

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING NOVEMBER 19, 2010

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THIS WEEK:

- **Statements; Public Employees**
- **Prosecutorial Misconduct; OCGA § 17-8-75**
- **Speedy Trial**
- **Sentencing; Crawford**
- **Sufficiency of the Evidence; False Imprisonment**
- **Sex Offender Registry; Constitutionality**
- **Sufficiency of Evidence; OCGA § 24-4-8**
- **Hearsay Testimony; Pre-Indictment Delay**
- **Prosecutorial Misconduct; Ineffectiveness of Counsel**
- **Abandonment of Criminal Purpose; OCGA § 16-4-5**
- **Sentencing; Cruel and Unusual Punishment**
- **Search & Seizure**
- **Chain of Custody**
- **Discovery; Business Records**
- **Telephone Conversations; OCGA § 16-11-62**



Statements; Public Employees

State v. Thompson, S10A0737; S10X0738 (11/8/10)

Thompson, a police officer, was charged with murder in connection with an on-the-job incident. The facts showed that after the shooting, Thompson gave a statement to Detective Calamease from the Major Felony unit. He also participated in two “walk-throughs” with Sgt. Love from Internal Affairs. Neither Calamease nor Love told Thompson he was required to participate

in the internal investigation; but they did not tell Thompson he was free to refuse to participate, either. Thompson cooperated with each investigation but testified that he felt compelled to do so for fear of losing his job. He also testified that he was aware of the police department employee manual which states that the failure to answer questions in an “internal department investigation” is prohibited and concludes by stating that an officer who fails to abide by department rules can be disciplined by being terminated from employment. The State appealed from the grant of his motion to suppress statements he made in the course of the internal police investigation.

In *State v. Aiken*, 282 Ga. 132 (2007), the Court adopted the “totality of the circumstances test” for evaluating whether a public employee’s statement to investigators was voluntary or coerced. The trial court found, under the totality of the circumstances, that Thompson subjectively believed he would lose his job if he did not cooperate with Calamease and Love. It also found that Thompson’s subjective belief was objectively reasonable. The State argued that since Thompson’s testimony showed that he wanted to tell Calamease what happened and that Calamease considered Thompson to be a witness, not a suspect, Thompson’s statements to Calamease were wholly voluntary. The Court disagreed. In the absence of a direct threat to Thompson for failing to cooperate, the trial court properly focused on Thompson’s subjective belief that he could lose his job, and whether that belief was objectively reasonable. The fact that Thompson testified he wanted to tell Calamease what happened did not undercut his subjective belief that he would be punished if he did not cooperate. The

Court also rejected the State's assertion that, because the employee manual's prohibition against refusing to cooperate only applied to investigations conducted by Internal Affairs, Thompson's subjective belief that he would be punished if he did not speak to Calamease from Major Felonies could not be deemed to be objectively reasonable. The Court found that given the totality of the circumstances, including evidence that the Internal Affairs and Major Felony investigations were proceeding simultaneously; that Thompson was instructed that he was not permitted to leave the scene; and that Thompson's statements to Calamease were included in the Internal Affairs report; the trial court did not abuse its discretion in making that determination.

Prosecutorial Misconduct; OCGA § 17-8-75

O'Neal v. State, S10G0060 (11/8/10)

Appellant was convicted of armed robbery, aggravated assault, and obstruction of a law enforcement officer. During the State's closing argument at trial, the prosecutor stated: "I'm going to invite y'all to come back to DeKalb County Superior Court courtroom—you can come to this courtroom or any of the other Superior courtrooms—watch trials for the next year. Okay. Come back and see how many times we have this much evidence." Defense counsel objected to this argument, and his objection was sustained. However, the trial court did not give a curative instruction as requested, instead simply stating, "All right. All right. Just proceed on."

