

# Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING NOVEMBER 14, 2008

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## THIS WEEK:

- **Reciprocal Discovery**
- **Kidnapping**
- **Bruton; Res Gestae**
- **Indictments; Bruton**
- **Jury Charges; Lesser Included Offenses**
- **Sentencing; Merger**
- **Bail**
- **DUI; Jury Charges**
- **DUI; Search & Seizure**
- **Sentencing; Recidivism**
- **Evidence; Rule of Sequestration**
- **Due Process**

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## *Reciprocal Discovery*

*Hudson v. State, S08A1396*

Appellant was convicted of murder and other offenses. She contended on appeal that the trial court erred in refusing to allow one of her witnesses to testify. The Supreme Court held that the trial court did not abuse its discretion. On the third day of trial, defense counsel notified the state that it intended to call the witness. Under the reciprocal discovery rules, a defendant's attorney must furnish opposing counsel with information on defense witnesses "no later than five days prior to trial." OCGA § 17-16-8 (a). Otherwise, the trial court may, "upon a showing of prejudice and bad faith, prohibit the defendant from introducing the evidence not disclosed." OCGA § 17-16-6. Here, the trial court was authorized to find prejudice to the state because the state was

not informed of the person as a possible witness until the third day of trial and had no opportunity to investigate his testimony or his background. The trial court was also authorized to find bad faith, because defense counsel knew of the witness's existence and had a plan to call him prior to trial, and yet failed to inform the state about the witness until the third day of trial.

## *Kidnapping*

*Garza v. State, S08G1628*

The Supreme Court, in this landmark ruling, reversed appellant's conviction on two counts of kidnapping, finding the evidence regarding asportation to be insufficient. Until this decision, the element of "abduct[ing] or steal[ing] away" the victim, known as "asportation," was established by proof of movement of the victim, however slight. In this decision, the Court adopted a new test for determining asportation. This test requires assessment of four factors in determining whether the movement at issue constitutes asportation: (1) the duration of the movement; (2) whether the movement occurred during the commission of a separate offense; (3) whether such movement was an inherent part of that separate offense; and (4) whether the movement itself presented a significant danger to the victim independent of the danger posed by the separate offense. The Court held that this new test "will assist Georgia prosecutors and courts alike in determining whether the movement in question is in the nature of the evil the kidnapping statute was originally intended to address —i.e., movement serving to substantially isolate the victim from protection or rescue —or merely a 'criminologically insignificant circumstance' attendant to some other crime." To the extent

prior case law and, specifically, the “slight movement” standard are inconsistent with this approach, those cases and that standard were overruled.

## **Bruton; Res Gestae**

*Butler v. State, S08A1629*

Appellant was convicted of felony murder and conspiracy to commit aggravated sodomy. The evidence showed that appellant and his co-defendants were prison inmates at the time of the murder. A guard found appellant and his co-defendant sitting on a bed in their cell and the victim lying on the floor. In response to a comment by the guard, appellant’s co-defendant immediately stated “[w]e didn’t mean to kill him.” Appellant contended on appeal that the admission of this statement against him violated his right of confrontation under *Bruton*. The Court disagreed. *Bruton* is grounded in a defendant’s right of confrontation and was a case in which a co-defendant’s confession implicating *Bruton* was not admissible against *Bruton* under any recognized exception to the rule against hearsay. However, it has been held that *Bruton* has no application when a statement by a defendant’s partner in crime is received under some exception to the hearsay rule. Here, the co-defendant’s voluntary utterance at the scene was admissible pursuant to the *res gestae* exception to the rule against hearsay. Therefore, appellant’s right to confrontation under *Bruton* was not violated.

## **Indictments; Bruton**

*Metz v. State, S08A1614, S08A1615, S08A1616*

Three appellants (A, B, and C) were jointly indicted, tried, and convicted of malice murder. Appellant A argued that the trial court should have granted his demurrer challenging the indictment because the state did not state whether he was being charged as the principal, or whether he was being accused as a party to the crime. The Court held that the law is “well-settled...that the State is not required to specify in the indictment that it is charging the defendant as a party to the crime.” Here, the trial court correctly charged the jury on parties to a crime and the charge was adjusted to the evidence. Since the indictment as drawn allowed appellant to intelligently prepare a defense and adequately

safeguarded him against double jeopardy, the indictment was legally sufficient and was not subject to a demurrer.

