Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING DECEMBER 5, 2008

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## THIS WEEK:



## Search & Seizure

*Stafford v. State, S08G0511*

The Supreme Court granted cert. to determine if the Court of Appeals correctly reversed the trial court's grant of appellant's motion to suppress. The evidence showed that an officer pulled up behind appellant's car parked in the middle of the street in a high crime area. Several people standing on both sides of appellant's car fled when the officer pulled up behind appellant, and appellant attempted to drive away without turning on his headlights. The officer then initiated a traffic stop of appellant. The officer repeatedly testified that he stopped appellant for the crime of parking in the middle of the street. During the ensuing stop, the officer discovered crack cocaine in appellant's car.

Appellant contended that the stop was illegal under OCGA § 40-2-202, because its provisions apply only to rural roads and not to city and residential streets. The Court, however, determined that the officer had probable cause to stop appellant under OCGA § 40-6-200 (a), which makes it improper to park in the middle of a two-way roadway. Thus, the Court of Appeals correctly overturned the judgment of the trial court.

*Fletcher v. State, S08A0982*

Appellant was convicted of numerous crimes related to the death of his elderly landlord. The evidence showed that appellant rented the basement from the victim. He contended on appeal that the court erred in denying his motion to suppress. The warrant did not specifically grant permission to search his basement apartment at the victim's residence, but instead simply stated that the place to be searched was "the residence at 1338 Georgia Avenue, East Point, Fulton County, Georgia." Appellant argued that the warrant was not particular enough to permit a search of his separate apartment. A search warrant for a multiple-occupancy building will usually be held invalid if it fails to describe the particular subunit to be searched with sufficient definiteness to preclude a search of one or more subunits indiscriminately. However, the warrant of a multi-unit structure will be valid where (1) there is probable cause to search each unit; (2) the targets of the investigation have

access to the entire structure; or (3) the officers reasonably believed that the premises had only a single unit. The Court held that the second and third exceptions were inapplicable but, because the application for the search warrant established probable cause to search appellant's basement apartment and the victim's part of the residence, the trial court properly denied appellant's motion to suppress.

*State v. Gibbs, A08A1625*

The State contended that the trial court erred in granting appellant's motion to suppress. The evidence showed that an officer noticed that appellant, who was a passenger in a vehicle, was sitting with her seat leaning backwards and may have not been wearing her seatbelt. Although the officer testified on direct that he stopped the vehicle because she was not wearing her seatbelt, he testified on cross that he thought she was sleeping and only after stopping the vehicle did he confirm that she was not wearing her seatbelt. Although the Court had difficulty determining the precise legal grounds upon which the trial court granted the motion to suppress, the Court held that viewing the order on a whole, it appeared that the trial court determined that the officer lacked a reasonable articulable suspicion to stop the vehicle. Based on the testimony, it could not say that the factual findings of the trial court were clearly erroneous. Judgment affirmed.

*King v. State, A08A1079*

Appellant was convicted of VGCSA and challenged the denial of his motion to suppress on appeal. The officer stopped appellant's car for an alleged window tint violation. The officer checked the tint and found it to be unlawful. The officer also observed appellant during the stop and found his conduct suspicious. The deputy told appellant that he was going to issue him a warning and that it was his departmental policy that all warnings be written. However, before he wrote the warning out, he asked appellant for permission to search. When appellant refused, the officer had a drug dog, which was present on the scene, conduct a free air search.

Appellant claimed that the officer expanded the permissible scope of the initial stop because the original purpose of the stop was achieved once the officer informed him that he was not going to be cited for the window tint violation, and thus, he argued, the "issuance of a written warning to [appellant] furthered no legitimate lawful purpose." The Court disagreed. It found that the trial court did not err in finding that the stop, which took less than ten minutes, was not expanded, as the undisputed evidence was that the officer had not completed his written warning when he asked appellant for consent to search and the open-air search was conducted. "While [appellant] would have us hold that a written warning per se expands a detention, we can find no basis in *Terry v. Ohio*, … or its progeny for such a conclusion." In so holding, the Court distinguished another case in which an officer admitted he could have given defendant either verbal or written warning and thus, that officer's decision to detain the defendant while he waited for another officer to bring a written warning book was unreasonable.

*James v. State, A08A1710*

Appellant, who was charged with rape, contended that the trial court erred in denying his motion to suppress. The evidence showed that an officer responded to a 911 call at appellant's house. The victim came outside and left the front door open. She related that she was visiting appellant from out of state and that appellant raped her the afternoon before. She locked herself into a bedroom and stayed there overnight. But appellant broke in that day and again raped her. At the time, she said he was sleeping. During the course of the officer's interview with the victim, he noticed that appellant was awake because lights came on in the house. Knowing that appellant was now awake, and believing that the he had probable cause to obtain a search warrant, the officer became concerned about preserving any evidence that was in the house. He went to the open door and called out "police" but got no reply. After waiting what he considered a "reasonable amount of time" for someone to respond, the officer entered appellant's house and found him upstairs. The officer noticed evidence consistent with the victim's statement and used this in his affidavit for a warrant.

Appellant contended that the officer's warrantless entry into his house violated his Fourth Amendment rights. The Court held that the officer's entry was justified because of the exigent circumstances. Exigent circumstances may be found where an officer reasonably fears the imminent destruction of evidence if entry into the residence is not immediately effected. Here, the officer testified that he approached the residence after he realized that appellant was awake, because he feared that appellant might destroy evidence in the house. This concern was justifiably heightened when appellant refused to respond to law enforcement's calls from the open front door. Viewed from the officer's perspective, in the context of a situation where quick action was required, the Court found the officer reasonably believed he needed to enter the residence to secure evidence until a search warrant could be obtained.

