



CaseLaw Update

Prosecuting Attorneys' Council of Georgia

Legal Services Staff

David Fowler
Deputy Executive Director
for Legal Services

Chuck Olson
General Counsel

Joesph Burford
Trial Services Director

Fay McCormack
Traffic Safety Coordinator

Patricia Hull
Traffic Safety Prosecutor

Tom Hayes
DPD Director

Gary Bergman
Staff Attorney

Tony Lee Hing
Staff Attorney

Rick Thomas
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Troy Golden
Staff Attorney

Clara Buccì
Staff Attorney

CaseLaw This Week

Week Ending January 7, 2005

- **Facts not in evidence**
- **Forfeiture**
- **Implied Consent Rights**
- **Probation Revocation – Tolling**

Facts not in evidence

Jackson v. State, A05A0069 (12/09/04), 05 FCDR 58, 2004 Ga. App. LEXIS 1607.

The defendant was convicted of aggravated sodomy and sexual battery. On appeal he challenges the trial court's failure to take corrective actions where the prosecutor alluded to facts not in evidence while questioning the victim. Defendant's counsel failed to object to the questioning. The defendant's claim is based on O.C.G.A. § 17-8-75 which states "[w]here counsel in the hearing of the jury make statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same." The Court of Appeals was unable to review this claim due to the failure to object at trial. The Court did not find the failure to object as suitable grounds for an ineffective assistance claim.

Forfeiture

Holmes v. State, A04A2321 (12/13/04), 05 FCDR 61, 2004 Ga. App. LEXIS 1619.

The defendant appeals the trial court's order striking his answer to a civil

forfeiture complaint filed by the State and claims error in the trial court's failure to hold a hearing prior to the forfeiture of the property. The defendant relies on O.C.G.A. § 16-13-49(o)(5) for his claim that the trial court erred by not holding the hearing. The statute requires the court to hold a hearing for *in rem* forfeiture proceedings where an answer to the complaint has been filed. However, the Court found that the trial court properly struck the answer for failure to comply with O.C.G.A. § 16-13-49(o)(3) which outlines the type of information required in the answer. The Court held "**in the absence of a sufficient answer, the court was not required to hold a hearing pursuant to O.C.G.A. § 16-13-49(o)(5).**"

Implied Consent Rights

State v. Adams, A04A2101 (12/13/04), 05 FCDR 63, 2004 Ga. App. LEXIS 1622.

Defendant's motion to suppress the results of the State administered breath test was granted. The State appealed. After conducting a field sobriety test, the arresting officer read the implied consent warning but the defendant failed to answer because he was confused. The officer offered to re-read the warning but the defendant declined. The officer then told the defendant he would take care of the defendant's vehicle and give the defendant time to think about the warning before the officer would ask for consent again. Instead, the officer took the defendant to the detention center and offered him a chance to take the test, without re-reading the implied

consent warning. The defendant complied. At the motion hearing, the defendant testified that he blew into the machine because he thought he had to. **The Court upheld the exclusion of the breath test based on failure to consent. However, the Court held that confusion is tantamount to a refusal.**

Probation Revocation **- Tolling**

Vincent v. State, A04A2009 (12/17/04), 05 FCDR 67, 2004 Ga. App. LEXIS 1638.

Defendant's probation was revoked and a sentence imposed for violation of his first offender status because the Defendant moved to an undisclosed address and failed to report to his probation supervisor. On Appeal, the defendant claimed the State did not meet the statutory requirements for tolling his sentence and the court no longer has jurisdiction over his sentence. The Court of Appeals found that the affidavit supplied with the application for the arrest warrant four years prior tolled the sentence, even though the affidavit did not specifically state that the probation officer was unable to locate the defendant after searching. **O.C.G.A. § 42-8-36(a)(2) requires a probation officer to submit an affidavit stating the probationer has absconded and cannot be found in order to toll the sentence. The statute does not require any "magic words or words of art."** The substance of the affidavit informed the court that the defendant was no longer at a known address and his current address was unknown. Judgment affirmed.