Appellants A and B argued that the trial court erred in denying their joint motions for mistrial on *Bruton* grounds when in opening statement, appellant C’s attorney commented that appellant B had given conflicting statements to the investigating officers. Prior to trial, the trial court had previously ruled B’s statements admissible on *Miranda* grounds, but it had reserved a ruling on the *Bruton* issue until determining whether B would testify at trial. For the admission of a co-defendant’s statements to constitute a *Bruton* violation the statements standing alone must clearly inculpate the defendant. B’s custodial statements that he was not present and that he had an alibi did not inculpate his co-defendants. The trial court therefore did not abuse its discretion in denying the motions for mistrial on *Bruton* grounds and in refusing to instruct the jury to disregard the comments.

## **Jury Charges; Lesser Included Offenses**

*Young v. State, A08A0962*

Appellant was convicted of aggravated assault on a police officer, felony obstruction of an officer, VGCSA, and traffic offenses. He contended that the trial court erred by not giving his requested charge of reckless driving as a lesser included offense of the aggravated assault. The officer testified that he had finished a traffic stop when he noticed a truck approaching from the rear. Looking in his rearview window, he noticed that the truck’s right front tire was not fully inflated and decided to exit his vehicle to inform the driver of the condition of his tire. He gestured to the driver, appellant, to stop and asked him if he knew about the tire. Appellant asked if he could pull over to the side, and officer said no. The officer said he heard and saw the movement of the gearshift in the truck. He tried to reach in to grab it but removed his hand after hearing the engine revving and seeing appellant turn the steering wheel. The officer backed up to get out of the way, and the truck accelerated and drove off, brushing against him. The appellant testified that when he made the decision to drive off, the officer was not near his vehicle. He maintained that he did not turn his wheels towards the officer or swerve the vehicle in the

officer’s direction and that he was not trying to hurt the officer. Additionally, he testified that had the officer been in a place where appellant thought he could have been hurt by the truck, he would not have driven away.

The Court held that the trial court erred because there was evidence from which the jury could have concluded that appellant did not intend to injure the officer but that appellant’s decision to drive off suddenly with the officer in close proximity to his truck was an act of criminal negligence, which would have supported a conviction for reckless driving. The trial court should have given appellant’s requested charge and accordingly, appellant is entitled to a new trial on the offense of aggravated assault upon a police officer.

## **Sentencing; Merger**

*Wells v. State, A08A1096*

Appellant fought with his landlord, shot him with the landlord’s own pistol, and then left the landlord’s home in the landlord’s truck with the same pistol in his possession. He was convicted of voluntary manslaughter, armed robbery, theft by taking and possession of a firearm during the commission of a crime. He asserted, and the State agreed, that the trial court made several merger errors regarding his conviction and sentence. The Court found that the trial court erred by 1) not merging the two counts of voluntary manslaughter because there was only one victim; 2) not merging the two counts of armed robbery and two counts of theft by taking into one count for judgment and sentencing; and 3) not merging the possession of a firearm during the aggravated assault count with the possession of a firearm during the armed robbery count under OCGA § 16-11-106 (b) because there was only one victim.

## **Bail**

*Hernandez v. State, A08A1160*

Appellant was charged with possession of 90 pounds of cocaine. At the time of his arrest, the police also recovered \$750K in U. S. currency. Bail was initially denied and then ultimately set at one million dollars. Appellant argued that the amount of bail was unconstitutionally excessive and equated to an unlawful refusal to grant bond. The Court disagreed. Bail set at a figure higher than an amount reasonably calculated to