OCGA § 17-8-75 states: "Where counsel in the hearing of the jury makes statements of prejudicial matters which are not in evidence, it is the duty of the court to interpose and prevent the same. On objection made, the court shall also rebuke the counsel and by all needful and proper instructions to the jury endeavor to remove the improper impression from their minds; or, in his discretion, he may order a mistrial if the prosecuting attorney is the offender." The Court held that nowhere in the statute is there a requirement for defense counsel to specifically request additional remedies after interposing an objection to the improper statements made by a prosecutor. To the contrary, the plain language of OCGA § 17-8-75 refers to the *trial court's* independent duty, after defense counsel's

objection, to rebuke the prosecutor, give an appropriate curative instruction, or grant a mistrial in the event that the prosecutor has injected into the case prejudicial statements on matters outside of the evidence. Moreover, because the plain language of OCGA § 17-8-75 speaks in terms of the trial court's duty to give a curative instruction when a proper objection is made to the State's introduction of improper argument on matters that are not in evidence, a mere objection is sufficient to preserve the issue for appellate review and appellant did not waive review of his claim by failing to obtain a ruling on his request for a curative instruction. However, the Court found, because the evidence was overwhelming, the trial court's error in failing to give a curative instruction was harmless.

Speedy Trial

State v. Gleaton, S10A1318 (11/8/10)

The State appealed from the grant of appellants' plea in bar alleging that their constitutional right to a speedy trial had been violated. The facts, briefly stated, showed that the victim was shot and killed at a particular apartment complex. Three witnesses came forward and pointed to appellants as the shooters. However, at a probable cause hearing shortly thereafter, two of them recanted and the third, who was not present, told the DA's Office that he was now living out of state and unwilling to assist the State. Three months after the shooting, appellants were released on bond and the State did not present the case to the Grand Jury. However, almost four years later, an indictment was obtained against appellants who thereafter filed their respective pleas in bar.

In examining an alleged denial of the constitutional right to a speedy trial, a court must engage in a balancing test with the following factors being considered: (1) the length of the delay; (2) the reasons for the delay; (3) the defendant's assertion of the right to a speedy trial; and (4) prejudice to the defendant. *Barker v. Wingo*, 407 U. S. 514 (1972). Here, the length of the delay was almost four years, presumptively prejudicial and weighed against the State. The reason for the delay was found by the trial court to be the negligence of the State in investigating the case. The Court found that this finding was supported by the facts. Although appellants

did not assert their right in a timely fashion, the Court held that the trial court was authorized to assess mitigating circumstances in their failure to file any demand for trial between arrest and indictment, including the fact that the motion to bar trial was timely filed within the parameters of the trial court's scheduling order.

As to the prejudice prong, the trial court found that appellants' defense suffered actual prejudice because the apartment complex where the crime occurred was now condemned, making it impossible for the defense to investigate the case in any meaningful manner, and that this was due entirely to the State's failure to have returned an indictment until nearly four years after the appellants' arrest. The State argued that this was "phantom" prejudice, but the Court disagreed. The prejudice was far from constructive or "phantom" because appellants were prevented from obtaining any forensic or other evidence the crime scene might hold and were faced with the practical impossibility of locating other viable witnesses to the murder by virtue of their residence or presence at the now condemned property. And, there was no merit to the State's seeking to charge defendants with a fatal lack of due diligence because they did not previously attempt to obtain a list of tenants from the management of the apartment complex prior to its condemnation. They could not be sanctioned for failing to seek witnesses or evidence to defend against crimes for which they had not been formally charged. Therefore, the trial court did not abuse its discretion in granting the pleas in bar.

Sentencing; Crawford

Brown v. State, S10A1280 (11/8/10)

Appellant was convicted of malice murder and two counts of tampering with evidence. Appellant challenged his convictions for tampering with evidence. The Court found the evidence was sufficient to authorize a rational trier of fact to convict appellant of the two counts of tampering (by wiping the passenger side of the victim's vehicle with a towel so as to alter or destroy physical evidence, and by bleaching and washing his clothing to destroy, alter, and conceal physical evidence). However, the Court held, because appellant tampered with evidence in his own case and not to prevent the apprehension or

prosecution of anyone other than himself, he was guilty of misdemeanor tampering and therefore could not receive the consecutive ten-year sentence imposed by the trial court. OCGA § 16-10-94(c).

Appellant also contended that the trial court erred in admitting a TPO issued eleven days prior to the murder and the affidavit of the victim in support of the TPO. The trial court held, over appellant's *Crawford* objection, that the affidavit was admissible because it was non-testimonial since it was an emergency request for the court to act and therefore similar to a call to 911 for emergency help. The Court found the trial court's rationale to be in error. The victim's sworn statement did not report events as they were actually happening and therefore differed from a call to 911 for emergency assistance. Thus, inasmuch as the victim's sworn statement was testimonial in nature, it was error to admit it over appellant's objection that it violated his Sixth Amendment right to confrontation. However, even error of a constitutional magnitude may be harmless. Here, the error was cumulative of other admissible evidence and therefore, reversal was not required. Similarly, the Court also found admission of the TPO to be harmless.

