



CaseLaw

Update

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CaseLaw This Week

Week Ending September 17, 2004

- **Jury Charges**
- **Search and Seizure**
- **Evidence**

Search and Seizure

State v. McMillan, A04A1003 (08/31/04),
04 FCDR 2902, 2004 Ga. App. LEXIS 1168

Jury Charges

Collins v. State, A04A1494 (08/31/04), 04
FCDR 2895, 2004 Ga. App. LEXIS 1171

Defendant's conviction for child molestation was affirmed. Defendant claimed that the trial court erred in failing to give the jury a charge on sexual battery as a lesser included offense of child molestation. Defendant argued that "since there is no direct evidence of the defendant's intent, the charge of sexual battery would have been appropriate, because the mere act of having the victim touch his penis amounted to sexual battery and not child molestation." **The Court held that where the only evidence shows sexual activity rather than mere touching, a charge on sexual battery is not warranted.**

The grant of defendant's motion to suppress evidence obtained at a routine license and insurance check roadblock was reversed. Defendant's car was stopped at a roadblock. Defendant presented his Georgia driver's license, but his insurance card had expired 17 days earlier. Upon second approach to defendant's vehicle, the officer noticed defendant's hand between the seats and observed defendant acting suspiciously. Defendant refused to comply with the officers' requests. The occupants were ordered out of the car, at which time the officers discovered the cocaine. **The Court found that the contraband was seized at a legally authorized roadblock and was inadvertently discovered in plain view during the course of reasonable activities directed toward the safety of the officers on the scene.**

Kelly v. State, A04A1378 (08/31/04), 04 FCDR 2905, 2004 Ga. App. LEXIS 1169

Defendant's convictions for two counts of methamphetamine possession and giving a false name were affirmed. Defendant contended that the search warrant was invalid because the affidavit on which the warrant was sworn was defective. Defendant claimed that the informants were not reliable. **The Court found that where "a named informant makes a declaration against his interest and based on personal observation, that in itself provides a substantial basis for the magistrate to credit his statement."**

State v. Jones, A04A1001 (08/30/04), 04 FCDR 2901, 2004 Ga. App. LEXIS 1156

The trial court's grant of defendant's motion to suppress was affirmed. Defendant refused the officer entry into his motel room and led him away from the room. The officer created the impression that he was going to search the room anyway, notwithstanding defendant's refusal to consent. Defendant consented to the search thereafter, and the officer found a crack pipe and residue in the motel room. **The Court found that defendant did not voluntarily consent to the search because defendant's consent was merely an "acquiescence to a claim of legal authority."**

State v. Gay, A04A1180 (08/30/04), 04 FCDR 2903, 2004 Ga. App. LEXIS 1158

The trial court's grant of defendant's motion to suppress evidence seized during a warrantless search of defendant's backpack was affirmed. The tenant consented to a search of the premises, where a narcotics dog busted through the door of the bedroom defendant was sleeping in and detected marijuana in a closet. **The Court held that defendant retained an expectation of privacy with regard to his own bag and**

its contents where he did not abandon the bag or deny that the bag was his.

Evidence - Crawford

King v. State, A04A1308 (08/31/04), 04 FCDR 2909, 2004 Ga. App. LEXIS 1170

Defendant's convictions for shoplifting and obstructing an officer were affirmed. Defendant contended that the trial court erred by admitting hearsay testimony in violation of his confrontation right. **The court declined to determine whether admission was error, however, since any error would have been harmless. The Court found that the testimony was admitted to prove that neither defendant nor anyone else had bought the items in his bag that day, a fact admitted to by the defendant himself during his testimony.**

Evidence - Photo Line-Up

Horton v. State, A04A1554 (09/01/04), 04 FCDR 2910, 2004 Ga. App. LEXIS 1179

Defendant's convictions for armed robbery, theft by taking and a firearms offense were affirmed. Defendant claimed that the line-up was unduly suggestive due to the use of darker-skinned males in the other photos which made defendant easily recognizable. The officer testified that he compiled the line-up using the darker-skinned males as a result of the witness's description. The witness identified the perpetrator as being "a Horton", and initially believed that the perpetrator was defendant's darker-complected brother. The Court noted that, after looking at the photographs, the witness identified defendant "without hesitation." **The Court held that, considering the totality of the circumstances surrounding the identification of defendant, the line-up was not unduly suggestive.**

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