insure the presence of the defendant is constitutionally prohibited. A trial court's foremost consideration when fixing the amount of bail should be the probability that the defendant, if freed, will appear at trial. Initially, it is the defendant's burden to produce evidence that he does not pose a significant flight risk. A trial court may consider the defendant's ability to pay, the seriousness of the offense, and the defendant's character and reputation in setting a bail. Here, appellant produced evidence that he was employed and had a wife and children living in Georgia. However, the trial court found that he posed a significant risk of fleeing since appellant was a foreign national and there was no evidence that he was in this country legally; no evidence he owned a house or any real property in Georgia; the circumstances surrounding his arrest supported an inference that he had access to large amounts of cash; and the crimes for which he was arrested were very serious and carried severe potential consequences. The Court held that balancing all these factors together, the trial court did not abuse its discretion in setting appellant's bail.

## **DUI; Jury Charges**

*Goethe v. State, A08A1555*

Appellant was convicted of DUI. At trial, he presented evidence that the Intox 5000 could have produced a false positive because of the presence of acetaldehyde. He contended on appeal that the trial court erred in giving three jury charges. First, he argued that the following charge was improper: "The Division of Forensic Sciences and the Georgia Bureau of Investigation has the authority and responsibility to approve the methods in conducting a chemical analysis for alcohol and drug content. Such a test must be given by an individual who possesses a valid permit issued by the Division of Forensic Sciences. For the purpose of performing such a test there is no requirement that the Intoxilyzer operator be an expert on the principles of the machine's internal workings." The Court rejected his arguments that 1) the charge was inappropriate because admissibility of evidence is never a question for the jury; 2) the language complained of could have been reasonably understood as creating a burden-shifting presumption that relieved the State of its burden of proof; and 3) the language could

have been misunderstood by the jury as being a conclusive statement, in that, if the breath test is administered by an individual possessing a valid permit issued by the Department of Forensic Sciences, then the State's breath test result was accurate.

The Court also rejected his contention that the following charge was improper: "I charge you that breath alcohol measuring equipment approved by the State Crime Lab is considered accurate if properly operated." The Court held that the charge embodies a proper statement of the law and its language simply informs the jury that the equipment used by law enforcement in measuring blood-alcohol content is considered accurate in general.

Appellant's third argument was that the trial court committed plain error in instructing the jury that "it is not necessary that the Defendant actually know he is violating the law. The State is not required to prove the defendant intended to be driving under the influence of alcohol, nor even that he knew that he was doing so." However, the Court found that the trial court instructed the jury that criminal intent had to be proved by the State in every prosecution and that criminal intent did not mean an intention to violate the law or to violate a penal statute, but simply meant "the intent to do the act which results in a violation of the law." When viewed in its entirety, the jury instructions were not improper.

## **DUI; Search & Seizure**

*Handley v. State, A08A1577*

Appellant contended that the trial court erred in denying her motion to suppress. The undisputed evidence showed that the arresting officer first saw appellant walking to their car in a shopping center parking lot. As appellant drove away, the officer saw that the car had no license tag, so he initiated a traffic stop solely on that basis. He observed nothing unusual about appellant's driving. When he asked appellant for her driver's license, he smelled alcohol on her breath and asked if she had been drinking. She initially said no, but when he asked her to submit to an alco-sensor test, she acknowledged she had been drinking "earlier that day." The alco-sensor tested positive for the presence of alcohol. The officer performed no other field sobriety evaluations, and testified to

no manifestations of intoxication other than the smell of alcohol, the positive alco-sensor test, and appellant's admission to drinking earlier. The Court reversed. The probable cause needed to conduct an arrest for DUI requires that the officer have knowledge or reasonably trustworthy information that a suspect was actually in physical control of a moving vehicle, while under the influence of alcohol to a degree which renders him incapable of driving safely. Here, the State offered no evidence showing that appellant's driving ability was impaired due to alcohol consumption. The officer testified that he noticed nothing remarkable about her driving. The State presented no evidence showing that her speech was slurred, her gait was unsteady, or her eyes were bloodshot, watery, or glassy, and the officer conducted no field sobriety tests. The only evidence offered was that the officer smelled alcohol on her breath, the alco-sensor test revealed the presence of alcohol, and she admitted that she had been drinking "earlier in the day." "This evidence is insufficient as a matter of law to constitute probable cause to arrest [appellant] for driving under the influence."

