Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 5, 2012

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THIS WEEK:

Venue; Jury Instructions

Lanham v. State, S12A1348 (10/1/2012)

Appellant was convicted of murder in connection with a drug deal. Appellant contended that the State failed to establish venue beyond a reasonable doubt and the trial court failed to instruct the jury on the burden of proof for venue. The record showed that the victim's cause of death was inflicted in Bryan Co., where, based on aerial photographs obtained from the tax assessor's office, the chief investigator for the Bryan Co. Sheriff's Department identified the location where the victim's body was found. Furthermore, GBI investigators testified that the Bryan Co. Sheriff's Department requested their involvement, asking for assistance off Porterfield Road in Bryan Co. where a body had been found. The Court concluded that the State met its burden of proving beyond a reasonable doubt that venue was properly laid in Bryan Co., in accordance with O.C.G.A. § 17-2-2(c), which states that a homicide is committed in the county in which the cause of death was inflicted, and if it cannot be readily determined what county the cause of death was inflicted, it shall be considered that the cause of death was inflicted in the county in which the dead body was discovered.

Appellant also contended that his conviction should be reversed because the trial court failed to specifically instruct the jury that it was required to find beyond a reasonable doubt that venue was proper before rendering a guilty verdict. The record showed that the trial court instructed the jury on the law of reasonable doubt. The trial court further instructed the jury on each count in the indictment and that the indictment alleged the defendant committed the offense in Bryan County. In its verdict form, the court again instructed the jury that if it found the defendant committed the offense in Bryan County as alleged, then it was authorized to find the defendant guilty. Given these instructions, the Court found no error in the trial court's failure to specifically charge that proof of venue is a material allegation of the indictment. The Court referenced *Shahid v. State*, 276 Ga. 543 (2003) explaining that "where venue is proven and the trial court charges the jury generally on the law of reasonable doubt, it is not necessary for the court to charge the jury that proof of venue is a material allegation of the indictment." Noting that although it has urged trial courts to

give a separate charge on venue to encourage prosecutors to make certain they prove venue and to alert juries to their specific role in determining venue, the Court declined to reverse a conviction and require a new trial based on the trial court's failure to *sua sponte* instruct the jury on venue.

Admissions; Right to Counsel

Simmons v. State, S12A0979 (10/1/2012)

Appellant was convicted of malice murder, felony murder, and aggravated assault. Appellant maintained that the trial court erred by admitting his pre-trial admissions, as well as admitting his statement of guilt at his first appearance hearing, made without benefit of counsel. The record established that appellant's aunt and uncle were found in their home shot and stabbed to death, respectively, shortly after appellant went to their house. Outside, an officer asked those gathered at the scene if they had been in the house, and appellant admitted that he had. Despite the chilly temperature, appellant was wearing only a tank top, shorts, and was barefoot. The officer asked appellant what had happened to his shoes and appellant replied that they were at his house. The officer drove appellant to his house to get a pair of shoes and clothes. The two then returned to the scene and the officer gave appellant his *Miranda* warnings. Appellant indicated that he understood his rights, agreed to talk, and said he did not know anything about the murders. Appellant was next taken to the Sheriff's Department where *Miranda* warnings were reissued. Appellant then admitted to the murders. After appellant requested an attorney, a magistrate judge arrived at headquarters to hold a first appearance hearing, at which time the judge advised appellant of his charges and his rights. Absent any questioning, appellant spontaneously stated, "I'm guilty. I'm guilty."

Appellant first contended that his pre-trial admissions to the crime were coerced and should have been suppressed. The Court, however, disagreed, noting that the record did not support appellant's contention. Before he made incriminating statements both at the scene and later at the station during an interview, appellant received and waived his *Miranda* warnings. In addition to this evidence, appellant's interrogators testified that they made no threats or promises and did not coerce appellant in any way. The Court found that the record fully supported the trial court's finding that appellant's statement was voluntary and that he was advised of but did not invoke his right to counsel until well into the interview, which the officers then properly ended. Accordingly, the trial court did not err in admitting appellant's statements.