Sufficiency of the Evidence; False Imprisonment

Benbow v. State, S10A1137 (11/8/10)

Appellant was convicted of malice murder, burglary, armed robbery, aggravated assault, false imprisonment, and possession of firearms during the commission of felonies. The evidence showed that appellant and co-conspirators went to a gambling house looking for drugs. When the occupants did not have a sufficient amount of drugs for purchase, appellant went to the door, knocked on it and then inserted a gun inside when the door opened. A struggle ensued and numerous shots were fired by him and his accomplice. Thereafter, appellant went inside and scooped up the money on the floor.

Appellant was convicted of six counts of false imprisonment, alleging that he "did confine" each of the six persons inside the house, thus violating OCGA § 16-5-41. However, the Court found, there was no evidence that appellant, or any accomplice, performed any act that could be considered

to have "confined" the victims, as that term is commonly understood, or otherwise "arrest[ed]" or "detain[ed]" them as set forth in OCGA § 16-5-41 (a). Accordingly, the judgments of conviction for the six counts of false imprisonment were reversed.

Sex Offender Registry; Constitutionality

Wiggins v. State, S10A0813 (11/8/10)

Appellant was convicted of cruelty to children and violation of oath of public office. After his conviction was upheld on appeal and his habeas petition dismissed for procedural default, he filed a motion to strike an illegal sentence asserting that the special condition of probation imposed by the trial court that required him to register as a sex offender was illegal because the statute that authorized the special condition was unconstitutional. The trial court denied the motion and he appealed.

First, the Court denied the State's motion to dismiss the appeal. The issues raised were not considered by the habeas court on the merits and therefore, the issues were not barred as *res judicata*. Also, because appellant was contending that his sentence was illegal because it was based on an unconstitutional statute which is a colorable claim that his sentence imposed is void, a direct appeal from the trial court's ruling was authorized.

The Court rejected appellant's argument that the special condition of probation requiring that he register as a sex offender is illegal because that condition of probation lasts a lifetime and OCGA § 42-8-34(c) prohibits the probated portion of a sentence from exceeding the maximum sentence of confinement that could be imposed for cruelty to a child and violation of oath of office, the crimes for which appellant was convicted. The Court found that this issue is controlled adversely to him by *Hollie v. State*, 287 Ga. 389 (2) (2010).

The Court also rejected appellant's argument that the special condition of probation is punishment and is unconstitutional under *Blakely v. Washington*, 542 U.S. 296 (2004) and *Apprendi v. New Jersey*, 530 U.S. 466 (2000), because it was imposed without appellant admitting or the jury finding the facts supporting the increased penalty. The sex-offender registry requirement is regulatory and not punitive in nature. Therefore, the special

condition of probation did not fall within the ambit of *Blakely* and *Apprendi*.

Furthermore, the facts supporting the requirement that appellant register as a sex offender—that he committed conduct which was a sexual offense against a minor—were found by the jury when it found appellant guilty of the crime of cruelty to children, which was described in the indictment as maliciously causing a child under the age of 18 cruel and excessive mental pain "by requiring her to touch his penis and requiring her to permit him to touch her breast."

Appellant's argument that OCGA § 42-1-12 is unconstitutionally vague because it does not designate the individuals or entities authorized to require persons to register as sex offenders was rejected as well. Noting that appellant's vagueness challenge did not involve freedoms protected by the First Amendment, the Court limited its decision to the statute as applied in this case. Here, appellant's special condition of probation requiring sex-offender registration was imposed due to his conviction of "[a]ny conduct which, by its nature, is a sexual offense against a minor." OCGA § 42-1-12(a)(9)(B)(xi). Since appellant's special condition of probation was imposed by the superior court, an entity with authority to impose the requirement, the Court "decline[d]" to address appellant's hypothetical arguments regarding the statute's failure to identify what other individuals or entities may require an individual to register as a sex offender."