## **Sentencing; Recidivism**

*Wester v. State, A08A1286*

Appellant was convicted of shoplifting and was sentenced as a recidivist to ten years without parole under OCGA § 17-10-7 (c). He contended that the trial court erred in sentencing him under the general recidivist statute instead of OCGA § 16-8-14 (b) (1) (C), the specific recidivist statute applicable to multiple shoplifting convictions. The Court found that in *Goldberg v. State*, 282 Ga. 542(2007), the Georgia Supreme Court held that a trial court did not err in sentencing a burglary defendant under the general recidivist statute, rather than the specific statute governing multiple burglary convictions, because that defendant also had prior non-burglary felony convictions. Here, however, the record showed that appellant had three prior felony shoplifting convictions and one prior misdemeanor shoplifting conviction at the time of trial. There was no evidence of felony convictions for other crimes. Therefore, under *Goldberg*, the trial court erred in imposing sentence under OCGA § 17-10-7. The case was remanded to the trial court for re-sentencing.

## **Evidence; Rule of Sequestration**

*Axelburg v. State, A08A0814*

Appellant was convicted of aggravated sexual battery. His defense at trial was that he did not have the requisite intent to commit the crime, because the underlying act occurred while he was sleepwalking. He argued that the trial court erred in admitting the videotape of his interview into evidence without requiring redaction of certain of the interrogating officer's comments. On the videotape, the interrogating officer stated that he also was a sleepwalker and that he was a forensic interviewing expert who could tell when an interview subject was lying to him. Upon the backdrop of this claimed expertise, the officer repeatedly accused appellant of lying about sleepwalking. Thus, the officer, through his comments, cast himself as an expert on appellant's veracity and on the critical issue of whether appellant was sleepwalking when he accosted the victim. Therefore, the comments during the interview required redaction because they contained the officer's opinions and conclusions on an ultimate fact and impermissibly invade the jury's province.

Appellant also argued that the trial court erred in applying the rule of sequestration to prevent his expert witness from rebutting the state's expert or from sitting at counsel table to assist in cross-examining the state's expert. During the trial, the state asked that the court exempt from the sequestration order its expert witness that the state had reserved for rebuttal, so that the expert could assist the state in cross-examining appellant's expert witness. Appellant objected, and the court declined to exempt the state's expert witness. After appellant's expert witness testified, the state asked the court to bar the expert from listening to its expert's rebuttal testimony. Appellant then dismissed his expert witness and the court allowed his expert to remain in the courtroom but prohibited him from sitting at counsel table. Appellant's expert witness remained in the courtroom and passed notes to counsel during the cross-examination of the state's expert witness. The Court held "[n]othing in the record shows that the trial court abused its discretion in declining to exempt [appellant's] expert witness from the application of the rule of sequestration or in declining to allow the expert to sit at counsel table, especially in

light of [appellant's] own trial tactic in opposing the state's earlier request that its expert be exempt from the rule of sequestration so as to assist counsel."

## **Due Process**

*Neugent v. State, A08A1130*

Appellant was convicted of possession of cocaine with intent to distribute. He contended that the trial court erred in denying his motion for new trial because he suffers from a hearing impairment that prevented him from understanding the testimony of the trial witnesses, in violation of his due process rights. Due process concerns are raised when a defendant cannot comprehend the testimony of the trial witnesses and thus cannot meaningfully participate in his defense. Here, however, the record showed that the trial court accommodated appellant by moving him closer to the witness stand and later obtaining a special hearing device for him to use. During pretrial proceedings and at trial, appellant himself engaged in several colloquies with the trial court and did not appear to have problems hearing or responding to the trial court's questions. Finally, at the new trial hearing, appellant's trial counsel testified that when the state's witnesses testified at trial, appellant kept responding to their testimony by telling his counsel, "They're lying." Thus, the trial court was not clearly erroneous in finding that appellant was able to hear and comprehend the trial testimony.