Appellant next alleged that his statement of guilt during a first appearance hearing was improperly admitted into evidence because he was denied the right to counsel at a critical stage of the proceedings. Prior to trial, upon appellant's motion, the trial court suppressed his confession. In a granted interlocutory appeal, the Court reversed, holding that the first appearance hearing was not a critical stage of proceedings. Subsequently, the magistrate judge was allowed to testify at trial as to appellant's statement of guilt. Over a decade later, in *O'Kelley v. State*, 278 Ga. 564 (2004), the Court overruled prior case law indicating that a first appearance hearing was not a critical stage of proceedings. In *O'Kelley*, however, the admissibility of appellant's statement of guilt was not considered. As to that statement, the record showed that it was spontaneously given in the absence of any questioning. The Court noted that any statement given freely and voluntarily without any compelling influences is, of course, admissible. Furthermore, the Court reasoned that voluntary, spontaneous outbursts, not made in response to any form of custodial questioning are admissible. Therefore, it was not error to admit at trial appellant's statement of guilt made at his first appearance hearing.

Juror Qualification

Johnson v. State, S12A1225 (10/1/2012)

Appellant was convicted of malice murder and possession of a firearm. Appellant contended that the trial court erred when it failed to excuse for cause a potential juror. The record showed that during voir dire, a prospective juror indicated he would expect a defendant to testify even though the law did not require him to do so. During individual voir dire, the prospective juror indicated that if he were accused of murder, he would want to testify on his behalf. When asked if he would be able to follow the law if the court instructed the jury that no inference was to be drawn from the fact that the defendant chose not to testify, the prospective juror responded, "I would do my best." Counsel again asked if he thought he would be able to; the prospective juror again said he would do his best.

The Court found nothing in the record showed that the prospective juror had prejudged any issue in the case. Additionally, the Court noted that the prospective juror testified that he would do his best to follow the law as instructed by the court. Before a juror is excused for cause, it must be shown that he holds an opinion of the guilt or innocence of the defendant that is so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence or the court's charge upon the evidence. When a potential juror testifies that he or she will "try" to decide the case based upon the court's instructions and the evidence, excusing that prospective juror for cause is not mandated. Moreover, an appellate court should not substitute its own finding for that of the trial court, since it must pay deference to the trial court's determination, which encompasses the resolution of any equivocations and conflicts in the prospective juror's responses on voir dire. Accordingly, the trial court did not abuse its discretion in refusing to strike the prospective juror for cause.

Sentencing; Right to Appointed Counsel

Thomas v. State, A12A1129 (9/27/2012)

Appellant challenged a trial court order denying his motion to correct a void sentence, arguing that he was improperly sentenced as a recidivist under O.C.G.A. § 17-10-7(c). In 2006, appellant pled guilty to possession of methamphetamine. The State subsequently filed a notice of its intent to seek recidivist sentencing based on appellant's prior felony convictions. The trial court accepted the plea, found that it was appellant's fourth felony conviction and thus sentenced him pursuant to O.C.G.A. § 17-10-7(c), which provides that anyone convicted of 3 prior felonies must, upon conviction of a fourth felony, serve the maximum time provided in the judge's sentence, based upon such conviction and shall not be eligible for parole until the maximum sentence has been served. In 2011, appellant filed a motion to correct a void sentence, arguing that his recidivist sentence under O.C.G.A. § 17-10-7(c) was improper because 1 of his 3 prior felony convictions was based

on an uncounseled guilty plea. The trial court denied the motion. Appellant acknowledged that he had the assistance of counsel for 2 prior felony convictions from 2004. However, he claimed that the State failed to present any evidence that he had an attorney for a 1999 felony conviction. Thus, appellant argued, that uncounseled conviction cannot serve as a predicate offense for recidivist sentencing under O.C.G.A. § 17-10-7(c).

The record showed that in 1997, with the assistance of counsel, appellant pled guilty to possession of cocaine and was given first offender probation. In 1999, the trial court revoked that probation and imposed a 4 year sentence. It is true that appellant appeared at that 1999 revocation hearing without an attorney. But at that time, he was not necessarily entitled to appointed counsel at a revocation hearing. Rather, the right to have a circuit public defender provide representation in a probation revocation hearing is a right only recently conferred upon indigent defendants by O.C.G.A. § 17-12-23(a)(2), which became effective in its current form in 2005. At the 1999 revocation hearing, appellant freely admitted that he had violated various terms of his probation, and such admission to having committed those violations created the very sort of situation in which counsel need not ordinarily be provided. Furthermore, the Court noted that even if appellant had shown he was entitled to counsel at the revocation hearing, the transcript revealed that he waived representation. At the beginning of the revocation hearing, the trial court specifically asked appellant if he wanted to go forward without an attorney, and he stated that he wished to proceed without one.

