

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING OCTOBER 31, 2008

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## THIS WEEK:

- **Search & Seizure, Right of Appeal**
- **Continuance, Jury Instructions**
- **Search & Seizure**
- **Search & Seizure, DUI**
- **Jurors**
- **Indictment, Similar Transactions**
- **Prior Consistent Statements**

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### *Search and Seizure, Right of Appeal*

State v. Kipple, A08A2034

The state appealed from the grant of defendant's motion to suppress methamphetamine and statements made during the course of a traffic stop. The Court of Appeals reversed in part. The record showed that a vehicle in which the defendant was a passenger was lawfully stopped and the driver arrested for suspended license. The defendant was asked to get out of the vehicle. When the officer asked if he had any weapons, the defendant stated that he had a knife and handed it to the officer. The officer then conducted a pat down of the defendant and felt a large hard object in defendant's back pocket. The officer asked if it was his wallet and the defendant said it was "some scales." The officer asked for permission to remove the object from his pocket, and the defendant consented. The officer removed the object, which was in fact scales, and saw that there was a substance on the scales that appeared to be methamphetamine residue. During a subsequent search of the vehicle incident to the driver's arrest, the

officer found a container holding a quantity of what appeared to be methamphetamine in the form of the same substance that the officer saw on the scales. At that point, the defendant and the driver were arrested for possession of the suspected methamphetamine.

The Court held that the trial court erred by suppressing evidence of the scales and appellant's statements made during the stop on the basis that the pat-down violated the Fourth Amendment. An officer is entitled during a traffic stop to order the driver and any passenger to get out of the vehicle without having any suspicion that they posed a threat to the officer's safety. Since the record showed that appellant was armed with a knife that he gave to the officer, there were specific and articulable facts taken together with rational inferences from those facts which provided the officer with a reasonable basis to believe or suspect that appellant might be armed with another weapon on his person. It was, therefore, reasonably prudent after taking control of the knife for the officer to conduct a pat-down for his own safety to determine if appellant was still armed with another weapon.

However, the Court refused to consider the State's additional claim that the trial court erroneously suppressed appellant's statements at the stop scene prior to his formal arrest on the basis that he had not been given Miranda warnings. The record showed that the trial court made the ruling orally at the suppression hearing. But, the ruling was not included in the written order entered on the motion to suppress. "[T]he State has the right to appeal oral orders only when the transcript affirmatively shows that the State requested the trial court to put the oral order in written form and that the trial court refused to do so." Because the record did not show that the State made this

request, the State had no right to appeal from the oral order, and that portion of the State's appeal was dismissed.

## **Continuance, Jury Instructions**

Palmer v. State, A08A1509

Appellant was convicted of cocaine possession and other offenses. He contended on appeal that the trial court erred by 1) refusing to grant a continuance for him to obtain civilian clothing, thus forcing him to appear for the first day of trial in "jail attire"; and 2) refusing his written request to charge on mere presence or mere association. As to the first contention, the Court held that while a defendant has a right to appear before a jury in civilian clothes, it is not error to try a defendant in prison garb if it bears no distinctive markings or is not otherwise different from normal civilian attire. The record showed that appellant was given a plain white oxford shirt, navy slacks and white tennis shoes to wear and that they looked just like "plain old work clothes." Nevertheless, appellant claimed that the state would not let him wear what his family brought for him and that the clothes he was given to wear were ill-fitting and the tennis shoes were too bright a shade of white. The Court held that the right guaranteed to a defendant is the right to appear in civilian clothes, not the particular civilian clothes of his fashion preference. Moreover, a defendant does not have the right to dictate to the trial court which civilian clothing he will wear. The trial court therefore did not err.

The Court also found his claimed error regarding his jury charge to be meritless because the rule that mere presence at the scene of a crime is insufficient to convict is actually just a corollary to the requirement that the State prove each element of the offense charged. The trial court fully instructed the jury on the presumption of innocence, the requirement that the State prove each element of the offenses charged beyond a reasonable doubt, circumstantial evidence, intent, and joint and constructive possession. Thus, there was no reason to give the requested charge. But, in any event, the charge was not proper because it was not adjusted to the evidence. The State presented additional evidence beyond the mere presence of appellant at the scene of the crime, including the testimony of a co-defendant,

appellant's attempts to conceal his identity and age, his proximity to the concealed contraband, and the discovery of additional contraband packaged in the same manner on his person.

## **Search & Seizure**

Eaton v. State, A08A1674

Appellant was convicted of trafficking in methamphetamine. She contended that the trial court erred in denying her motion to suppress evidence of two bags of suspected methamphetamine. The Court of Appeals affirmed her conviction. The Court found that her vehicle was lawfully stopped and the officer was within his rights to ask her to exit her vehicle. He then observed appellant's extremely nervous behavior and saw what could have been the handle of a gun or knife sticking out of her fanny pack. Based on this observation, the officer had a reasonable basis to believe that appellant may be armed. When the officer pointed at the fanny pack and asked if she had any weapons in the pack, appellant reacted by grabbing the pack with her hands. The Court found that the officer did nothing which violated the limits of a Terry-type search by simply pointing at the pack and asking if she had any weapons in the pack. Appellant's reaction to the question by grabbing the pack with her hands justified the officer's actions within Terry limits to protect himself by pulling her hands away from the pack to prevent her from gaining access to the object inside that he reasonably suspected could have been a weapon. In pulling appellant's hands away from the pack the officer observed in plain view that appellant had a small bag of suspected methamphetamine in one of her hands. It follows, the Court found, that the officer lawfully discovered the small bag of suspected methamphetamine. At that point, the officer acted on probable cause to arrest appellant for possession of methamphetamine. During the officer's subsequent struggle to arrest her, a second larger bag of suspected methamphetamine fell out of the fanny pack in plain view of the officer. This too was lawfully discovered.

