



# CaseLaw

## Update

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#### CaseLaw This Week

Week Ending September 24, 2004

- **Confrontation Clause – Child Hearsay**
- **Confrontation Clause – Crawford**
- **DUI – Cooper, Buchanan**
- **Guilty Plea – Drug Court Contract**
- **Jury Poll**
- **Merger**
- **Similar Transaction – Photographs**

#### Confrontation Clause – Child Hearsay

*Starr v. State*, A04A1454 (09/03/04), 04 FCDR 3030, 2004 Ga. App. LEXIS 1191.

Defendant was convicted of child molestation. On appeal, he argued that his confrontation rights were violated under *Crawford v. Washington* by the erroneous admission of the videotaped interview with the victim pursuant to the Child Hearsay Statute of O.C.G.A. § 24-3-16. **The Court, assuming without deciding the statement was testimonial, found no basis for reversal because, although she did not testify, the prosecutor stated the child victim was in the courthouse and available if necessary. As stated explicitly in Crawford, the confrontation clause places no constraints on the use of a declarant's prior testimonial statements when she is available for cross-examination at trial.**

#### Confrontation Clause – Crawford

*Brawner v. State*, S04A0898 (09/13/04), 04 FCDR 2986, 2004 Ga. LEXIS 614.

Defendant was convicted of malice murder and possession of firearm by a convicted felon. At trial, defense counsel objected to the admission of an unavailable witness' statements on the ground that he was not able to cross-examine the alleged eyewitness. **The Court held the statements were testimonial hearsay made in response to police questioning and were erroneously admitted in violation of the defendant's right to confrontation. Further, the Court held that its admission was not harmless beyond a reasonable doubt as it was the only unimpeached statement identifying the defendant as the killer.**

#### DUI – Cooper, Buchanan

*Hough v. State*, A04A1970 (09/03/04), 04 FCDR 3018, 2004 Ga. App. LEXIS 1189.

Defendant was found guilty of DUI arising out of an accident investigation. He argued on appeal that the trial court erred in denying his motion to suppress

the results of his blood alcohol test because his blood was tested solely as a result of his involvement in a serious accident as prohibited by *Cooper* and because he was not under arrest for DUI at the time the test was requested and administered in violation of *Buchanan*.

The court found the officer had reasonable grounds to request the test based on the strong smell of alcoholic beverage and res gestae information that defendant had been drinking at a bar just prior to the wreck. **Where reasonable grounds exist to suspect a violation of O.C.G.A. § 40-6-391, “an arrest or serious injury are alternative conditions precedent to seeking a chemical test pursuant to Implied Consent laws.”** (emphasis in original). Because defendant was involved in a serious accident and reasonable grounds existed, an arrest was not required in this case.

### Guilty Plea – Drug Court Contract

*State v. Stinson*, S04G0742 (09/13/04), 04 FCDR 2968, 2004 Ga. LEXIS 631.

Defendant pled guilty to unlawfully possessing Xanax and signed a Drug Court Contract in December 1998. Between that time and August 2002, the defendant was given two opportunities to honor the terms of his contract after he violated it. Then, in January 2003, during a hearing considering whether to terminate his participation and enter sentence, the defendant attempted to withdraw his guilty plea and was denied. The Court of Appeals held, under O.C.G.A. § 17-7-93(b), that defendant could not waive his right to withdraw his guilty plea before sentencing. The Supreme Court reversed saying the Court of Appeals’ focus on a lack of a formal sentence being entered was misplaced. **Where a defendant has pled guilty and utilized the benefits of a rehabilitative option to avoid an adjudication of guilt, he may not withdraw his plea as a matter of right under O.C.G.A. § 17-7-93(b).**

### Jury Poll

*Benefield v. State*, S04G0664 (09/13/04), 04 FCDR 2970, 2004 Ga. LEXIS 600.

Defendant was found guilty of three counts of aggravated child molestation and one count of child molestation. Defendant’s counsel requested that the jury be polled. One juror responded, “No,” when asked whether the published verdict was her verdict in the jury room. Neither the court, the prosecutor, nor the defense attorney reacted. The juror was then asked, “Is it now your verdict,” to which the juror responded, “Yes.” The court then entered judgment and sentenced the defendant without requiring further deliberation. The Supreme Court overturned the Court of Appeals’ finding that the juror’s answer to the second question cured any ambiguity caused by her negative answer to the first question. **The purpose of polling is to discern possible coercion. A negative response to a poll question is enough to raise the inference that the verdict was not concurred in by each juror and thus, there was no legal verdict. Further, no motion by defense counsel was necessary as the court should have returned the jury to deliberations on its own motion.**

### Merger

*Wyman v. State*, S04A1079 (09/13/04), 04 FCDR 2955, 2004 Ga. LEXIS 626.

Defendant was found guilty of felony murder during the commission of an aggravated assault, two separate counts of aggravated assault, and one count of possession of a firearm during commission of a felony. The felony murder count alleged that defendant caused the death of the victim during the commission of an aggravated assault against another victim by firing a gun at him. **Even though the felony murder and underlying felony had different victims, a separate conviction and sentence on the underlying felony was not authorized and was vacated.**

### Similar Transaction – Photographs

*Williams v. State*, A04A1366 (09/09/04), 04 FCDR 3015, 2004 Ga. App. LEXIS 1208.

Defendant was convicted of one count of aggravated assault after he beat his ex-wife with a two-by-four board. At trial, evidence of two similar transactions involving the victim were introduced which included photographs of the injuries the victim sustained. Defendant argued on appeal that the photos should not have been admitted as they were substantially more prejudicial than probative. **The photos depicted similar injuries inflicted by the defendant and were probative to establish his course of conduct “even if they also inflamed and prejudiced the jury.”**



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