The Court held it was undisputed that the State showed appellant was represented by counsel when he entered his 1997 guilty plea. The State further showed by the transcript of the 1999 revocation hearing that appellant waived representation by counsel at that hearing. Because the State met its burden of showing the regularity of the prior guilty plea and probation revocation for purposes of recidivist sentencing, the trial court did not err in denying appellant's motion to correct a void sentence.

Sufficiency of Evidence

Grell v. State, S12A1177 (10/1/2012)

Appellant was convicted of felony murder with aggravated assault as the underlying felony. He was also convicted of burglary, two counts of aggravated assault of another individual, and five counts of possession of a firearm during the commission of a felony. Each count of possession of a firearm utilized a separate felony with which the defendant was charged, as its predicate felony. The record revealed that the deceased victim was killed in a second-story bedroom of his home by a gunshot wound to the face. The aggravated assault victim, "M", identified appellant as a man she previously met through the deceased victim. "M" testified that appellant was one of two men she saw arrive at the deceased victim's home and appellant was the one who entered the home and went upstairs. While standing in the home's front yard, "M" heard a bang and saw appellant run down the stairs and exit the home. Appellant then twice shot "M," who was approaching the house. The first shot injured "M's" ear and the second shot struck her in the leg.

The Court found that the evidence was sufficient to authorize a rational trier of fact to find appellant guilty beyond a reasonable doubt of felony murder, aggravated assault, burglary, and possession of a firearm during the commission of a felony. However, two of the five convictions for possession of a firearm during the commission of a crime must be vacated. "[W]here multiple crimes are committed together during the course of one continuous crime spree, a defendant may be convicted once for possession of a firearm during the commission of a crime as to every individual victim of the crime spree, as provided under O.C.G.A. § 16-11-106(b)(1), and additionally once for firearm possession for every crime enumerated in subsections (b)(2) through (5)." Here, there were two individual victims and appellant was convicted of burglary, a crime enumerated in subsection (2) of O.C.G.A. § 16-11-106(b). Accordingly, the statute authorized imposition of sentence on appellant for three of the guilty verdicts returned on the five counts charging appellant with being in possession of a firearm during the commission of a crime: the firearm possession count in which burglary was the underlying felony, one of the firearm possession counts in which the deceased was the victim, and one of the firearm possession counts in which "M" was the victim. The remaining two possession had to be vacated. Furthermore, the Court held that one of the two aggravated assault convictions of "M" must be vacated. The Court concluded that the two gunshots that struck "M," fired without a deliberate interval as appellant left the premises, did not constitute separate aggravated assaults, and thus one had to be vacated.

Sentencing; Right of Confrontation

Young v. State, S12A1403 (10/1/2012)

Appellant was convicted with a co-defendant for felony murder, armed robbery, and burglary. Appellant contended his constitutional right to confront witnesses was violated when the trial court denied his motion in limine to redact from the testimony of the victim's neighbor all references to appellant. Evidence showed that the victim was shot inside his home and died from a single gunshot wound to the chest. Entry to the home had been gained by breaking a bedroom window. Tinch, who admitted driving appellant to and from the crime scene, testified against appellant in exchange for immunity from prosecution of the charges surrounding the death of the victim. A neighbor of the victim testified that appellant's co-defendant told him the day after the shooting that appellant had shot the victim after the co-defendant and appellant had entered the victim's home through a window.

Although the Court found that the evidence was sufficient to authorize a rational trier of fact to conclude beyond a reasonable doubt that appellant was guilty of felony murder, with burglary as the underlying felony, because the burglary conviction served as the predicate felony for the felony murder conviction, it was error to sentence appellant for both felony murder and burglary. O.C.G.A. § 16-1-7. Accordingly, the Court vacated the separate judgment of conviction and sentence for burglary.

