

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING OCTOBER 2, 2009

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THIS WEEK:

- **Speedy Trial**
- **Search & Seizure**
- **Right to be Present; Statements**

Speedy Trial

State v. Porter, A09A1508

The State appealed from an order dismissing its 2001 child molestation indictment against Porter. The record showed that Porter was originally arrested in November, 2000 and made a legally sufficient assertion of his right to a speedy trial in January 2009. The Court, utilizing the *Barker-Doggett* balancing test, affirmed the trial court. First, the Court determined that the interval from the Porter's arrest to the trial was sufficiently long to be considered presumptively prejudicial. The Court then proceeded to weigh the four factors of the *Barker-Doggett* test: Whether pretrial delay was uncommonly long; whether the defendant or the State was primarily responsible for the delay; whether the defendant timely asserted his right to a speedy trial; and whether the defendant was prejudiced by the delay.

The State conceded that the pretrial delay was uncommonly long, but contended that the trial court erred in determining that the other three factors weighed against it. The Court disagreed. It found that the "government" was primarily responsible for the delay. The Court stated that "relevant inquiry for purposes of the second factor is not whether the *prosecutor* or the accused bears more responsibility for the delay, but whether the *government* or the criminal defendant is more to blame for

that delay." In this regard, the government includes all state actors, including the courts. Noting that both the State and the trial court put off trying the case, the Court determined that almost seven years was attributable to the government and therefore this factor weighed against the State.

The Court found that Porter did not make a timely assertion of his constitutional rights, but held that no one particular factor is dispositive. The Court then held that the last factor, prejudice to the defendant, weighed against the State. It found that a substantial delay gives rise to a presumption of actual prejudice, because greater pretrial delays simultaneously increase the degree of prejudice presumed and decrease the expectation that the defendant can demonstrate tangible prejudice to his or her ability to present a defense. The pretrial delay totaling over seven years was egregious. Actual prejudice to Porter upon such delay stood un rebutted, and, in large part, was negligently incurred for the convenience of the government. Consequently, the trial court did not abuse its discretion in dismissing the 2001 case based upon the denial of Porter's constitutional right to a speedy trial.

Search & Seizure

Thomas v. State, A09A1370

Appellant was convicted of obstruction of an officer, possession of methamphetamine, bringing contraband to a jail, and possession of a firearm during the commission of a crime. He contended that the trial court erred in denying his motion to suppress. The Court agreed and reversed his convictions. The evidence showed that a suspect named Morris has stolen a vehicle and abandoned it near some woods. An officer was dispatched to the

location to search for Morris. The officer saw appellant driving a truck slowly, looking into the woods and making intermittent stops. The officer stopped appellant and when he approached the vehicle, he noticed appellant had a cell phone in his hand. The officer took the cell phone from appellant and then scrolled thru the directory and saw Morris's name. The officer then told appellant not to leave and went to his patrol car to get his camera. The officer told appellant to get out of his truck so the officer could take his picture. Appellant refused and was arrested for obstruction. The remaining charges resulted from a search incident to the arrest.

The Court held that taking appellant's cell phone and instructing him not to leave so that his photograph could be taken constituted a second tier encounter allowing the officer to detain appellant briefly only if the officer had a particularized and objective basis for suspecting appellant was involved in criminal activity. The State conceded that the officer had no legal basis for taking appellant's cell phone from him or viewing the call log without appellant's consent, but argued that even excluding the knowledge gained from reviewing the call log, the officer still had a reasonable suspicion that appellant was involved in criminal activity. However, the Court held that appellant's mere presence at the scene of the abandoned vehicle alleged to have been stolen by Morris was insufficient to establish a reasonable articulable suspicion to detain him. Appellant's slow driving and intermittent stops may have caused the officer to closely observe him, but it was not sufficient to indicate that appellant was or might have been engaged in illegal activity so as to provide a reasonable articulable suspicion to detain him.

Right to be Present; Statements

Walker v. State, A09A1349

Appellant was convicted of possession of cocaine. He contended that the trial court erred in holding a motion to suppress hearing without his being present and in denying his motion to suppress his statements. The evidence showed that on the day of the motion to suppress hearing, appellant's counsel told the court that appellant had called him, stating that he had just gotten out of the hospital, wasn't feeling all too well and that he was waiv-

ing his presence at the hearing. The Court held that while appellant had the right to be present at the motion hearing, such right can be expressly waived by counsel by express authority. Here, appellant had numerous opportunities to rebut that the waiver was not done by his authority, but failed to do so and in fact, only raised it for the first time in his motion for new trial. Thus, there was no error.

Appellant also contended that the trial court erred in admitting his statements because he alleged that the statements were made while he was intoxicated and thus not freely and voluntarily given. The Court held that the record belied appellant's claim of intoxication. But, even if he was intoxicated, intoxication, standing alone does not render a statement inadmissible. If the evidence was sufficient to establish that the defendant's statement was the product of rational intellect and free will, it may be admitted even if the defendant was intoxicated when he made the statement.