

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 12, 2007

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THIS WEEK:

- **Mistrial**
- **Evidence –
Preservation of Scientific Evidence**
- **Search and Seizure**

Mistrial

McGee v. State, A07A1589 (09/26/07)

On Monday, February 12, 2007, a jury was impaneled and sworn for appellant's DUI trial. The trial was scheduled to begin two days later on Wednesday, February 14, 2007. Late Tuesday afternoon, the trial court conducted a conference call with both sides informing them that no courtroom was available for Wednesday. The trial court indicated that he desired to declare a mistrial if the case could not be worked out by plea. The trial court asked both sides if they had "anything to say". Appellant's attorney objected to the declaration of a mistrial and announced ready for trial. Despite appellant's objection, the trial court declared a mistrial. Appellant moved for discharge and acquittal which the trial court denied. On appeal, the Court of Appeals found that the trial court abused its discretion in declaring a mistrial and abridging appellant's constitutional right to be tried by the originally impaneled jury. In this case, there was absolutely no evidence that the trial court even considered less drastic alternatives. The judgment of the trial court was reversed.

Evidence – Preservation of Scientific Evidence

State v. Brady, A07A2018 (09/24/07)

A.M. was evaluated at Hugh's Spalding Children's Hospital for vaginal rash and painful urination. The hospital took a vaginal swab and prescribed a course of antibiotics. The swab was subsequently tested and found to be positive for neisseria gonorrhoeae, a sexually transmitted disease. As a result, all of the male members of A.M.'s household were tested for sexually transmitted diseases. All tested negative with the exception of the appellee, A.M.'s brother. Appellant's specimens tested positive for Chlamydia trachomatis and neisseria gonorrhoeae. During a forensic interview, A.M. identified appellee as her abuser and described the abuse in detail by using anatomical dolls. Appellant was indicted on May 31, 2005 and then re-indicted on May 12, 2006. The positive test sample taken from A.M. was destroyed by Hughes Spalding in accordance with the hospital's standard operating procedures prior to appellee's indictments. Neither the police, the prosecutor nor the GBI had any involvement whatsoever in the initial testing of the lab samples. At the time of the testing, A.M. was simply undergoing diagnostic testing for her medical complaints; no criminal investigation was even being conducted. Appellee moved to dismiss the indictment based on the destruction of the original sample taken from A.M. The trial court dismissed the indictment and the State appealed. The trial court found that a finding of bad faith on the part of the State was not necessary in order to determine whether the state failed to preserve

evidence which might have exonerated the appellee. The Court of Appeals reversed the judgment of the trial court. The Court held that there must be a showing that the evidence was material and that the State acted in bad faith in order to dismiss the indictment on the basis that the State failed to preserve evidence. Here, the Court found that the sample was only potentially exculpatory and that there was absolutely no evidence of bad faith on the part of the State.

Search and Seizure

State v. Davis, A07A0981 (09/26/07)

Appellee filed a motion to suppress which the trial court granted. The State appealed. The record shows that in 2006 officers observed a car parked in front of a duplex which they recognized. The officers had seized marijuana from this same vehicle in 2005 resulting in the arrest of an individual named Kenyada Campbell. The officers set up a surveillance of the duplex and later seized six bags of trash from a garbage can placed on the road in front of the duplex. In one of the bags, officers discovered a residual amount of marijuana and numerous documents addressed to appellee. The bag did not contain any documents addressed to any other person. Officers submitted a search warrant application for appellee's residence which included a supporting affidavit containing the aforementioned information. The search resulted in the discovery of a trash bag containing marijuana residue, five boxes of plastic bags and \$10,000 in cash. The trial court granted appellee's motion to suppress; expressing concern that the presence of the suspicious car could not be connected directly to the appellee. The Court of Appeals reversed finding that no such connection was required to be shown. Relying on *Butler v. State*, 192 Ga. App. 710 (1989), the Court held that the contents of appellee's trash provided a substantial basis for concluding that probable cause existed to justify issuance of the search warrant for appellee's residence.

Rivers v. State, A07A1078 (09/25/07)

Appellant's girlfriend complained to police that he had assaulted her. The officers saw visible injuries to her body and accompanied her to

appellant's house to retrieve some personal belongings. When officers arrived at appellant's residence, appellant was arrested for assault and searched. During the search of appellant's person, officers discovered \$1,598 in small bills. After appellant's arrest, the girlfriend told police that appellant had hidden drugs in the yard near the fence approximately 12 feet from the house. The officers were not able to find any contraband in plain view nor did they seek to obtain a search warrant. Instead, a drug dog was brought to the residence where it alerted to an area near the fence. Police found 17.1 grams of cocaine. At the motion to suppress, the arresting officer testified that the drugs were located in an area that he "guessed you would call it the curtilage, on the property, on the side of the house." Appellant filed a motion to suppress which the trial court denied on the basis that the search took place in a public area. On appeal, the Court of Appeals found that the trial court's ruling was not supported by the evidence. The Court found that appellant had a reasonable expectation of privacy in the area where the drugs were located. Thus, the State's contention that the contraband was located during a free air search by the drug dog was without merit. Under the Fourth Amendment officers are prohibited from entering a person's home or curtilage without a warrant absent consent or a showing of exigent circumstances. The State argued that there was sufficient probable cause for the search. Whether there was probable cause for a search warrant was immaterial because the police did not seek to obtain one. The search was invalid and the judgment of the trial court was reversed.