

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING NOVEMBER 6, 2009

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## THIS WEEK:

- **Indictments**
- **Jury Charges; Aggravated Battery**
- **Search & Seizure**
- **Directed Verdict; Motion for New Trial**
- **DNA**
- **Cross-Examination; Brady and Giglio**
- **Jury Charges; Deliberate Ignorance**
- **Evidence; Circumstances of Arrest**
- **Similar Transactions**

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### **Indictments**

*Roman v. State, A09A2218*

Appellant was convicted of theft by taking. He argued that the value of the stolen property is an element of the crime of theft by taking; and that because the indictment failed to specify the value of the property, his conviction was void. The Court held that while it is true there can be no conviction for the commission of a crime an essential element of which is not charged in the indictment, the value of the stolen property is not an essential element of the crime of theft by taking, but is relevant only for purposes of determining the punishment for the offense. Thus, it is not necessary for a theft by taking indictment to allege the specific amount taken because even though the amount taken is not alleged, a defendant cannot admit the facts alleged in the indictment and still be innocent of the offense.

Appellant also argued that because the indictment did not specify any value for the stolen goods, it alleged only misdemeanor theft by taking. Therefore, he contended, his sentence for felony theft by taking was void.

The Court found that this argument asserts that felony theft by taking is a distinct crime from misdemeanor theft by taking. However, there are not two theft by taking crimes, one being a misdemeanor and the other being a felony. Rather, there is only one such crime, and upon conviction for it, the punishment only is determined by the value of the property taken. Therefore, appellant's conviction for theft by taking cannot be reversed by reason of the failure of the indictment to specify the value of the property stolen.

### **Jury Charges; Aggravated Battery**

*Seymore v. State, A09A2058*

Appellant was convicted of aggravated battery. The evidence showed that appellant struck the victim with enough force to cause severe injuries: His face was severely swollen, his eyes were swollen shut for several days, his nose was broken, he was bleeding profusely, and he required stitches. Appellant contended that the jury charge was incomplete because the trial court was required to instruct the jury on the meaning of "serious disfigurement." The Court disagreed. It noted it has never attempted to illustrate what is meant by the term "seriously" in the "seriously disfiguring" element of aggravated battery, and the trial court was not required to give a charge explaining that term. Moreover, because the circumstances of each aggravated battery vary, whether disfigurement is serious is best resolved by the fact finder on a case-by-case basis.

### **Search & Seizure**

*Flewelling v. State, A09A1100*

Appellant was convicted of aggravated

child molestation and statutory rape. The evidence showed that he met the 15 year old victim in Florida while she was staying with her father. Appellant then travelled to Georgia when the victim went home to live with her mother. Appellant rented a motel room where he and the victim engaged in vaginal and oral sex. Appellant contended that the trial court erred in denying his motion to suppress the search of the motel room. Specifically, he argued that the affidavit supporting the search warrant was insufficient in that it (a) failed to disclose the source of the information, (b) omitted information regarding the source's credibility, and (c) failed to disclose the existence of evidence contradicting a material fact provided by the victim.

The Court held although the affidavit failed to disclose the name of the victim, the affiant gave oral testimony to the magistrate in which the affiant named the victim. Appellant's argument that there was no markings in the area of the application form designated to give notice that "oral testimony, given under oath, [was] received and recorded." was without merit since this went to credibility choices made by the trial court.

The Court also found that appellant's claim that the affidavit was insufficient due to its omission of information regarding the victim's credibility was without merit. Appellant argued that the affiant was aware that the victim had lied to her parents concerning her whereabouts during the overnight visit with him, and that this information impacting the victim's credibility should have been presented to the magistrate. The Court held there is an important distinction between circumstances in which the information comes from the alleged victim, as opposed to a confidential hearsay informant. When the source of the information provided in the affidavit is based upon the personal observation of the alleged victim of the crime, corroboration to establish the reliability of the victim's report is not necessary. Thus, because the non-confidential hearsay informant was the victim of the crime, there was no requirement that her reliability be further corroborated in order to show that probable cause existed. Moreover, probable cause to issue the search warrant remained even if the information concerning the victim's credibility had been included with the other facts considered by the magistrate. The fact that the teen-aged victim deceived her parents

as to her whereabouts when she was with appellant did not render it less probable that the crimes occurred or that evidence of the crimes would be found in the motel room.

