

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 23, 2009

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THIS WEEK:

- **Right to Remain Silence; Jurors**
- **Search & Seizure**
- **Aggravated Child Molestation; Cruel and Unusual Punishment**
- **Mistrial; Manifest Necessity**
- **Sentencing; Credit for Time Served**
- **Possession of Methamphetamine; Sufficiency of Evidence**
- **Jury Charges; Closing Arguments**

Right to Remain Silence; Jurors

Jones v. State, A09A1244

Appellant was convicted of child molestation. He argued that the trial court erred by allowing a detective to comment on his right to remain silent. During cross examination, the defense attorney asked the detective if he had questioned the appellant's younger sister. The detective responded, "How could I interview [her] when her mother wouldn't let me talk to [appellant?]" The Court found that the detective's rhetorical question was unresponsive—the detective was asked what *he* did, not what the defendant's mother did or did not do. However, the Court determined, while the remark may be viewed as evidence that appellant's mother had thwarted the detective's attempt to interview her teenaged son, it did not imply that appellant had elected to remain silent. Therefore, the trial court did not abuse its discretion by refusing to grant the motion for mistrial.

Appellant also contended that the trial court erred in not granting him a new trial based on a juror giving dishonest answers during voir dire. The Court stated that for a defendant to secure a new trial because a juror did not give a correct response to a question posed on voir dire, a defendant must show that (1) the juror failed to answer honestly a material question on voir dire and (2) a correct response would have provided a valid basis for a challenge for cause. One of the State's main witnesses was a minister named "Gloria Christ" who had recently changed her name from "Gloria Winters." The juror stated that he did not hear that name and did not realize he knew the witness until she walked into the courtroom. The Court held that the trial court did not abuse its discretion in not granting a mistrial because even if it could be concluded that the juror lied, a correct response to the question asked that is, whether he knew a "Gloria Christ" formerly known as "Gloria Winters" of the Heart of Christ Ministry would not have provided a valid basis for a challenge for cause because merely knowing a witness is not a sufficient ground to strike for cause a prospective juror.

Search & Seizure

Adams v. State, A09A1391

Appellant was convicted of burglary and criminal damage to property. Appellant argued that the trial court 1) should have held an evidentiary hearing on his motion to suppress; and 2) erred in determining that the affidavit in support of the warrant was insufficient because the testimony of the witnesses at trial differed from what was represented in the affidavit. The Court held that the State bears the burden of proof to show the lawful-

ness of the search made pursuant to a warrant. This burden is satisfied by production of the warrant and its supporting affidavit and by showing either by those documents or by other evidence that the warrant is not subject to the statutory challenge alleged. Once the State introduced the warrant and affidavit, the burden of producing evidence shifted to appellant, the challenger of the search warrant, to produce evidence to support his challenge. Here, the trial court determined that, on its face, the affidavit contained sufficient facts for the issuance of the search warrant. At that point, it was up to appellant to produce evidence to support his challenge. He failed to do so and did not insist on a full evidentiary hearing. Therefore, the State met its burden of proof as a matter of law and the denial of appellant's motion to suppress was mandated.

Appellant also challenged the sufficiency of the supporting affidavit to the warrant. An affidavit is presumed valid in the absence of evidence that it contained deliberate falsehoods, was made with reckless disregard for the truth, or that the affiant consciously omitted material facts that, if included, would have indicated the absence of probable cause. Appellant, however, did not contend that the detective who wrote the affidavit was deliberately lying or was otherwise untrustworthy. Thus, the Court could not say that the magistrate lacked a substantial basis for concluding that probable cause existed for issuing the search warrant.

Johnson v. State, A09A1141

Appellant was convicted of DUI. He contended that the trial court erred in denying his motion to suppress. The evidence showed that a trooper was called to the scene of a one-car accident. He ran the tag and went to appellant's apartment complex but could not find appellant's particular apartment. Appellant's father approached the trooper and said that his son had been in an accident. The trooper and the father then went to appellant's apartment where the father knocked on the door. When appellant answered, the trooper said "come on out here," and appellant almost immediately stepped out of the apartment. The trooper did not enter the home or touch appellant before he exited. The trooper then developed probable cause from which he determined that appellant was under the influence.