The Court found no violation of appellant's constitutional right to confront witnesses when the testimony of the victim's neighbor made reference to appellant. The neighbor's

testimony recounted a statement made to the witness by appellant's co-defendant the day after the crimes were committed, identifying appellant as a participant in the crimes and as the one who shot the victim. Co-defendant did not testify at his and appellant's joint trial. O.C.G.A. § 24-3-5 provides that after the fact of conspiracy is proved, the declarations by any one of the conspirators during the pendency of the criminal project shall be admissible against all. The co-defendant's statement to the victim's neighbor was made during the concealment phase of the conspiracy and was admissible against appellant under the co-conspirator exception to the hearsay rule. The admission of the co-defendant's statement to the neighbor did not violate the Confrontation Clause because, as the Supreme Court stated in *Crawford v. Washington*, 541 U.S. 36, 56 (2004), statements admissible pursuant to the hearsay exception permitting the use of statements made in furtherance of a conspiracy are not "testimonial."

Right of Confrontation; Consciousness of Guilt

Leger v. State, S12A0833 (10/1/2012)

Appellant was convicted of the malice murder and aggravated battery of his estranged wife. Appellant argued that the trial court should have excluded a photo taken of him after trial began, pursuant to a search warrant. The record showed that the photo depicted appellant's chest, upon which there was a tattoo reading: "God Forgive Me." Appellant acquired the tattoo between the murder of his estranged wife and the time of trial. The Court noted that evidence regarding a tattoo is not inadmissible per se. Rather, any statement or conduct of a person, indicating a consciousness of guilt, where such person is, at the time or thereafter, charged with or suspected of crime, is admissible against him upon his trial for committing it. *Bridges v. State*, 246 Ga. 323 (1980). The Court held that the trial court did not err in admitting the tattoo at issue into evidence, as it was properly admitted as evidence of consciousness of guilt.

Appellant next contended that his confrontation rights were violated when a forensic analyst testified about DNA evidence linking appellant to a hat found near the victim's body. Appellant argued that because the forensic analyst did not physically perform all of the steps in the testing of the DNA sample and hat, the analyst's testimony violated appellant's right to confront the witnesses against him. The record showed the forensic analyst testified that: "I am the supervisor of a case. Evidence is submitted and I review the evidence, decide what I am going to test and then direct biologists to do the testing, to do the sampling and they provide me the data. I interpret the results, I write a report, and I testify in court." As to this particular test, the forensic analyst selected the specific stains which were to undergo further DNA testing. She was then presented with the data from the testing, interpreted the data, and wrote the report. She did not cut the samples and put them in the tubes and add the chemicals. She testified about the laboratory's reliability procedures and noted that another examiner reviewed her interpretations; no certified DNA report was actually admitted into evidence.

The Court previously held in *Disharoon v. State*, 291 Ga. 45 (2012) that a supervisor of such testing can testify without offending the Confrontation Clause. The Confrontation Clause does not require the analyst who actually completed the forensic testing used against a defendant to testify at trial. In *Disharoon*, the Court noted that the U.S. Supreme Court had recently rejected the practice of "surrogate testimony," and held that the admission of testimony of a "scientist who did not sign the certification or perform or observe the test" would be a violation of the Confrontation Clause. *Id.* at 47, citing *Bullcoming v. New Mexico*, 131 SC 2705, 2710 (2011). The witness testimony approved in *Disharoon* is similar to that of the forensic analyst in this case; the forensic analyst here was the supervisor of the testing, had significant personal connection to the test (having selected the stains to be analyzed), interpreted the data, performed the statistical analysis, and prepared the test report. The errors present in *Bullcoming* did not occur in this case, and the forensic analyst's testimony did not run afoul of that precedent. Therefore, appellant's right to confront witnesses against him under the Sixth Amendment to the Constitution of the United States was not violated.

Identification; Photographic Line-ups

McBride v. State, S12A0843 (10/1/2012)

Appellant was convicted of malice murder and various other offenses. He contended that the trial court erred by denying his motion to suppress because one of the witnesses who identified him did so through a photographic lineup that was based on an impermissibly suggestive procedure. Appellant argued that because the witness claimed to have seen appellant's picture in the newspaper before she saw the photographic lineup, and because the only picture in the lineup that resembled the picture in the newspaper was the photo of appellant, the identification procedure was impermissibly suggestive.

