

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING DECEMBER 12, 2008

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## THIS WEEK:

- **Sexual Offender Registration; Eighth Amendment**
- **Search & Seizure**
- **Sentencing; Recidivist**
- **Sexual Offender Registration**
- **Evidence; Cross-Examination**
- **Impeachment; First Offender**

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### **Sexual Offender Registration; Eighth Amendment**

*Bradshaw v. State, S08A1057*

Appellant was convicted of failing to register as a convicted sex offender in that he had failed to provide his valid current address within 72 hours of changing his address. Since this was his second violation of the registration law, a mandatory sentence of life imprisonment was imposed. He contended on appeal that the sentence was cruel and unusual and violated the Eighth Amendment. The Supreme Court agreed. It found that the Eighth Amendment forbids only sentences that are grossly disproportionate to the crime. It found that the life sentence was grossly disproportionate because the failure to update information on the sexual offender registry is a "passive felony" that neither caused nor threatened to cause harm to society. The Court then "confirmed" this finding by comparing appellant's sentence to sentences imposed for other crimes within Georgia and for the same crime in other jurisdictions. The Court remanded the case to the trial court for re-sentencing.

## **Search & Seizure**

*Baker v. State, A08A1528*

Appellant appealed his conviction on multiple counts of rape, aggravated sodomy, kidnapping, theft by taking and possession of a firearm during the commission of a felony. The evidence showed that appellant was a serial rapist. Appellant was arrested on evidence which included, in part, an identification of him by the last victim on the basis of an illegal lineup. The police then obtained a search warrant for his home and thereafter, another search warrant for his blood. Appellant contended that because of the illegal lineup, his arrest was illegal and that the subsequent search warrants were illegal as fruits of the poisonous tree. The Court held that the arrest was legal because the affidavit supporting the arrest warrant did not mention the identification of appellant and the other facts alleged in the affidavit supported the arrest warrant. The affidavit supporting the search warrant for the residence did, however, contain the identification of appellant from the illegal lineup. When an affidavit in support of a search warrant contains information which is in part unlawfully obtained, the validity of a warrant and search depends on whether the untainted information, considered by itself, establishes probable cause for the warrant to issue. If the lawfully obtained information amounts to probable cause and would have justified issuance of the warrant, apart from the tainted information, the evidence seized pursuant to the warrant is admissible. Here, the Court found that if the identification is excised from the affidavit, there still existed enough facts sufficient to establish probable cause for the warrant. The Court additionally found, using the same analysis, that the search warrant for the blood was also sufficient.

Finally, appellant also contended that the search warrant for his blood should have been suppressed because the state failed to produce the warrant and affidavit at the motion hearing. However, while the Court agreed that the better practice would have been to produce the search warrant and affidavit for the blood sample, under the circumstances, the state met its burden because appellant's arguments only concerned the invalidity of the arrest warrant and only challenged this particular search warrant as a fruit of the poisonous tree.

## **Sentencing; Recidivist**

*Thompson v. State, A08A2306*

Appellant appealed the trial court's denial of his motion to vacate a void sentence. He contended the trial court erred by denying his motion to vacate a void sentence because the state could not prove three valid prior convictions which would authorize punishment under OCGA § 17-10-7(c), and thus, the trial court improperly sentenced him as a recidivist. A felony used to convict a defendant of possession of a firearm by a convicted felon cannot also be used to enhance the defendant's punishment as a repeat offender. Appellant contends that the state improperly reused one previous conviction to enhance his punishment because it was "used up" when the State offered it to establish an element of the firearm possession by a convicted felon charge that resulted in a directed verdict. The Court held that the conviction was not "used up." At his trial, the court granted the appellant's motion for directed verdict because the State offered the appellant's indictment for the previous offense rather than the conviction. Since the conviction was not used on the dismissed possession by a convicted felon charge, it was properly used for sentence enhancement following appellant's conviction on his other charges.