Appellant argued that he was seized when the officer ordered him to leave his apartment, and that the trooper lacked a warrant or exigent circumstances which would justify a search or seizure within the residence. The Court disagreed for the following reasons: First, the trooper was authorized to go to the door of appellant's apartment in the course of investigating the crash because where a police officer enters upon private property only to the extent of knocking on outer doors, the Fourth Amendment is not violated. Second, if a suspect complies with an officer's request to step outside the home and is arrested on the porch, the detention does not occur inside the home for purposes of Fourth Amendment analysis. And third, the trooper did not force Johnson to cross the threshold. Therefore, appellant was not unlawfully seized within his home when the trooper met him at the threshold of his apartment, told him to "come on out," and he chose to comply with the instruction. Although the officer did not have probable cause to arrest appellant at the time of their initial encounter, the trooper did have reasonable suspicion of criminal activity sufficient to authorize a brief detention for purposes of investigating why appellant drove his car off the road and into a tree.

Baker v. State, A09A1314

Appellant was convicted of trafficking in cocaine. He contended that the trial court erred in denying his motion to suppress. The facts, briefly stated, were as follows: An officer noticed appellant's vehicle traveling slower than permitted on the interstate. The officer followed the vehicle off the interstate and the vehicle made some turns suggesting it was trying to avoid the officer. The vehicle then turned into a truck stop and pulled up next to one of the pumps. The officer "never turned on his traffic lights, did not initiate a stop, and did not order the occupants out of the vehicle, but approached the driver as he walked towards the truck stop and asked for his driver's license." The encounter led to a consent to search and the search revealed the cocaine.

The Court held that the officer did not "stop" the vehicle or prevent it from leaving, but merely approached the driver after he had parked his vehicle at the gas pumps and started to walk to the truck stop. Because the officer's conversations with appellant and his

passenger were within the scope of a first-tier encounter and did not rise to the level of a stop, no articulable suspicion was required. Additionally, numerous facts supported an articulable suspicion that the occupants of the vehicle were engaged in some sort of criminal activity. Not only did the driver commit two traffic offenses, he engaged in a series of unusual maneuvers by appearing to turn into a business, and then abruptly moved back onto the highway, turning into another business, then leaving and returning to the first business. The officer could reasonably infer that this oddly circuitous route was an attempt by the driver to evade the officer. Finally, the strong odor of air freshener and the occupants' nervous behavior provided additional articulable suspicion. Therefore, the trial court did not err in denying the motion to suppress.

LeRoux v. State, A09A1351

The Court granted an interlocutory appeal to appellant to address whether the trial court erred in denying his motion to suppress. Appellant claimed that the officer lacked a reasonable articulable suspicion to stop his vehicle. The Court, based on the following facts, disagreed: Numerous crimes had been committed on a particular golf course property after hours, to the point that the police department directed that officers on the midnight shift patrol the golf course a certain number of times during the night. Appellant drove at 2:30 a.m. through a gate and past signs clearly indicating that the roadway was private property. He drove past many places where he could have turned around or stopped if he had taken a wrong turn or stopped if he needed to consult a map or make a telephone call. Once he reached the end of the roadway, he entered a parking lot and began circling, and he continued to circle rather than exit the parking lot when he returned to the entrance. Under these circumstances, the officer was justified in stopping appellant's vehicle even if he did not observe appellant violate any traffic laws.

