



# CaseLaw

## Update

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#### CaseLaw This Week

Week Ending November 19, 2004

- **Search & Seizure**
- **Hearsay**
- **Statute of Limitations**
- **Polygraph**

#### Search & Seizure

*Scott v. State*, A04A2100 (11/01/04) 04 FC DR 3642, 2004 Ga. App. LEXIS 1406

Defendant was convicted for cocaine trafficking and possession of a controlled substance. The police seized several garbage bags from the defendant's premises and found a plastic bag containing a small amount of marijuana and plastic bags containing residue in the bags. The officers obtained a search warrant and following a subsequent search of the defendant's home, found approximately 250 grams of cocaine. Defendant argues that the warrantless search and seizure of the garbage bags were illegal and a violation of his Fourth Amendment rights because the bags were in garbage cans which were not at curbside but instead within the cartilage of his house. The defendant kept the garbage cans under an oak tree approximately 20 feet from the street. The sanitation workers would come onto the property pick up the trash cans and after they were emptied, the cans were left at the curbside. **"The warrantless search and seizure of the defendant's garbage bags would violate the Fourth Amendment only if he manifested a subjective expectation of privacy in his garbage that society**

**accepts as objectively reasonable."** Given the totality of the circumstances, that the cans were placed at a considerable distance from the home to avoid rodent infestation, the cans were not within an enclosure surrounding the home, they were placed in an area that the sanitation company routinely collected, and the defendant took no steps to protect the area from observations by passersby, the court held that the trial court did not err in finding that the garbage cans were not within the cartilage of the home. When garbage is placed on an area for anticipated collection by public employees for hauling to a public dump signifies abandonment and warrantless searches of abandoned property do not violate the Fourth Amendment.

*State v. Randolph*, S04G0674 (11/08/04) 04 FC DR 3586, 2004 Ga. LEXIS 991

The Court of Appeals granted an interlocutory appeal to review the trial court's denial of defendant's motion to suppress evidence seized from his home in a warrantless search. The search was conducted by law enforcement officers pursuant to permission given by the defendant's wife, in the defendant's presence, after the defendant had refused to give the officers permission to search. The Court of Appeals held that the trial court erred in denying the defendant's motion to suppress and the Supreme Court affirmed the Court of Appeals judgment. **The Court held that while one co-inhabitant may have assumed the risk that a second**

co-inhabitant will consent to a search of common areas in the “absence” of the first co-inhabitant, the risk assumed by joint occupancy goes no further – the risk “is merely an inability to control access to the premises during one’s absence. While a co-inhabitant has authority to consent to a search of joint premises, a present, objecting party should not have his constitutional rights ignored due to a property interest shared with another.

### Hearsay

*Mullins v. State*, A04A1060 (11/01/04) 04 FCDR 3644, 2004 Ga. App. LEXIS 1404

Defendant was convicted of voluntary manslaughter and aggravated assault. Defendant argues the trial court should not have admitted hearsay evidence of the victim’s prior difficulties with him under the necessity exception to the hearsay rule. The hearsay statements concerned a prior robbery that the defendant allegedly committed against the victim. Defendant argues that the necessity exception does not apply because there were insufficient guarantees of trustworthiness based on minor inconsistencies in the three witnesses’ account of the robbery, and the fact that one of the witnesses and the victim were convicted felons. The witnesses, victim’s girlfriend, brother, and cousin, were all ones to whom the victim was close and would place great confidence. The victim told each of the witnesses about the robbery separately at a time when there was no motive to fabricate the story. **The court held that there was sufficient evidence that the robbery occurred, that it was relevant to show the defendant’s motive in shooting the victim, and that the robbery explained why the defendant retaliated against the victim for the victim’s brother’s retaliation for the robbery earlier in the day. Thus the trial court did not abuse its discretion by allowing the State to present evidence of the prior difficulties between the defendant and the victim.**

*Jenkins v. State*, S04A1260 (11/08/04) 04 FCDR 3579, 2004 Ga. LEXIS 960

Defendant was charged in September, 2000 with malice murder, felony

murder, aggravated assault, three counts of armed robbery, kidnapping with bodily injury, burglary and two firearms offenses in connection with the victim’s death, more than seven years after the victim’s murder. The defendant lived with his aunt and uncle and said that he was home all day during the alleged commission of these crimes and that his aunt and uncle were his alibis. When the police interviewed the defendant’s uncle, he made several statements that contradicted the defendant’s story and incriminated him. The defendant’s uncle died before the case went to trial. The State sought to admit the uncle’s statements to the police under the necessity exception to the hearsay rule and the trial court ruled that the statements were admissible. **The Supreme Court applied the Crawford holding and held that the uncle’s statements to the police were testimonial because they were the product of questioning by police officers investigating a murder. The defendant never had the opportunity to cross-examine his uncle about these statements. Therefore, these statements to the police are inadmissible at the defendant’s trial and the trial court’s ruling to the contrary was error.**

*Watson v. State*, S04A1098 (11/08/04), 04 FCDR 3591, 2004 Ga. Lexis 999

Defendant was convicted of malice murder in connection with the death of his wife. Defendant appeals asserting the trial court erred in admitting, under the necessity exception to the hearsay rule, statements made by his wife before her death to several friends and a police officer. The State was allowed to present the hearsay testimony of three of the victim’s friends, as well as that of an investigating officer, as to statements made by the victim over the course of approximately ten years. There were approximately 30 hearsay statements that were allowed during the testimony. The substance of the hearsay statements concerned threats made by the defendant, episodes of physical and mental abuse, and other instances of prior difficulties between the defendant and victim. Necessity is demonstrated when the declarant is deceased, when the statement is shown to be relevant to a material fact, and when the statement is more probative of the material fact than other evidence that may be produced and offered.

