained the knowledge of the sex acts described by watching pornographic movies at her natural father's house. The Court granted the State's Motion in Limine excluding discussion of victim's viewing pornographic material based on the rape shield statute, O.C.G.A. § 24-2-3.

Defense asked the State's witness if the victim recanted and why, to which the witness replied, after refreshing his memory from notes, "she stated she had seen a pornographic movie." When defense followed up on this response the State moved for and was granted a mistrial, based on defense's violation of the grant of State's Motion in Limine. Whereupon defense filed a plea in bar on double jeopardy. The Court of Appeals reversed stating:

1. **Even though the trial court did not err in granting the State's Motion in Limine because the victim's viewing of the pornographic movie was part of her sexual history and thus irrelevant under the rape shield statute, the defense was still entitled to show that the victim recanted, as well as the reason for recantation and explain how she had acquired the knowledge of the alleged sex acts.** However, the defense could have shown that the victim acquired knowledge of sexual acts from someone other that the defendant without specifying that she viewed pornography.

2. The trial court did abuse its discretion in denying the defendant's plea of former jeopardy. "**If a mistrial is declared without a defendant's consent or over his objection the defendant maybe retrial only if there was a 'manifest necessity' for the mistrial.**" That was not the case here, since defense counsel's question did not call for an answer violative of the State's Motion in Limine.