Finally, appellant contended that OCGA § 42-1-12(a)(9)(B)(xi) was unconstitutionally vague because it did not contain definitions for terms contained therein, i.e., "in the nature of" and "sexual offense." The Court held that due process requires that a law give a person of ordinary intelligence fair notice that his contemplated conduct is forbidden. Noting again that the challenged statute does not involve First Amendment freedoms, the Court examined in the light of the facts of the case. "It is commonly understood by persons of 'common intelligence' that criminal conduct which is a sexual offense is, at a minimum, criminal conduct which involves genitalia. Inasmuch as the offense of cruelty to children for which appellant was convicted is found in Title 16 of the Official Code of Georgia and appellant's conduct that led to his conviction...is a sexual offense, the statute is not unconstitutionally vague."

Sufficiency of Evidence; OCGA § 24-4-8

Moore v. State, S10A1102 (11/8/10)

Appellant was convicted of murder and other related offenses. The evidence showed that the victim and co-indictee Washington arranged to buy a kilo of cocaine from appellant. The victim, driving his own car with Washington in the front passenger seat, picked up appellant and the three drove to an apartment complex. Appellant gave the victim a bag, and when the victim bent down to look inside, appellant hit him in the head with a gun. Washington then jumped out of the car and appellant started firing. The victim died of gunshot wounds and Washington was grazed by a bullet.

Appellant contended that the evidence as to his involvement in the crimes was insufficient under the rule that “[in] felony cases where the only witness is an accomplice, the testimony of a single witness is not sufficient.” OCGA § 24-4-8. Specifically, appellant argued that the only evidence establishing his connection with the crime was the testimony of Washington, his co-indictee on the drug trafficking charge. The Court agreed that, given the victim’s death and the inability of any eyewitness to identify appellant as the shooter, Washington was the only witness who could testify firsthand as to appellant’s involvement. However, the Court “questioned” whether Washington could be considered an accomplice to murder and the other non-drug-related crimes on which appellant was tried, insofar as there was no evidence of her intent to participate in any crime other than drug trafficking, because proof that one shares a *common criminal intent* with the actual perpetrator is necessary to render one a party to the crime. Nevertheless, the Court held, even assuming Washington was an accomplice, there was slight evidence from an extraneous source identifying appellant as a participant in the criminal acts.

Hearsay Testimony; Pre-Indictment Delay

Hilton v. State, S10A1235 (11/8/10)

Appellant was convicted of the murder of an Atlanta Police officer which occurred in 1971. The evidence showed that appellant was a member of the Black Liberation Army (BLA)

and that he and another member, Myers, did the shooting under orders from their leader, Thomas. He contended that the trial court erred in excluding testimony from a woman who was Thomas’s girlfriend in 1971 and later his wife. She would have testified that Thomas, Myers and she were in Tampa shortly after the murder in Atlanta. A deputy approached them, engaged in small talk, and then walked away. Myers allegedly then said the deputy was “lucky he got away with his life because I could have done to him what I did in Atlanta.” In another statement, Thomas allegedly stated in 1977 that he regretted allowing people to think that appellant was guilty of murdering the Atlanta police officer, when in truth he and Myers were the killers. Both Thomas and Myers died in the 70’s.

The Court stated that evidence of a co-indictee’s alleged confession is generally inadmissible hearsay. However, another person’s confession to a third party may be admitted in the guilt-innocence phase under exceptional circumstances that show a considerable guaranty of the hearsay declarant’s trustworthiness. The trial court must determine whether the value and reliability of the tendered hearsay evidence outweighs the harm resulting from a violation of the evidentiary rule. The Court held that because Myers’s alleged statement to Ms. Thomas was consistent with the evidence in this case that he and appellant acted together in murdering the officer, the trial court did not abuse its discretion in excluding her testimony about that remark, as the value of Myers’s statement to the defense was minimal at best and did not outweigh the harm from a violation of the hearsay rule. Similarly, the trial court did not abuse its discretion in excluding evidence of Thomas’s statement. The statement was made many years after the murder, not spontaneously or shortly after the crime occurred; and not corroborated by any other evidence. Instead, it was inconsistent with other evidence that Thomas ordered the killing of the officer and that Thomas was not personally involved in the actual shooting. The declarant was also deceased and thus not present and available for cross-examination. Moreover, Ms. Thomas testified that BLA members like her husband engaged in “disinformation,” disseminating misinformation as to who committed crimes. Under these circumstances, therefore, the trial court did not abuse its discretion in excluding the hearsay statements.

