



CaseLaw

Update

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CaseLaw This Week

Week Ending July 30, 2004

- **Jury Instructions – DUI**
- **Opening Statement**
- **Witness Credibility –
Province of Trier of Fact**

prescription drugs. Therefore, the Court did not violate the Equal Protection Clause in this case nor was it compelled to give the “rendered incapable” jury charge when it was requested by the defendant.

Opening Statement

Jury Instructions – DUI

Johnson v. State, A04A0800 (07/09/04),
04 FCDR 2477, 2004 Ga. App. LEXIS 940.

Defendant was convicted of DUI alcohol and driving with no license. At the close of evidence, the jury was authorized to convict if it felt defendant was under the influence to the extent it was “less safe” for him to drive. On appeal, Defendant argued the trial court violated the Equal Protection Clause when it refused his requested instruction allowing conviction if he was “rendered incapable of driving safely,” the jury charge for a prescription drug case. **The standards are legally equivalent. Their difference arises from the language of O.C.G.A. § 40-6-391 (a) (1) which employs the “less safe” language for DUI alcohol and subsection (b) which employs the “rendered incapable” language regarding DUI**

Johnson v. State, A04A0800 (07/09/04),
04 FCDR 2477, 2004 Ga. App. LEXIS 940.

Defendant was convicted of DUI and driving with no license. Defendant’s refusal to take field sobriety tests was suppressed by the court because it came after he had received Miranda. On appeal, defendant argued that the trial court erred in not granting his request for a mistrial after the prosecutor informed the jury that “for various legal reasons, we will not be talking about field sobriety tests.” The prosecutor did not refer to defendant’s refusal to take the tests, and did not suggest that any incriminating evidence relating to these tests existed. **There was no abuse of the trial court’s discretion to permit the prosecutor to inform the jury that an expected part of a DUI case, field sobriety examinations, would not be heard.**

Similar Transaction

Helton v. State, A04A1008 (07/09/04), 04 FCDR 2457, 2004 Ga. App. LEXIS 944.

Defendant was convicted of child molestation and aggravated sexual battery against his 3-year-old stepdaughter. During trial, the court allowed evidence of two prior sexual attacks against adults as similar transactions. Defendant appealed contending that there was insufficient similarity between the prior attacks and the current offense. **There is no per se rule prohibiting evidence of a sexual offense involving an adult in a case involving a sexual offense perpetrated on a minor.** The logical connection between the two cases rebutted defendant's defense of fabrication.

hearing, even if it is uncontradicted and unimpeached, the decision to believe the witness will be left to the judge as trier of fact.

Smith, C.J. and Blackburn, P.J. concurred in judgment, but wrote separately saying the Court was not authorized by the facts of this case to reach or overrule its prior decision in *Stokes*.

Witness Credibility – Province of Trier of Fact

State v. Hester, A04A0125 (07/15/04), 04 FCDR 2479, 2004 Ga. App. LEXIS 959.

Defendant was charged with two counts of DUI and with making an illegal U-turn. The trial judge, sitting as trier of fact, chose to disbelieve the arresting officer's testimony and granted defendant's motion to suppress all evidence resulting from the stop for failure to prove reasonable, articulable, suspicion. Sitting en banc, the Court of Appeals affirmed the grant and **overturned** *State v. Stokes* insofar as it held that the state's evidence could not be rejected by the trial judge "upon the mere surmise that it might not be in accord with the truth." 185 Ga. App. 718, 720 (1988). **Where no error of law appears on the record, and the trial court's ruling is based on the credibility of oral testimony presented at the**

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