**The necessity exception is satisfied in this case. The declarant is deceased and thus, unavailable to testify. The statements are relevant to a material fact, namely to show the defendant’s intent, motive and bent of mind. Finally, the statements were more probative of these facts than evidence that could otherwise be produced and offered. Thus, the trial court properly admitted the statements made to the victim’s friends under the necessity exception. In regards, to the statements made to the investigating officer, the Court analyzed these statements in light of the Crawford holding. The hearsay portion of the investigating officer’s testimony, which consisted of no more than two sentences, was cumulative of other, properly admitted evidence. Moreover, the deputy’s testimony did not go to the core issue of the case, the defendant’s innocence or guilt of the crime for which he was convicted. Thus even if erroneous, the admission into evidence of the hearsay evidence was harmless.**

### Statute of Limitations

*Jenkins v. State*, S04A1260 (11/08/04) 04 FCDR 3579, 2004 Ga. LEXIS 960

Defendant was charged in September, 2000 with malice murder, felony murder, aggravated assault, three counts of armed robbery, kidnapping with bodily injury, burglary and two firearms offenses in connection with the victim’s death, more than seven years after the victim’s murder and after the statute of limitation had expired for all but the murder charges. The progression of the investigation is an important part of the determination of whether the statute of limitations tolled in this case for the lack of a known suspect. The alleged crimes took place on August 25, 1993 and the police first interviewed the defendant on August 26, 1993. The defendant denied any involvement and told the police where he had been during the entire day on August 25, 1993. The defendant’s alibis told a different story about his whereabouts and the police interviewed the defendant a second time. The defendant admitted he lied during his first interview and this time said that he had been at a local crack house during the day. On September 7, 1993,

using the “Super Glue” method, the GBI preserved a palm print from an armrest of the victim’s pickup truck cab. However, it was determined that it lacked “sufficient ridge detail” for a match with the defendant’s palm print. In December 1993, the police drew blood from the defendant. In January 1994, the crime lab found that DNA extracted from saliva on the cigarette butt in the victim’s truck bed was a match with the defendant’s DNA. Due to the imprecision of the DNA test use, the crime lab could only report that this DNA profile was consistent with one out of one thousand African-Americans. In March 1994, the police interviewed two of the defendant’s friends who said that the defendant offered to sell them a television that he obtained from “some old man.” The investigation then came to a halt and in the subsequent years, the defendant spent time in jail on various drug offenses in Florida and Georgia. On July 25, 2000, a prosecutor brought the unidentified palm print to a fingerprint examiner who concluded that it was indeed a match for the defendant. Subsequently, the GBI concurred with the fingerprint examiner that it indeed matched the defendant. On September 11, 2000, more than 7 years after the alleged crime took place, the defendant was indicted. **The court held that the statute of limitations runs from the time of the criminal act to the time of indictment. “It is uncontroverted that the State did not indict Jenkins until more than seven years had elapsed from the date of the commission of the offenses.” The General Assembly intended for the “person unknown” tolling exception to apply to a situation, as in *Beasley*, where there is no identified suspect among the universe of all potential suspects. The tolling exception to the statute of limitations cannot be based upon the subjective opinion of the district attorney as to whether there was enough evidence to file charges against a particular person. Such a broad interpretation of the tolling period would permit the exception to swallow the rule. The evidence shows that the State had actual knowledge of Jenkins’s identity as a suspect for the crimes shortly after they were committed, but it did not indict him until more than seven years had elapsed.**

## Polygraph

*Height v. State*, S04A1183 (11/08/04), 04 FCDR 3597, 2004 Ga. LEXIS 958

Defendant was convicted of malice murder and sentenced to death. Subsequent to his arrest, defendant took a polygraph test and the results indicated that the defendant was not being deceptive when he denied harming the victim. Despite this test, the State proceeded to indict him for malice murder and the defendant was convicted and sentenced to death. The defendant sought the introduction of the test results, in the penalty stage, as a mitigating factor. The trial court ruled that the polygraph test was inadmissible, during the penalty phase, unless both sides stipulated. **The Court held that the requirement of the parties’ stipulation should not be applied automatically in the sentencing phase of a capital case so as to prevent the defendant from presenting a favorable polygraph test result. “Evidentiary rules may be trumped by a defendant’s need to introduce mitigation evidence.” This holding should not be “misconstrued as authorizing the admission of polygraph test results in the penalty phase of every capital case.” The trial court must still determine whether the polygraph results are sufficiently reliable to be admitted.**