



CaseLaw

Update

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CaseLaw This Week

Week Ending June 18, 2004

- **Evidence – Character**
- **Constitutional Law – Equal Protection**
- **Child Molestation – Recantation**
- **Discovery**
- **Right to Counsel**
- **Search & Seizure**

Evidence – Character

Fulton v. State, S04A0548 (06/07/04), 04 FCDR 1900, 2004 Ga. LEXIS 456

The defendant's convictions for malice murder and possession of a firearm during the commission of a crime were affirmed. The defendant contended that the trial court erred in denying his motion for mistrial. While cross-examining the defendant's sister, the sister testified that three weeks before the police came to her house looking for the defendant in connection with the instant charges, she had called the police to report that the

defendant pointed a gun at her. Defense counsel moved for a mistrial, contending that the testimony was "non-responsive, impugned [defendant's] character, and the prejudice could not be overcome by a curative instruction." The trial court denied the motion for mistrial. The Supreme Court held, "[w]here a witness injects the defendant's character into issue by referring to a prior act of misconduct in an answer not responsive to the question asked and the trial court instructs the jury to disregard the unresponsive answer, it is not error for the trial court to deny a motion for mistrial." Although there was no curative instruction given in the instant case, the Court held, "[i]n the case at bar, defense counsel informed the trial court a curative instruction would not be sufficient, and none was given. While the better practice is to deny the motion for mistrial after instructing the jury to disregard the non-responsive answer, we conclude the trial court did not abuse its discretion in denying a mistrial where trial counsel declined to have curative instruction given."

Hames v. State, S04A0489 (06/07/04), 04 FCDR 1905, 2004 Ga. LEXIS 473

PAC Summer Interns

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The defendant was acquitted of murder and convicted of felony murder for killing his brother. When the police executed a search warrant on the defendant's house, they discovered handwriting on the wall of the defendant's bedroom. The writing was admitted as evidence relevant to the existence of a motive for the defendant to kill his brother. The Supreme Court held that because the defendant was acquitted of intentional homicide, admission of evidence of motive constituted **harmless error**. The Court applied the rule from *Stoudmire v. State*, 261 Ga. 49 which held “[t]he introduction of improper evidence that goes to motive is harmless error where there is a conviction for an offense requiring no motive.” The Court noted that an exception to this “Stoudmire rule” exists when the State introduces evidence of an insurance policy to which the defendant is a beneficiary, which was not the case here. Judgment affirmed.

Chief Justice Fletcher concurred separately by reaffirming the ruling from *Brown v. State*, 270 Ga. 601 which held that “evidence of a defendant's motive which is not material to his criminal liability is irrelevant and inadmissible.”

Constitutional Law – Equal Protection

Ciak v. State, S04A0343 (06/07/04), 04 FCDR 1909, 2004 Ga. LEXIS 468

Defendant appeals her conviction for DUI challenging the constitutionality of OCGA § 40-8-73.1, the statute governing the use of tinted automobile windows in Georgia. The defendant was stopped by police because he suspected that the tinted windows violated OCGA § 40-8-73.1. During the traffic stop the officer smelled alcohol and began a DUI investigation. The defendant was subsequently arrested and charged with DUI. She was not

charged with violation of OCGA § 40-8-73.1 because the officer determined at the scene that the tint on her windows did not violate the statute. The defendant filed a motion to suppress all evidence obtained from the traffic stop on the grounds that because OCGA § 40-8-73.1 contains an exception for motor vehicles not registered in Georgia, and therefore facially denies equal protection.

Since the statute did not affect either a suspect class or a fundamental right, the statute was analyzed under a “rational relationship” standard. The Court held that the purpose of the statute is to promote the safety of law enforcement officers when they must approach vehicles they have stopped. The Court held that the distinction drawn by the statute, i.e.: vehicles registered in Georgia as opposed to those registered outside the state, does not bear a rational relationship to the goal of promoting officer safety. Therefore **OCGA § 40-8-73.1 is unconstitutional**. The Court went on to hold that because the police officer in the instant case was not aware that the statute was invalid a grant of the motion to suppress in the instant case was unnecessary.