Appellant also argued that probable cause for the search warrant did not exist due to the omission in the affidavit of information regarding the motel registration card. Specifically, he argued that the registration card, showing a check-in date of August 14, 2005 at 11:15, was exculpatory and directly contradicted the victim's claim that she was with him at the motel room on the prior evening of August 13, 2005. As to omitted information, appellant bore the burden of showing not only that the omitted information was material to the determination of probable cause, but also that the material information was intentionally or recklessly omitted for the purpose of misleading the magistrate. Here, this evidence did not satisfy appellant's burden of proving that the detective intentionally or recklessly omitted the motel registration card from the information provided to the magistrate. And, at the time the search warrant was requested, the registration card merely presented an unconfirmed potential conflict in the evidence. Therefore, the Court found, even if the conflicting motel registration card had been provided to the magistrate, probable cause for the search warrant nonetheless existed based upon the victim's report of the crimes.

### **Directed Verdict; Motion for New Trial**

*State v. Canup, A08A1924*

Appellant was convicted of failure to register as a sex offender in violation of OCGA § 42-1-12 (f) (5). Because it was his second conviction for failure to register, he received a mandatory life sentence under OCGA § 42-1-12 (n) (3). He filed a motion for new trial, requesting that the trial court grant his motion for directed verdict that had been presented during trial. In ruling upon the motion for new trial, the trial court granted the motion for directed verdict. The State appealed, contending that the trial court erred in granting the motion for directed verdict after the judgment of conviction had already been entered. The Court agreed. The Court held that because there is no provision in Georgia law authorizing a trial court to entertain a motion for judgment of not guilty notwithstanding a

verdict of guilty in a criminal case, the trial court's action was procedurally unauthorized. After the trial court's entry of judgment on the verdict, the trial has ended. See OCGA § 16-1-3 (4). At that juncture, the defendant's challenge of the conviction must be pursued through post-conviction remedies, such as a motion in arrest of judgment or motion for new trial.

### **DNA**

*Fortune v. State, A09A1236*

Appellant was convicted of two counts of aggravated sodomy, five counts of kidnapping, two counts of burglary, and two counts of aggravated assault. The evidence showed that appellant pushed his way into a university apartment and assaulted five women inside. Lip balm was found at the scene and DNA tests from it led to appellant's arrest. He contended that the trial court erred in denying his motion to suppress the DNA evidence. Specifically, he argued that the State violated OCGA § 24-4-60 et seq. by retaining his DNA profile generated from a blood sample collected pursuant to a 2000 search warrant in a rape case. Appellant was acquitted of the rape, and argued that, because he was acquitted of the prior charge, he had no reason to suspect his DNA profile had been retained and thus no opportunity to expunge it as provided by OCGA § 24-4-65. Finally, he asserted that allowing the State to maintain his DNA evidence compelled him to give evidence against himself in violation of the state constitution and OCGA § 24-9-20.

The Court first found that the DNA profile generated from appellant's blood taken pursuant to the search warrant in the previous rape case was never entered into the database, known as CODIS. The DNA profile entered into CODIS was generated from seminal fluid lawfully collected from a carpet stain at the scene of the incident that led to the rape charge. The profile from the seminal fluid stain was labeled "unknown" and identified with a GBI case number. The GBI case file led to appellant as a suspect. Second, the statute does not require the State to purge lawfully collected forensic profiles from its database, or to delete from those profiles information related to unsuccessful criminal prosecutions. Although appellant "essentially argues that the State violated the spirit of the statute by including sufficient information with the "un-

known” profile to identify it as belonging to him, absent legislative directive regarding the admissibility of such evidence, we decline to adopt a rule excluding it on this ground.”

Finally, the Court held that the Georgia constitutional protection against self-incrimination is broader than the federal protection, because while the United States constitutional protection applies only to “testimony,” the Georgia Constitution applies to both oral and real evidence. Nevertheless, the State did not force appellant to incriminate himself by maintaining in its database a DNA profile generated from a seminal fluid stain at the scene of an alleged rape, which included the GBI case number that led to him being identified as the defendant in this case.