Appellant also contended that the delay of more than 30 years between the crimes in November 1971 and the indictment in July 2002 violated his due process rights under the State and Federal Constitutions. To prevail on a constitutional claim of pre-indictment delay, appellant must prove 1) that the delay caused actual prejudice to his defense, and (2) that the delay was the result of deliberate prosecutorial action to give the State a tactical advantage. The Court found first that appellant failed to demonstrate actual prejudice from the delay in his prosecution. The offense in this case is murder, for which there is no applicable statute of limitation. Hence, any prejudice which results merely from the passage of time cannot create the requisite prejudice. The possibilities that memories will dim, witnesses become inaccessible, and evidence lost are inherent in any extended delay, and, these possibilities are not in themselves enough to demonstrate that the appellant could not receive a fair trial. Second, appellant failed to prove that the delay was the result of deliberate prosecutorial action to give the State a tactical advantage. Here, the record showed that the State did not seek appellant’s indictment in the period shortly after the crimes due to its belief that the evidence was insufficient to proceed, and the record contained no showing that the long delay that followed this initial decision was deliberate and designed to give the State a tactical advantage. Accordingly, the trial court did not err in denying appellant’s motion to dismiss based on pre-indictment delay.

Prosecutorial Misconduct; Ineffectiveness of Counsel

Smith v. State, S10A1281; S10A1282 (11/8/10)

Appellants, husband and wife, were convicted of felony murder, involuntary manslaughter, cruelty to children, aggravated assault, false imprisonment, and reckless conduct based on the couple’s treatment of their eight-year-old son. They alleged that their respective counsel was ineffective for not objecting when the trial court allowed the prosecutor to dim the lights in the courtroom, bring out a cake with lit candles, and sing “Happy Birthday” to the deceased victim during her closing argument. At the motion for new trial, defense counsel (who made the closing arguments for both appellants) testified that he made a strategic decision not to object

to the “Happy Birthday” song during closing argument. Specifically, he thought that the “Happy Birthday” song was so “preposterous,” “absurd,” and “over the top” that “it would turn the jurors off,” and that he should not call any more attention to it by objecting to it.

The Court stated, “In this regard, we must remind all prosecutors in this State that it is not their job to pursue stunts and antics during their closing arguments that are designed merely to appeal to the prejudices of jurors, but to see that justice is done and nothing more. That duty should not be forgotten in an excess of zeal or the eager quest for victory in [any given] case. The people of the state desire merely to ascertain beyond a reasonable doubt that the accused is guilty of the crime charged, and do not countenance any unfairness upon the part of their representatives in court.”

Although the trial court would have been well within its right to control the courtroom by putting an end to the display of the prosecutor, even absent an objection from defense counsel, it was not unreasonable for defense counsel to pursue a strategy that would allow the potentially inappropriate antics of the prosecutor to backfire against her. Therefore, appellants’ claims of ineffective assistance of counsel were without merit. Moreover, the Court noted, it could not be said that counsel was incorrect in his belief that the jurors may have been turned off by the closing argument, because the jury found appellants not guilty on several of the charges against them, including two of the felony murder charges, one of the first degree cruelty to children charges, and the malice murder charge.

Abandonment of Criminal Purpose; OCGA § 16-4-5

Younger v. State, S10A1233 (11/8/10)

Appellant was convicted of felony murder and possession of a firearm during the commission of a felony. Appellant contended that the evidence was insufficient to convict him of the felony of criminal attempt to commit armed robbery, which was the predicate felony to his felony murder conviction, because the evidence introduced at trial established that he abandoned the attempt to commit robbery before the victim was shot. The evidence showed that a co-conspirator knocked on the victim’s door. When the victim answered, another co-conspirator, wearing a bandana over

his face, and appellant, wearing a ski mask, rushed through the front door. Appellant brandished a handgun, and demanded money and drugs. The victim confronted the men, pulled the bandana off the co-conspirator’s face, at which point, the co-conspirator and appellant retreated. The victim followed them, and as appellant backed out of the house, the victim reached for appellant’s pistol, and appellant fatally shot him in the chest.

Appellant argued that his conduct of leaving the house when confronted by the victim fit the parameters of the affirmative defense of abandonment as set forth in OCGA § 16-4-5. The Court disagreed. First, abandonment is an affirmative defense. At trial, appellant testified and did not admit engaging in the crime of criminal attempt to commit armed robbery so as to warrant a charge on the affirmative defense of abandonment.