## **Search & Seizure, DUI**

Thomas v. State, A08A1808

Appellant was convicted of DUI and other traffic offenses. He contended that the

trial court erred in admitting evidence of his field sobriety tests because he was not first read Miranda warnings. If an officer gives a field sobriety test to a suspect who is in custody or under arrest but who has not been warned of his right against self-incrimination, then the test results are inadmissible. However, if the suspect is not in custody when he takes a field sobriety test, the results are generally admissible even if the person had not been warned of his Miranda rights. The test to determine whether a suspect is "in custody" for Miranda purposes is whether a reasonable person in the suspect's position would have thought the detention would not be temporary. Here, the record showed that a city officer noticed appellant driving erratically. Since the officer was at that time transporting another suspect, he contacted a dispatcher and asked for assistance before stopping appellant. The Court found that although the officer held onto appellant's keys and license and appellant was not able to leave the scene, the officer told him that a county officer was on the way. Therefore, it was clear that the initial detention would be temporary and that there would only be a minor delay before the county officer arrived to determine whether appellant was driving under the influence. Furthermore, the officer did not handcuff appellant or place him in the patrol car while they waited and both the city and county officers testified that only a few minutes elapsed between the traffic stop and the arrival of the county officer. Thus, appellant was not in custody when the county officer had him perform field sobriety tests and evidence of the results of the evaluations were properly admitted.

## **Jurors**

Peterson v. State, A08A1735

Appellant was convicted of DUI. He contended on appeal that the trial court erred in failing to take corrective measures concerning a sleeping juror. If a juror falls asleep during the course of a trial it is the duty of the trial judge to awaken him. When counsel or the parties in a trial observe a sleeping juror, it is their duty to bring it to the attention of the court. However, a party may not observe a juror sleeping, fail to bring this to the judge's attention at a time when corrective action may be had, take a chance on a favorable verdict, and then if the verdict

is unfavorable, ask the trial court to declare a mistrial or new trial because of the “otiose juror.” Here, after playing a video tape for the jury, the defense counsel complained to the trial court that one of the jurors had been asleep for over an hour. The trial court disagreed, having watched the same juror over the same period of time and in any event, counsel did not ask for corrective action or for a mistrial. Thus, the Court held, the asserted error presented nothing for the Court to review.

## **Indictment, Similar Transactions**

Martin v. State, A08A1097

Appellant was convicted of numerous counts of child molestation and other offenses. Appellant argued that the trial court erred in instructing the jury that it could disregard the specific date alleged in one particular count of the indictment. That count stated that appellant committed the offense of child molestation on January 23, 2006, in that he had sexual intercourse with the victim on that date. Appellant had offered an alibi defense for that date. During deliberations, the jury sent out a note asking, with regard to that count, “are we obligated to the specific date listed?” The trial court responded by note, stating “[f]or the date of the offense to be material, the indictment must specifically allege the date of the offense is material.” The Court found no error.

When the exact date is not stated as a material allegation of the time of commission of the offense in the indictment, it may be proved as of any time within the statute of limitations. An exception exists where the evidence of the state proving that the offense was committed at a time substantially different from that alleged in the indictment surprises and prejudices the defense in that it deprives the defendant of a defense of alibi or otherwise denies him his right to a fair trial. Here, the victim stated that she saw appellant on January 22, but from her testimony it could be inferred that it was actually in the early morning hours of January 23. Thus, the state’s evidence as to the time of the offense was not substantially different from that alleged in the indictment and, in fact, the only evidence was that it was committed on that date. Therefore, appellant did not show that he was surprised and prejudiced such that he could not present an alibi defense.

Appellant also claimed that the trial court erred in admitting similar transaction evidence. He contended that even if admitted for a legitimate purpose, its prejudicial value outweighed the probative value because it kept him from taking the stand in his own defense. He claimed that because he did not wish to be questioned about the other incidents, he did not testify as to what happened in the instant case. The Court noted that appellant did not cite any cases in support of this allegation and that it could find no such supportive cases either. The contention was therefore without merit.

## **Prior Consistent Statements**

Nguyen v. State, A08A1441

Appellant was convicted of rape, incest, and two counts of child molestation. He contended on appeal that the trial court erred in allowing the state to introduce the victim’s videotaped interviews into evidence as prior consistent statements. The Court stated that if the witness is present at trial and available to testify, the rule is as follows: “[O]nly if affirmative charges of recent fabrication, improper influence, or improper motive are raised during cross-examination is a witness’s veracity placed in issue so as to permit the introduction of a prior consistent statement. Even then, the prior consistent statement may be admitted as non-hearsay only if it was made before the motive or influence came into existence or before the time of the alleged recent fabrication. Otherwise, it is pure hearsay, which cannot be admitted merely to bolster the witness’s credibility.” In other words, to counter an allegation that a witness is motivated or has been influenced to testify falsely or that her testimony is a recent fabrication, evidence is admissible that the witness told the same story before the motive or influence came into existence or before the time of the alleged recent fabrication. In such circumstances, the prior consistent statement is defined as not hearsay and may be admitted into evidence.

Here, appellant claimed that the victim’s credibility was never challenged on cross examination. However, after reviewing the direct, cross, re-direct and re-cross of the victim, the Court found otherwise. Specifically, that defense counsel implied during cross-examination that the victim had recently fabricated her trial testimony in order to leave foster

care and reunite with her mother, whom she had not seen in three years, and on re-cross, that her testimony was motivated by a desire to please her DFCS social worker and avoid criminal prosecution for unauthorized credit card charges on her foster mother’s account. The trial court therefore did not err in admitting the two videotaped interviews.