Aggravated Child Molestation; Cruel and Unusual Punishment

Morris v. State, A09A0537

Appellant was convicted of aggravated child molestation. He argued that under

Humphrey v. Wilson, 282 Ga. 520 (2007), his conviction was cruel and unusual under the Eighth Amendment. Appellant was 15 years old at the time he committed the aggravated child molestation of his 13-year-old brother, A. M., by having A. M. place his mouth on appellant's penis. The Court held that like the defendant in *Humphrey*, appellant was a teenager convicted only of aggravated child molestation, based solely on an act of sodomy, with no claimed injury to the victim, involving a teenage partner no more than four years younger than he was. As a result, the crime and circumstances in this case met each of the factors listed in *Humphrey* as important in determining whether a case is sufficiently similar to require a similar result. The fact that appellant and the victim were 15 and 13 years old, whereas the defendant and victim in *Humphrey* were 17 and 15 years old, and the fact that appellant and the victim were brothers were not relevant considering the factors set out by the Supreme Court in *Humphrey*. Moreover, the Court stated, the General Assembly has not provided that those differences have any bearing on cases arising out of OCGA § 16-6-4. Therefore, applying the constitutional standards adopted by the Supreme Court of Georgia, the Court held that *Humphrey* required appellant's sentence be set aside. Furthermore, given that the minimum punishment as imposed against appellant was unconstitutional and because there was no other law in existence at the time under which he could be sentenced, appellant could not be resentenced. Therefore, the Court was "constrained to direct that the trial court dismiss the proceedings against [appellant] and that he be discharged from custody."

Mistrial; Manifest Necessity

Ogletree v. State, A09A0929

Appellant appealed from the denial of his plea in bar after the trial court granted a mistrial during his first trial on charges of child molestation. Appellant contended that double jeopardy barred his subsequent prosecution because the trial court's grant of the mistrial was not manifestly necessary. The evidence showed that a voir dire began on Wednesday and the jury was impaneled on Friday. On the following Monday, the judge ruled that in order for the State to introduce the videotaped interview of the victim, the State would have to call the

forensic interviewers. An unreported conference then occurred in chambers followed by an announcement to the jury that one of the interviewers could not be called because she had unexpected pregnancy issues requiring immediate attention. The trial court thereafter granted a mistrial since the unavailability of the witness was indeterminable.

The Court held that a trial court may interrupt the proceedings and declare a mistrial over the defendant's objection only if the prosecutor demonstrates manifest necessity for the mistrial. Manifest necessity exists when the accused's right to have the trial completed by a particular tribunal is subordinate to the public interest in affording the prosecutor one full and fair opportunity to present his evidence to an impartial jury. When there is no prosecutorial misconduct, the trial court has broad discretion in deciding whether to grant a mistrial.

Here, the trial court and defense counsel, both of whom were privy to what transpired in an unreported conference in chambers, agreed that the State did not act in bad faith. Additionally, the witness problem did not come up until Monday morning when the mistrial was granted and there was no evidence that the State knew that the witness was going to be unavailable. Moreover, it was the trial court's ruling that the State could not introduce the videotaped statement of the victim that created the manifest necessity for a mistrial, not the absence of the interviewer standing alone. Therefore, a reasonable judge could certainly have concluded that the videotape was necessary to afford "the prosecutor one full and fair opportunity to present the evidence to an impartial jury."

Sentencing; Credit for Time Served

Williams v. State, A09A1647

Appellant appealed from the denial of his motion to correct an order amending his sentence, claiming that the trial court erred in not giving him credit for certain time that he had already served. The Court, citing *Smashley v. State*, 282 Ga. App. 293 (2006), held that that the issue was not properly before the Court because credit for time served "is to be computed by the convict's pre-sentence custodian, and the duty to award the credit for time served prior to trial is upon the Department

of Corrections. OCGA § 17-10-12. The trial court is not involved in this determination." Thus, if aggrieved by the calculations in awarding credit, appellant must seek relief from the Department of Corrections. Dissatisfaction with that relief would not be a part of his direct appeal from his original conviction but would be in a mandamus or injunction action against the Commissioner of the Department of Corrections.