Second, there was no evidence showing abandonment under the State’s version of events either. OCGA § 16-4-5 specifically states that to be considered abandonment, the defendant’s conduct must be “under circumstances manifesting a voluntary and complete renunciation of his criminal purpose.” OCGA § 16-4-5 (a). And, a “renunciation of criminal purpose is not voluntary and complete if it results from . . . [a] belief that circumstances exist which increase the probability of detection or apprehension of the person or which render more difficult the accomplishment of the criminal purpose.” OCGA § 16-4-5 (b) (1). Without a complete and voluntary renunciation, there is no abandonment. Here, the State’s evidence was that appellant left the house when confronted, which is not a voluntary renunciation, but a response to circumstances that increased the probability of apprehension and made accomplishing the criminal purpose more difficult.

Sentencing; Cruel and Unusual Punishment

Cuvas v. State, A10A0975 (11/1/10)

Appellant was convicted of armed robbery and she was sentenced to 20 years to serve ten in prison. She argued that her sentence amounted to cruel and unusual punishment inasmuch as she was 13 years old at the time of the offense. A presumption arises when a defendant is sentenced within the statutory limits set by the legislature that such sentence

does not violate the Eighth Amendment’s guarantee against cruel and unusual punishment. Such presumption remains until a defendant sets forth a factual predicate showing that such legislatively authorized punishment was overly severe or excessive in proportion to the offense so as to shock the conscience. Here, the Court found that appellant was properly tried as an adult in superior court as she was alleged to have committed armed robbery with a firearm. Although she was only 13 years old at the time of the robbery, she had no inherent right to be treated as a juvenile. The legislature’s determination that the superior court has jurisdiction over minors 13 to 17 years of age who are alleged to have committed certain serious offenses is founded on a rational basis. Although appellant was only 13 years old, she participated in the actual armed robbery, and her punishment was not severe or excessive in proportion to the offense so as to shock the conscience.

Search & Seizure

Ramsey v. State, A10A1432 (11/5/10)

Appellant was granted an interlocutory appeal from the denial of his motion to suppress. The evidence showed that an officer stopped a vehicle in which appellant was the front seat passenger. The officer smelled burnt marijuana when he approached the passenger side window. He got the driver out, handcuffed him and asked about the marijuana. The driver stated that “they had smoked marijuana in the vehicle earlier that day.” Backup was called and when it arrived, the officer got appellant out of the vehicle. He conducted a pat down of appellant and under the plain feel doctrine, determined that a bulge in appellant’s right front watch pocket was a narcotic of some sort based on his training and experience.

Appellant first argued that the trial court erred because the officer did not have a reasonable articulable suspicion to pat down appellant’s person. The Court held that despite the fact that the officer testified at the time he asked appellant to step from the car to be searched, appellant did nothing to make the officer fear for his safety, and despite the officer’s “lengthy testimony” regarding his habitual use of handcuffing individuals and employing pat-down searches in certain instances, the trial court’s denial of the motion was supported with regard to this issue.

Appellant was the front-seat passenger in a vehicle in which the driver admitted a weapon was contained in the glovebox. Moreover, the officer had detected the scent of burning marijuana upon approaching the vehicle.

Appellant next argued that the officer exceeded the permissible scope of the pat-down when the officer intruded into his pocket. The Court disagreed. Here, the officer testified that the bulge in appellant's watch pocket "felt like a narcotic," and in his experience, contraband sometimes was hidden in the watch pocket by other individuals. Although the officer did not testify concerning the specifics of this particular bulge's contour or mass that made it's identity as contraband immediately apparent, there was no abuse of discretion based on the testimony of the officer that the item felt like contraband.

Chain of Custody

Thomas v. State, A10A1551 (10/29/10)

Appellant was convicted of VGCSA (cocaine). He contended that the State failed to prove a sufficient chain of custody. Specifically, the chain of custody was interrupted between the evidence custodian at the police department and the GBI crime lab, which then delivered it to a private testing facility, because there was no testimony from the recipient at the crime lab or evidence log showing that the cocaine tested at the private facility was the same cocaine obtained from appellant.