### **Cross-Examination; Brady and Giglio**

*Williamson v. State, A09A1433*

Appellant was convicted of trafficking in methamphetamine and possession of methamphetamine. The evidence showed that appellant sold meth to an undercover agent through Weeks, a middleman. Weeks testified for the State. Before Weeks testified, he entered a non-negotiated guilty plea to trafficking in methamphetamine and two counts of selling methamphetamine. At the plea hearing, the State made no recommendations as to sentence, and Weeks acknowledged that he faced a maximum term of 90 years in confinement. The trial court accepted the plea and deferred sentencing. After Weeks testified, the court allowed him to withdraw his plea to trafficking in methamphetamine and instead plead guilty to possession of methamphetamine with intent to distribute. Based on the State’s recommendation, the court sentenced him to 20 years, 11 in confinement. As a result of these events, appellant contended that: (a) she was denied her constitutional right to cross-examine Weeks regarding his ultimate plea; (b) she did not receive a fair trial because of the State’s actions in failing to reveal its deal with Weeks; and (c) she was entitled to a new trial based on the newly discovered evidence of Weeks’s ultimate plea.

The Court held that she was not denied her constitutional right of cross-examination. Defense counsel was entitled to a reasonable cross-examination on the relevant issue of whether Weeks entertained any belief of

personal benefit from testifying favorably for the prosecution. Weeks testified at trial that he had been incarcerated since his arrest, had pled guilty to all charges, and understood that the sentencing range for trafficking was 10 to 30 years confinement. He stated that he had not yet been sentenced, and the State had not promised him any sentence recommendation. During cross-examination, Weeks acknowledged that he could be facing as much as 90 years confinement and admitted that he was cooperating with the State by testifying “for them.” When asked whether he hoped to receive some benefit from his testimony, Weeks responded, “I hope it’s going to help me.” The trial court did not limit defense counsel’s questioning on this issue. Thus, appellant was not denied her right to explore Weeks’s potential bias or partiality.

As to her *Brady* and *Giglio* claim, the Court held that to prove that the State violated a defendant’s rights by failing to reveal a deal with one of its witnesses, a defendant must show that the State possessed evidence of the deal; that the defendant did not possess the evidence nor could he obtain it himself with any reasonable diligence; that the State suppressed evidence of the deal; and that, had the evidence of the deal been disclosed to the defendant, there existed a reasonable probability that the result at trial would have been different. Appellant failed to meet this standard because she failed to show that, at the time Weeks testified, there was a deal with him concerning the charges pending against him.

Finally, a party seeking a new trial on the basis of newly discovered evidence must satisfy the court that: (1) the evidence has come to his or her attention since the trial; (2) it was not the result of a lack of due diligence that he or she did not acquire it sooner; (3) it is so material that it would probably produce a different verdict; (4) it is not cumulative only; (5) the motion is supported by an affidavit of the witness or its absence has been accounted for and (6) the effect of the evidence is not only to impeach the credit of a witness. To secure a new trial, all six requirements must be met. Here, appellant failed to meet this standard. The only effect of the evidence regarding Weeks’s ultimate plea and sentence would have been to impeach Weeks’s credibility. Thus, it was not sufficient to support the grant of a new trial.

### **Jury Charges; Deliberate Ignorance**

*Williamson v. State, A09A1461*

Appellant was indicted for trafficking in methamphetamine and possession of a firearm during commission of a felony, but only was convicted of conspiracy to commit trafficking in methamphetamine. He argued that the trial court erred in giving a charge on deliberate ignorance. The court charged the jury as follows: ‘Ladies and gentlemen, I charge you that the elements of knowledge or intent may be satisfied by inferences drawn from proof that a Defendant deliberately closed his or her eyes to what would otherwise have been obvious to him or her. A finding beyond a reasonable doubt of conscious purpose to avoid enlightenment would permit an inference of knowledge. Stated another way, a Defendant’s knowledge of a fact may be inferred from willful blindness to the existence of the fact. Again, whether or not you draw any such inference is a matter solely within your discretion.’

The Court found that the trial court erred in giving this charge for two reasons. First, the Court stated that a deliberate ignorance instruction is appropriate when the facts support the inference that the defendant was aware of a high probability of the existence of the fact in question and purposely contrived to avoid learning all of the facts in order to have a defense in the event of a subsequent prosecution. A court should not instruct a jury on deliberate ignorance when the evidence points to actual knowledge or no knowledge on the defendant’s part. Here, appellant admitted that he knew about the drug activity in the house, but denied participating in it. This was not one of “those comparatively rare cases where there are facts that point in the direction of deliberate ignorance.” Thus, the deliberate ignorance instruction was unwarranted.