The Court noted that as an initial matter, there was no evidence the police had anything to do with appellant's photo being published in the newspaper. In this connection, because any issue regarding the suggestiveness of an identification procedure used by police applies only to state action, the mere fact that appellant's picture appeared in a newspaper did not support his claim that the identification procedure used by police was impermissibly suggestive. Moreover, even if the procedure used by police could somehow be interpreted as having been impermissibly suggestive, the trial court still did not err in denying appellant's motion to suppress. The question is whether there was a very substantial likelihood of irreparable misidentification. Factors to be considered in answering that inquiry include: (1) the witness's opportunity to view the accused at the time of the crime; (2) the witness's degree of attention; (3) the accuracy of the witness's prior description of the accused; (4) the witness's level of certainty at the confrontation with the accused; and (5) the length of time between the crime and the confrontation. The ultimate question is, whether under the totality of the circumstances, the identification is reliable.

The Court found that the witness had ample opportunity to observe appellant before the murder; saw him during daylight hours; indicated that she got a good look at the shooter; and provided a description of him to police that matched the descriptions of other witnesses. Accordingly, the trial court did not err in denying appellant's motion to suppress the identification evidence.

Miranda Rights, Self-Incrimination

Thomas v. State, A12A1577 (9/28/2012)

A jury found appellant guilty of theft by shoplifting and giving a false name to a police officer. Appellant asserted that the trial court

erred in admitting at trial her custodial statement because the statement was not voluntarily made and that she was induced to make it because she feared that she and her daughter would be taken to jail and her grandchildren would be taken into the custody of the Georgia Department of Human Resources Division of Family & Children Services (DFCS). The record showed that the arresting officer testified that he responded to a call about a theft at a shopping mall. The officer approached appellant and her daughter as they exited a store, after they were pointed out as suspects, and both denied they had shoplifted. When the officer asked for identification, appellant stated that she did not have identification, but gave him a name and date of birth. Upon transmitting that identification information to dispatch and running it through GCIC, the officer received a response from dispatch indicating that appellant had given him a false name. He arrested appellant for that crime, and placed her in the back seat of his patrol vehicle. The officer turned his attention back to the daughter, who was accompanied by minor children. He approached her vehicle, parked 15 yards away from his patrol car and conversed with her about the shoplifting allegations. The officer then walked back to his patrol vehicle and read appellant her *Miranda* warnings. After advising appellant of her rights, the officer asked her whether she understood them, to which appellant replied that she did. He then asked appellant whether she wanted to make a statement, and appellant stated that she had taken the items, that her daughter had a good job, and that she did not want her daughter to lose her job.

Appellant argued that her custodial statement was not voluntarily made and that she was induced to make it by fear of being taken to jail. A custodial statement is admissible only if it was made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. The remotest fear of injury that renders an incriminating statement involuntary and inadmissible under O.C.G.A. § 24-3-50 is 'physical or mental torture' or coercion by threats. The evidence showed that when appellant made the statement at issue she was in police custody and had been arrested for giving the police officer a false name. Thus, the Court found that contrary to appellant's assertions, any fear of being taken to jail could not have induced her custodial statement. Concerning appellant's argument that her custodial statement was not voluntarily made and that she was induced to make it by fear of her daughter being taken to jail and her grandchildren being removed from the scene by DFCS agents, appellant was confined in a police vehicle 15 yards away when the arresting officer later allegedly made threatening statements to her daughter, not to appellant. And in any event, there was no evidence that appellant heard any officer state that he was considering taking her daughter to jail or that he would have representatives from DFCS pick up the grandchildren if the daughter did not issue a written statement of confession.

The Court found that appellant presented no evidence which would authorize a finding that her custodial statement was inadmissible for the reasons she contended. There was no evidence that appellant's custodial statement was induced by fear that her daughter would be arrested or that her grandchildren would be placed in the custody of DFCS. Accordingly, the trial court was authorized to find that appellant freely and voluntarily gave a statement after she knowingly waived her *Miranda* rights.