The evidence showed that police put the cocaine in separate bags marked by a case number and separate evidence numbers. The evidence custodian testified that she removed the bags from a secure evidence bin, logged them into evidence, and personally delivered them to the GBI crime lab. She testified that the evidence bags were in the same or substantially the same condition as when she delivered them to the GBI lab. The chemist from the private facility which tested the cocaine testified that when the evidence is received at the laboratory, it is logged in and given a work order number that followed the evidence throughout the entire process. She testified that the State's exhibits were the items that she received and that they appeared to be in the same or substantially the same condition as when they were last in her possession. Thus, the Court determined, the State's evidence showed with reasonable certainty that the evi-

dence examined was the same as the evidence seized. There was no evidence of substitution or tampering. Where the testimony shows that the police placed the substance in an identifiable container and that the crime lab technician who tests the substance received it in the same container with no proof of tampering or substitution, the State has met its burden of showing with reasonable certainty that the substance tested was the same as that seized.

Discovery; Business Records

Mallory v. State, A10A1130 (11/1/10)

Appellant was convicted of robbery, false imprisonment and battery. He contended that the trial court erred in admitting testimony and evidence about two latent fingerprints because the State failed to timely produce two supplemental reports prior to trial. Appellant opted into discovery. The record showed that in pre-trial discovery, the State served appellant with a fingerprint identification notice which identified appellant's fingerprint from a partial latent print taken from a cash register drawer. In a more detailed second report dated August 22, 2007, the expert compared latent fingerprints taken from the scene with appellant's fingerprints, and confirmed a match of his second finger but could not conclude a match from a rolled print of his right ring finger. The State provided the second report to appellant on August 27, the first day of trial. In a third, supplemental report dated August 27, the expert confirmed a match of appellant's right ring finger when he enlarged the print on a chart. The State provided this report to appellant on August 28.

Under OCGA § 17-16-6, if the State fails to comply with its discovery obligations, the court "may order the State to permit the discovery or inspection, interview of the witness, grant a continuance, or, upon a showing of prejudice and bad faith, prohibit the state from introducing the evidence not disclosed . . . or may enter such other order as it deems just under the circumstances." The Court found no error in the admission of the second or third report because there was no evidence of bad faith or prejudice. First, as to bad faith, the Court found that the second report concerning appellant's partial latent print from the cash register drawer was provided to him in discovery from the State. The third report revealed newly discovered evidence which the

State did not discover until the expert enlarged appellant's fingerprint on charts in his preparation for trial. As soon as the State received the third report from its investigator, it provided the same to appellant. As to the prejudice prong, the Court found that appellant could have obtained an independent evaluation of the latent prints, which were equally available to him, but he chose not to do so. He also failed to request a continuance.

Appellant also contended that the trial court erred in requiring his counsel to explain the missing steps of a business record exception after he objected to the State's introduction in evidence of his fingerprint cards. After the State sought to introduce two of the fingerprint cards in evidence as business records, defense counsel objected on the grounds that an "adequate foundation is missing." The trial court asked him to specify the missing item and counsel responded that the State did not establish the steps required for a business record exception. When asked to identify the missing element, counsel stated, "if I tell her, then she fixes it[.]" indicating he "[did not] know if [he] had to state the specific step of the business record exception." After the trial court instructed him to do so, trial counsel stated that the State did not specify that the exhibits "were created at or near the time they are alleged to have been created." The Court determined that it could not say that the trial court abused its discretion in this matter.

Telephone Conversations; OCGA § 16-11-62

Hill v. State, A10A1178 (10/29/10)

Appellant was convicted of armed robbery. The evidence showed that appellant had an accomplice. The police, using a third party named Lawrence, had Lawrence call the accomplice. The call was recorded and this recording was admitted at trial.

Appellant contended that the recording of the conversation was illegal eavesdropping, and that even if Lawrence consented to the taping of the conversation, police were prohibited from intercepting the conversation between the two because the accomplice was under the age of 18 at the time of the conversation. The Court disagreed. While OCGA § 16-11-62 (a) prohibits any person from clandestinely recording the private conversation of

another, OCGA § 16-11-66 (a) excludes from this prohibition situations in which one party to the conversation has consented to the recording of it. OCGA § 16-11-66 (b) requires that “[c]onsent for the recording or divulging of the conversations of a child under the age of 18 years conducted by telephone or electronic communication shall be given only by order of a judge of a superior court upon written application.” Here, the Court found, even assuming without deciding that appellant had standing to object to the conversation between Lawrence and the accomplice, there was no error in the admission of the taped conversation. Moreover, even if the tape was inadmissible because of the age of the accomplice, the evidence was merely cumulative as the accomplice testified extensively at trial about appellant’s involvement in the robbery.