Possession of Methamphetamine; Sufficiency of Evidence

Millsaps v. State, A09A1763

Appellant was convicted of possession of methamphetamine. He challenged the sufficiency of the evidence supporting his conviction. The evidence showed that an officer spotted a vehicle in a known drug area. He ran the tag and when it came back as registered to a different vehicle, he attempted to pull the car over. Instead the vehicle failed to stop for a couple of miles and then stopped abruptly and the front seat passenger jumped out and ran off. The driver and appellant, who was sitting immediately behind the driver, stayed in the vehicle. The officer had both exit from the vehicle and then arrested the driver. Upon searching the passenger compartment incident to arrest, the officer saw about two inches of a plastic baggy sticking out under the left corner of the back seat, where the seat met the floorboard carpet. When the officer pulled this baggy out from under the seat, he discovered that it contained methamphetamine.

The Court held that the evidence was insufficient to support appellant's conviction. Appellant alone was charged with possession of the methamphetamine. The State did not present evidence that appellant had actual possession of the methamphetamine; instead, the State sought at trial to show constructive possession, based on circumstantial evidence. But, the circumstantial evidence adduced at trial failed to establish such a connection between appellant and the methamphetamine found under his seat in the car. Because he was a passenger, no presumption arose that he was in possession of the contents of the car. The bag itself, but not its contents, could be seen sticking out from under the seat occupied by the passenger. The State offered no evidence that appellant knew that the baggy contained

contraband, or that he was the one who hid the contraband. Moreover, even though the vehicle did not immediately pull over when the traffic stop was initiated, the arresting officer discerned no erratic behavior or furtive movement by the occupants of the vehicle as he followed it. Mere spatial proximity combined with flight is insufficient to connect a defendant to nearby contraband. Since there was no evidence that might permit an inference that appellant hid the methamphetamine or at least knew of its presence, the jury was not authorized to find him in constructive possession of the contraband.

Jury Charges; Closing Arguments

Emmanuel v. State, A09A1594

Appellant was convicted of two counts of aggravated assault. He contended that the trial court erred in not charging the jury on reckless conduct and assault. The evidence showed that appellant was a supporter of a rap group which group had a disagreement with a rival rap group. The two groups agreed to meet at a public park to “settle things.” A gun battle broke out and the victims were caught in the crossfire. The Court found no error in failing to give the instructions. Appellant raised a justification defense at trial, arguing that he “fired back” at individuals who shot at him. With this defense, appellant conceded that his act was intentional, but asserted that he committed the act “for an excusable reason, such as self-defense.”

Thus, the trial court properly refused to charge the jury on reckless conduct because the crime of reckless conduct is, in essence, an instance of criminal negligence, rather than an intentional act, which causes bodily harm to or endangers the bodily safety of another. Appellant was either guilty of aggravated assault or justified in firing his gun, and reckless conduct was not at issue. The same was true for assault. Any error in the charge would not have affected the outcome of the case, as appellant admitted to actions which would constitute aggravated assault unless the jury found he acted in self-defense.

Appellant contended the trial court erred in permitting the state to make improper “golden rule” and “future dangerousness” arguments during its closing arguments. Specifically, he challenged the following comments:

(a) arguing that a not guilty verdict would be the same as giving the defendants’ guns back to them; (b) asking the jurors to imagine the anguish one of the victims felt as “that bullet tore through his young body;” (c) asking the jurors if the victim would be the “last baby” killed if a “not guilty” verdict was rendered; (d) stating, “he threatens the innocent who spares the guilty;” (e) commenting that the jurors can’t use their park because “thugs” have taken it over and use it as a battleground; and (f) referring to the boy’s empty place at the family table and telling the jury the boy is now “in a cave of loneliness.” The Court found the arguments did not entreat the jury to place themselves in the victim’s shoes with regard to the crime committed. Instead, the comments appealed to the jury to convict for the safety of the community, which is permissible. Nevertheless, the Court stated, “[w]hile the better practice would have been for the prosecutor not to refer to the victims in making his closing argument, we cannot say the trial court erred in allowing the comments.” Also, while the prosecutor did make impermissible “future dangerousness” arguments, the trial court took corrective measures and any error was harmless given the overwhelming evidence of guilt.