Out-of-Time Appeal

Barnes v. State, S12A0708 (10/1/2012)

In 1993, appellant was convicted of malice murder, two counts of felony murder, and armed robbery. The trial court sentenced appellant to death for the murder and also imposed a consecutive life sentence for the armed robbery. The Court affirmed appellant's convictions but vacated the death sentence and remanded to the trial court for a new sentencing hearing based on the Court's conclusion that the trial court had improperly restricted the scope of mitigating evidence presented at the sentencing phase of appellant's trial. On remand, appellant and the State entered into a sentencing agreement under which appellant accepted a sentence of life without parole and the State agreed to withdraw its notice of intent to seek the death penalty. The trial court accepted the agreement in 1999 and sentenced appellant to life without parole on his malice murder conviction. In 2011, appellant's motion for out-of-time appeal was denied, which is the basis of this appeal.

Appellant maintained that the sentencing agreement should be invalidated because the trial court imposed multiple life sentences for the same offense, contrary to the terms of the sentencing agreement and Georgia law. It is well established that a criminal defendant has no unqualified right to file a direct appeal from a judgment of conviction and sentence entered on a guilty plea. An appeal will lie only if the errors asserted on appeal can be resolved by facts appearing on the face of the record, and the denial of a request for out-of-time appeal is proper if an examination of the record reveals no merit to the claimed errors.

The Court held that the record contradicted appellant's contentions. Under the sentencing agreement, appellant agreed to accept a single sentence of life without parole for malice murder, and that is the sentence the trial court imposed. The two felony murder convictions always stood vacated by operation of law. Because the Court's prior decision affirmed appellant's conviction and life sentence for armed robbery, the sentencing agreement could not and did not purport to address his sentence for that offense. Appellant's argument to the contrary notwithstanding, the armed robbery conviction did not merge into his conviction for felony murder with armed robbery as the underlying felony. Nor did appellant's conviction for armed robbery merge into the malice murder conviction. The Court concluded that because appellant's challenges to the validity of the sentencing agreement can be resolved against him on the record, the trial court did not err in denying his motion for an out-of-time appeal.

Recusal of Judge, Out-of-Time Appeal

Leverette v. State, S12A0906, (10/1/2012)

In 2000, appellant entered guilty pleas to charges arising from the malice murder of his wife. In June 2011, appellant filed a motion for out-of-time appeal, which the trial court denied. Appellant contended he was entitled to an out-of-time appeal because, four days before appellant entered his guilty plea in 2000, the trial judge erroneously denied appellant's motion to recuse the trial judge. The record showed that the motion to recuse asserted that the trial judge had a conflict of interest since he had served as the District Attorney in 1990, when appellant was convicted of the predicate felony supporting the 2000 charge of being a convicted felon in possession of a

gun. The record also showed that the trial court declined to recuse himself, ruling that the case presented none of the statutorily-required grounds for judicial recusal found in O.C.G.A. § 15-1-8(a). The Court found that the fact that a judge in the judge's previous capacity as district attorney prosecuted the defendant on another charge not currently pending before the judge, is not, standing alone, a ground for disqualification. Thus, the Court held, the trial court did not err when it denied appellant's motion to recuse.

Appellant argued he was entitled to an out-of-time appeal because his failure to pursue a timely direct appeal was a result of trial counsel's "abandonment" of him shortly after appellant's guilty pleas were entered and sentences were imposed. The Court disagreed. A criminal defendant has no unqualified right to file a direct appeal from a judgment of conviction and sentence entered on a guilty plea. A direct appeal will lie from a judgment entered on a guilty plea only if the issue on appeal can be resolved by facts appearing in the record. Having established that appellant's assertions of error that could be decided on the basis of the existing record are without merit, the Court concluded that the trial court did not abuse its discretion in denying appellant's motion for out-of-time appeal.

Search & Seizure

State v. Wolf, A12A1117(9/28/2012)

The State appealed from the trial court's grant of a motion to suppress evidence obtained from a vehicle after a traffic stop. The trial court found that the traffic stop was illegal because it was not based on specific articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct, and that the subsequent arrest was unlawful because the police lacked probable cause. The State argued that the trial court erred because the traffic stop was legal, as the officer had an articulable suspicion to perform it, and that the ensuing arrest was legal because it was based on probable cause.