Child Molestation – Recantation

Dameron v. State, A04A1213 (06/03/04), 04 FCDR 1937, 2004 Ga. App. LEXIS 749

The defendant was convicted of child molestation, aggravated sexual battery, and cruelty to children based on acts he committed against his step-daughter. At trial, the victim recanted on the stand. The defendant, without challenging the sufficiency of the State's evidence, appealed his conviction contending that reversal was required. **The court held that the victim's recantation required the jury to make a**

credibility determination. The State produced evidence demonstrating the defendant's guilt, including the victim's videotaped statement detailing the abuse committed by the defendant. The State also introduced evidence that showed the victim's extreme concern for the welfare of her mother and her concern that she would be placed in foster care. The court held that a jury could conclude that the victim's expressed concerns caused the recantation. Judgment affirmed.

Discovery

Brooks v. State, A04A0642 (06/03/04), 04 FCDR 1941, 2004 Ga. App. LEXIS 750

The defendant appeals from his misdemeanor convictions of battery, hindering another person from making a 911 call, and second-degree cruelty to children. The defendant's conviction resulted from an incident where the defendant came home intoxicated, and forcibly entered the home. Defendant's wife barricaded herself in a bedroom with the couple's two year old son and called 911. The defendant gained access to the room, took the telephone and hung it up and then kicked his wife, all of which occurred in front of the child. In his appeal, the defendant alleged that the State violated OCGA § 17-16-4 by not providing him with copies of the police report, the 911 recordings, crime scene photographs, the victim's criminal history, witness statements and repair records for the property he damaged. **The court held that the provisions of OCGA § 17-16-4 do not apply to misdemeanor cases and therefore the defendant was not entitled to those items.**

Right to Counsel

Dempsey v. State, A04A0491 (06/03/04), 04 FCDR 1944, 2004 Ga. App. LEXIS 746

The defendant appeals his misdemeanor conviction of leaving the scene of an accident. He contends on appeal that he was forced to proceed to trial without benefit of counsel. The record put before the court was “very sparse” and did not contain a trial transcript. **The court held that although in the absence of a transcript, a judgment entered by a court of competent jurisdiction will be accorded the presumption of legality, a waiver of the defendant’s constitutional right to counsel may not be presumed from a silent record.** The court vacated the defendant’s conviction and remanded the case to the trial court for an evidentiary hearing to determine whether the defendant properly waived his right to counsel.

Search & Seizure

Holmes v. State, A04A0559 (06/02/04), 04 FCDR 1946, 2004 Ga. App. LEXIS 747

The defendant was convicted following a bench trial of possession of methamphetamine with intent to distribute. The defendant appeals the denial of his motion to suppress. At the suppression hearing the narcotics officer testified that he and two other officers went to the residence of Brian Pack after receiving a complaint that there were a lot of people coming in and out of Pack’s house and that he might be selling methamphetamine. The officers did a computer search and learned that Pack was on probation which contained a search clause, allowing police to search his residence. Upon arrival at the Pack residence officers observed the defendant, Joshua Holmes, exiting the residence. Police identified themselves and questioned Holmes about his identity and relationship to Pack. Holmes told

police that he lived at the house but did not own it. Holmes invited police into the home so that Holmes could retrieve his identification. While in the house, Holmes stated that he did not want the house searched until the owner returned home. Police observed that Holmes was “moving around a lot” and this fact, coupled with previous experience that weapons are often part of drug activity led police to pat Holmes down for weapons. Police felt something in Holmes’ left pocket and inquired. Holmes produced \$4000.00 cash from that pocket. Police noticed a “little piece of plastic” sticking out of the other pocket and inquired. Holmes denied having anything in that pocket but police could see a “bulge” and “pretty much knew what it was.” Police touched the bulge, which confirmed suspicions. Holmes took the bag out of his pocket and threw it onto the table and stated “you got me.” The bag contained methamphetamine.

The defendant moved to suppress this evidence, contending that police were not authorized to conduct a pat-down search and that even if the pat-down was authorized, police exceeded the scope. The trial court denied the motion and the defendant appealed. The court held that the officers were authorized to conduct a pat-down to ensure the defendant was not armed. **The court also held that the “plain feel doctrine” applies in that if an officer is conducting a lawful pat-down and detects an object which is readily identifiable by its contour, warrantless seizure of the object is justified by reasoning similar to the “plain view doctrine.”** Since the pat-down was lawful in this case, seizure of the drugs was also lawful. Judgment affirmed.

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