Appellant also contended that the use of the prior convictions was improper because the State did not prove that he properly waived his rights before pleading guilty as required by *Boykin v. Alabama*. However, the burden is on the state to establish a valid waiver only if the defendant first raises the issue of intelligent and voluntary waiver with respect to prior guilty pleas. Here, appellant never raised any *Boykin* issue about these pleas, and the state introduced the prior guilty pleas showing that appellant

was represented by counsel when he pled guilty. The state therefore met its burden.

## **Sexual Offender Registration**

*Sharma v. State, A08A1066*

Appellant appealed from the trial court's order denying his petition for release from the requirement that he register as a sexual offender pursuant to OCGA § 42-1-12. Appellant was convicted of a Texas statute that criminalized exploitation of a person's emotional dependency on a clergyman or spiritual advisor in order to have sexual relations with that person. Appellant, at the time of his conviction, was such a spiritual advisor. The Court held that a sexual offender is defined in OCGA § 42-1-12 (a) (20) (B) as any individual "[w]ho has been convicted under the laws of another state or territory, under the laws of the United States, under the Uniform Code of Military Justice, or in a tribal court of . . . a dangerous sexual offense." The Court found that the trial court erred by finding that appellant had been convicted of committing a dangerous sexual offense as that term is defined in OCGA § 42-1-12 (1) (10) (A). Therefore, he did not meet the definition of a "sexual offender" and was not required to register under Georgia's Sexual Offender Registry law.

## **Evidence; Cross-Examination**

*Bell v. State, A080124*

Appellant was convicted of aggravated child molestation. During trial, a nurse who examined the victim was allowed to testify that during the exam, the victim told her that appellant forced her to have intercourse. Appellant claimed that this was improper "bolstering." The Court found that because the victim was 13 at the time she made the statements, her statements were admissible under the Child Hearsay Statute, which actually contemplates testimony from both the child and those witnessing the child's later reaction, even if the hearsay may be "bolstering." Any "bolstering" could have been explored by appellant in cross-examination.

Appellant also contended that the trial court erred in denying his motion for mistrial. During its cross-examination of appellant, the State introduced, over appellant's objection

and motion for mistrial, four past alleged felony convictions of him for impeachment purposes. When the court discovered that three of the alleged convictions were missing vital information or were not convictions at all, the court reversed its ruling as to the admissibility of those three, whereupon appellant again moved for a mistrial. The court denied the second motion for mistrial and instead gave a curative instruction to the jury to "disregard entirely" all evidence with regard to prior alleged offenses of the appellant, with the exception that they could consider the one valid conviction for credibility purposes only. When the court asked defense counsel if there was anything further, counsel said no, and the State continued its cross-examination. Following closing arguments and the court's charge to the jury, appellant renewed his motion for mistrial, which the trial court again denied. The Court found no error. After a trial court has issued a curative instruction, failure by the defendant to timely renew his motion for mistrial waives any error in the denial of that motion. Here, immediately following the curative instruction, the trial court even asked defense counsel if there was anything further, to which counsel responded there was not. Moreover, even if counsel had not waived his motion, the curative instructions given by the trial court were sufficient.

## **Impeachment; First Offender**

*Lee v. State, A08A1416*

Appellant was convicted of armed robbery, kidnapping, and possession of a firearm during the commission of a crime. Appellant took the stand in his own defense. The state sought to impeach him with a certified copy of his 1997 guilty plea under the First Offender Act. According to the documents, appellant pled guilty to five crimes, including entering an automobile and carrying a concealed weapon, and he was placed on probation. Included with the certified copy of his plea was a memorandum from GCIC stating that GCIC had changed the record of appellant's first offender treatment to a conviction. However, there was no evidence showing that appellant was subsequently adjudicated guilty of these crimes by the trial court which accepted the plea.

As a rule, unless there is an adjudication of guilt, a witness may not be impeached

on general credibility grounds by evidence of a first offender record. The modification of appellant's first offender status by GCIC, while authorized by OCGA § 42-8-65, did not amount to a conviction because only a court that imposed first offender probation has authority to revoke that status. Thus, the Court found, appellant was never shown to have been adjudicated guilty of the prior crimes and the trial court erred in allowing appellant to be impeached with them. Nevertheless, the Court held that the evidence was harmless given the overwhelming evidence of guilt.