The evidence showed that a mail carrier reported to the police that he observed at a residence a gray Nissan pickup truck and several black men who entered the truck and left the residence, apparently after they had seen the mail carrier. The mail carrier suspected that the men were about to break into the residence. The next day, a police officer on patrol in the area observed a gray Nissan four-door pickup truck in the same location that the mail carrier had reported. The officer followed the truck, which drove away and then circled back to the original location. The officer, who testified that he was patrolling the area because of the high number of recent burglaries, thought it strange that the truck returned to the original area so he continued to follow the truck, and called dispatch for backup in reference to possible burglary suspects. The truck then stopped and picked up a black male who had come out of a yard, at which time the officer activated the blue lights on his vehicle and initiated a stop of the truck. A second officer, arrived just as the first officer had activated his lights. The officers got the men out of the truck and handcuffed them. Appellant was the front seat passenger. The first officer asked the driver why they had picked up an individual, and the driver responded that the individual was "getting directions" to a particular location. The officer testified that he did not believe that story, and instead believed the men were burglars. A third officer who had arrived on the scene testified that as she approached the truck to take pictures of it, the doors were open, and she observed in plain view a small baggie of what appeared to be marijuana behind the driver's side seat of the truck. That officer reported to the first officer that she had seen marijuana in the truck. The first officer then placed the men under arrest and they were later indicted for burglary.

The State argued that the first officer had an articulable suspicion to perform a traffic stop because the following facts made the officer suspicious that a burglary had been or was about to be committed: the officer was patrolling an area in which many burglaries had occurred; he observed a vehicle matching the description of and on the same road as a vehicle which had been reported as suspicious; and he observed the vehicle circle that area and pick up an individual; and all of this occurred in the middle of the day, during the week, when few people were likely to be home. Although an officer may conduct a brief investigative stop of a vehicle, such a stop must be justified by specific, articulable facts sufficient to give rise to a reasonable suspicion of criminal conduct. An investigatory stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity.

The Court found that the first officer did not have a reasonable suspicion connecting appellant to any crime. The fact that the first officer had no details about the occupants of that vehicle other than their race and gender and that their vehicle was the same make and color as the one he observed the next day in an area where prior burglaries had reportedly been committed did not provide the requisite particularized basis for suspecting appellant or the other occupants of the vehicle of criminal activity, justifying a stop of the vehicle. The first officer testified that he had not seen the occupants of the truck violate any traffic laws or commit any illegal acts. And there was no evidence that there was anything unlawful about the circumstances under which an individual was picked up. Nor was there testimony about the alleged recent burglaries in the area. Accordingly, the Court held that the police stopped the vehicle without the reasonable suspicion necessary to justify an investigative stop, and the detention was an unreasonable intrusion under the Fourth Amendment.

The State also argued that the ensuing arrest was lawful because it was based upon probable cause, namely, that an officer saw suspected marijuana in plain view. A police officer who observes contraband in plain view is entitled to seize it, so long as he is at a place where he is entitled to be, i.e., so long as he has not violated the defendant's Fourth Amendment rights in the process of establishing his vantage point. The officer who located the suspected marijuana testified that when she approached the vehicle the doors were open and she observed in plain view the suspected contraband "behind the driver's side seat." Had the first officer not illegally stopped the vehicle and detained the occupants, however, the doors to the vehicle would not have been open and the third officer would not have seen the suspected marijuana. The third officer was not in a lawful position when she viewed the interior of the vehicle; thus what she saw in "plain view" did not furnish probable cause for appellant's arrest and the arrest was unlawful. Thus, the Court held that the trial court did not err in granting the motion to suppress.

Search & Seizure

Chamblee v. State, A12A1078 (9/25/2012)

Appellant was convicted of possession of a drug related object. Appellant contended that

the trial court erred by denying her motion to exclude evidence because the evidence was the result of an illegal seizure. The record showed that an officer was on patrol in his squad car in what he considered a "known drug area." The officer testified that he observed appellant, whom he recognized, walk initially toward a man sitting in a parked vehicle, then abruptly stop when she saw his squad car. The officer further testified that, while he had not witnessed appellant commit any crime, he stopped and exited his vehicle, said her name, then walked to her to interview her. He asked appellant whether she had any weapons or drugs and whether he could search her person. The officer testified that, at that point, appellant was not under arrest and that she was free to walk away. Appellant replied, however, that she had a "crack pipe" underneath her clothing. The officer asked her to show it to him, and appellant complied.