Second, the deliberate ignorance instruction contained an erroneous statement. The court charged that intent is an essential element of any crime and must be proved by the State beyond a reasonable doubt. Yet the deliberate ignorance charge instructed the jury that the element of intent could be satisfied by inferences drawn from proof that appellant deliberately closed his eyes to what would otherwise have been obvious to him. The deliberate ignorance instruction, when appropriate, provides another way to satisfy

the knowledge element of a criminal offense, not the intent element. The Court then found that the error was not harmless because the jury requested that the trial court re-instruct them on this charge and that the evidence of guilt was not overwhelming.

## **Evidence; Circumstances of Arrest**

*Saxton v. State, A09A1125*

Appellant was convicted of aggravated assault with a deadly weapon and possession of a firearm during commission of a felony. He argued that the trial court committed prejudicial error by allowing the circumstances of his arrest into evidence. The Court agreed and reversed. The evidence showed that in March, appellant flagged down his sister's boyfriend's car in Fulton County. When the boyfriend-victim, stopped, appellant asked about his sister's whereabouts. The victim then took appellant's phone no. and he was entering it into his cell phone when appellant shot him numerous times. In November, appellant was arrested in Columbus on an unrelated traffic offense. At the time, appellant had a loaded 9mm weapon in his waistband. The prosecutor also referred to the 9mm in opening and closing statements.

The Court held that as a general rule, circumstances connected with a defendant's arrest are admissible into evidence. Nevertheless, the evidence still must be shown to be relevant and the circumstances connected with an accused's arrest are not automatically relevant. Rather, such evidence is subject to the same standard of relevancy and materiality applicable to other evidence. When evidence of certain circumstances surrounding the arrest is wholly unrelated to the charged crime; the arrest is remote in time from the charged crime; and the evidence is not otherwise shown to be relevant; it should not be admitted, and thus, it is an abuse of the trial court's discretion to do so.

Here, the Court held, the circumstances of appellant's arrest were both wholly unrelated and remote in time to the charged crime. Further, the State did not contend that the 9mm handgun found by the officer in Columbus was the gun used in the shooting. Without more, the fact that appellant was arrested for an unrelated matter in Columbus, over seven months after the alleged crime, car-

rying a gun and acting belligerently towards a police officer, was not probative of any issue in the case, including appellant's identity as the person who shot the victim. Nor was the evidence of appellant's arrest admissible to show his propensity for violent behavior. Consequently, the trial court abused its discretion in allowing the circumstances of appellant's arrest into evidence. The Court further held that because there was no physical evidence, the identification testimony arguably had been impeached, and thus, the evidence of appellant's guilt was not overwhelming, the error was not harmless.

## **Similar Transactions**

*Cobb v. State, A09A1504*

Appellant was convicted of committing numerous sexual offenses against his minor daughters. Citing *Riley v. State*, 181 Ga. App. 667 (1987), he argued that the admission of similar transaction evidence was improper because he had been tried and subsequently acquitted of charges that stemmed from the incidents underlying the transactions. The similar transactions at issue were the bases of several charges of child molestation and incest involving another of appellant's daughters and his niece, for which he was tried and convicted. Those convictions, however, were overturned the Court of Appeals, but there was no determination that the evidence was insufficient as to any count.

Appellant argued that he was not tried again for those charges, but was afterward acquitted of the charges because the State failed to prosecute the case within two terms of court pursuant to his demand under OCGA § 17-7-170 (b). Appellant argued that because he was thus "acquitted" of the charges, the State was barred from using the underlying incidents against him as similar transactions in the instant case.

The Court disagreed. Although some jurisdictions have adopted a per se rule prohibiting any evidentiary use of independent offenses where an acquittal was obtained, our courts have not. Instead, the application of collateral estoppel requires an examination of what facts were in issue and necessarily resolved in the defendant's favor at the first trial. Given the circumstances under which appellant's first case was terminated, the Court concluded that the facts in issue were not necessarily resolved

in appellant's favor. Thus, his reliance upon *Riley* was misplaced and given the absence of a per se rule prohibiting the evidentiary use of the similar transaction where an acquittal was obtained, his acquittal pursuant to OCGA § 17-7-170 (b) did not bar the similar transaction evidence.