Appellant contended that the trial court erred by not excluding the incriminating evidence on the ground that the underlying police encounter violated the Fourth Amendment. Appellant argued that the officer's exiting his squad car, saying her name, and approaching her with inquiries amounted to sufficient coercion to give rise to a "tier-two" encounter- a brief seizure that must be accompanied by a reasonable suspicion. Appellant asserted these actions by the officer were not supported by a reasonable suspicion, pointing out further that the officer admittedly had observed her engage in no illegal conduct.

The Court stated that law enforcement officers do not violate the Fourth Amendment's prohibition of unreasonable seizures merely by approaching individuals on the street or in other public places and putting questions to them if they are willing to listen. Even when law enforcement officers have no basis for suspecting a particular individual, they may pose questions, and ask for identification –provided they do not induce cooperation by coercive means. If a reasonable person would feel free to terminate the encounter, then he or she has not been seized.

The Court held that the evidence authorized the trial court to conclude that the officer's approach of and initial inquiries to appellant amounted to a first-tier encounter that did not have to be supported by reasonable suspicion of criminal wrongdoing. There was no evidence that the officer engaged his siren and emergency equipment, drew his firearm, or made any other show of force. Nor is there any evidence that the officer threatened, coerced, or physically restrained appellant. There was no evidence that the officer physically touched appellant or used either language or a tone of voice reflecting that compliance with his request was compelled. Further, the officer testified that appellant was not then under arrest and was free to leave the scene, and the record contains no evidence to the contrary. The Court concluded that contrary to appellant's contention, the trial court did not err by concluding that no unlawful seizure occurred.

Possession of Cathinone; Sufficiency of Evidence

Amin v. State, A12A1401 (9/25/2012)

Appellant was convicted of possession of cathinone, in violation of the Georgia Controlled Substance Act. Appellant contended, among other things, that the State did not present sufficient evidence of intent to find him guilty of the crime. The record showed that a courier service manager suspected that two packages shipped from Kenya contained illicit material. A supervisor opened the packages and found plant material, which a Narcotics officer subsequently identified as khat. When appellant and his friend Mohamed arrived separately, each to claim a package, they were arrested and charged with possession of cathinone. Freshly cut khat contains the chemical cathinone, which is a Schedule I hallucinogenic substance. O.C.G.A. § 16-13-25. The cathinone in khat degrades over time into the milder stimulant cathine. While cathine is also a controlled substance, described in our statute as imparting either a stimulant, a depressant, or a hallucinogenic effect, neither appellant nor Mohamed was charged with cathine possession. After a bench trial, appellant and Mohamed were convicted. The Court reversed Mohamed's conviction because the evidence was insufficient. *Mohamed*, 314 Ga.App. 181 (2012). In *Mohamed*, the Court held that, while the evidence was sufficient to establish that the defendant possessed khat, it was insufficient to prove he intended to possess khat with knowledge that it contained cathinone, which was the controlled substance specified in the accusation.

Appellant argued, as did Mohamed, that the State presented insufficient evidence that he intended to possess cathinone. Possession of a controlled substance is not a strict liability offense. Rather, the criminal intent required by O.C.G.A. § 16-13-30(a) is intent to possess a drug with knowledge of the chemical identity of that drug. At trial, Mohamed testified that he was born in Somalia, where khat is legal and widely used. He further explained that Somalians do not ingest it for "two days, three days, five days" to wait "for the chemicals to go out" so it is not too strong. He further testified that it took three to five days for khat to arrive from Africa to the United States, by which time "the strong chemicals are gone." According to Mohamed, the khat at issue here was grown in Kenya, driven approximately 400 kilometers to the Nairobi airport, shipped to the Netherlands by air, and then shipped to Ohio before finally arriving in Atlanta. The evidence showed that the packages originated in Kenya on March 2, 2009, and arrived in Atlanta on March 4, 2009. The evidence against appellant was not significantly different from the evidence against Mohamed, and was therefore also insufficient to prove that appellant knew he was in possession of cathinone. Accordingly, the Court reversed the conviction.