## Voir Dire

*Huskins v. State, A08A1626*

Appellant argued that the trial court erred in denying his motion to strike a juror for cause. Defense counsel sought to strike a juror after she stated that she was "related to law enforcement" and that it would be a "little bit harder" for her to remain impartial. However, the juror stated that she could decide the case based on the evidence presented. A potential juror's mere indecisiveness as to whether she could be fair and impartial is insufficient to support a strike for cause. Rather, a party seeking to strike a juror for cause must show that the potential juror has "an opinion . . . so fixed and definite that the juror will be unable to set the opinion aside and decide the case based upon the evidence or the court's charge upon the evidence." Moreover, a juror who has expressed doubts about her ability to be impartial will be eligible to serve where she also "positively testifie[s] that, despite h[er] general doubts, [s]he could set h[er] feelings aside and make a decision based on the facts and law alone." Thus, because she stated that she could decide based on the evidence presented, the trial court did not abuse its discretion in refusing to strike the juror for cause.

## Sexual Offense Registration; Due Process

*Jenkins v. State, S08A0761*

Appellant was convicted of attempted rape. He subsequently failed to register as a sex offender and was convicted under O.C.G.A. §

42-1-12. He contended on appeal that he was not required to register because he was only convicted of attempted rape and that the statute was unconstitutionally vague. At the time of his conviction, OCGA § 42-1-12 required a person convicted of a "sexually violent offense" to register as a sex offender and to notify the sheriff of any subsequent changes of address. OCGA § 42-1-12 (b) (4) (B). The statute defined "sexually violent offense" as "a conviction for violation of Code Section 16-6-1, relating to rape. . . ." OCGA § 42-1-12 (a) (7) (2005). The Court found that the statutory phrase "relating to rape" includes the crime of attempted rape. The Court further found that subsection (a) (7) clearly provided that convictions for rape and crimes "relating to rape" required registration as a sex offender. Thus, the statute was not unconstitutionally vague.

## Speedy Trial; Demurrers

*Moore v. State, A08A2295*

Appellant argued that the trial court improperly denied his constitutional speedy trial claim. The evidence showed that after his arrest for molestation, 43 months passed before his indictment. Under the four factors of *Barker v. Wingo*, the Court held 1) the length of the delay was presumptively prejudicial; 2) the unintentional delay was solely the result of state inaction; 3) appellant waited almost 45 months to assert his right to a speedy trial and then promptly withdrew his demand for a speedy trial; and 4) the delay here did not fall in that category of cases that presumes actual prejudice, as this category generally includes only those cases where the delay is five years or longer. Although appellant proved that during the delay, the State lost two key files that may have contained exculpatory evidence, he did not show that either of those files in fact did contain such evidence. Therefore, since the trial court found no actual prejudice, the Court held that while they may have found otherwise, they could not say that the trial court abused its discretion in denying the motion.

Appellant also argued that the trial court erred in denying his special demurrer as untimely, and that the trial court should have dismissed the indictment in light of the State's failure to present evidence as to why it had alleged a range of dates over an eight-year period as opposed to a specific date. An indictment which fails to allege a specific date on which the crime was committed is not perfect in form and is subject to a timely special demurrer. This rule is subject to an exception where the evidence does not permit the state to identify a single date on which the offense occurred. But, this exception does not apply if the State never presents evidence to the trial court showing that it cannot more specifically identify the dates of the offenses. Thus, because the Court found that the demurrer was not untimely, the case was remanded for the state to be allowed to present evidence as to why it cannot allege a more specific time frame.

## Contempt

*In Re Beckstrom, A08A1557*

Appellant, a criminal defense lawyer, was found guilty of criminal contempt after failing to appear for trial. On Sept. 13, the day of calendar call, appellant sent a conflict letter but announced ready. The trial court excused him but then set the day of trial for Oct. 1 and notified appellant by telephone and faxed letter. Appellant's staff then notified the court that appellant again had a conflict. The court called the other court and got appellant released so he could be there on the 1st for trial. The court then notified appellant again on Sept. 28 by fax and telephone. Nevertheless, appellant didn't show for trial and was subsequently held in contempt.

Appellant argues he did not receive timely notice of the trial date pursuant to USCR 32.1 and thus could not be found in criminal contempt for failing to appear at trial. USCR 32.1 requires that the trial court give counsel and the defendant at least seven days notice of the trial date. The Court held, however, that even assuming, without deciding, that the notice of the trial date was inadequate under USCR 32.1, his remedy was not to disobey the trial judge's letters and telephone call ordering him to appear for trial. Rather, he should have appeared before the trial court and sought a continuance. Appellant also contended that he could not be held in contempt because the letters and telephone call he received from the trial judge directing him to appear at trial were not enforceable orders under OCGA § 15-1-4 (a) (3). The Court held that because he was an officer of the court, that section was inapplicable. Instead, his conduct fell under OCGA § 15-1-4 (a) (2). This section is intended to impose upon officers of the courts engaged in their official transactions a higher duty to the court than is demanded of the broader group of individuals listed in OCGA § 15-1-4 (a) (3) who are arguably subject to the contempt powers only for failure to comply with those commands of the court spread upon the record in written form. Therefore, appellant was properly found in contempt under OCGA § 15-1-4 (a) (2) for his failure to comply with the trial judge's directive that he appear for trial, communicated to him in the two faxed letters and his telephone conversation with the judge.

## Post-Conviction Motions; DNA

*Hunter v. State, A08A2390*

Appellant was initially charged with rape and incest with regard to his half-sister. As part of a plea deal, he pled to the incest and the state nolle pros'd the rape. He then moved for a post-conviction DNA test to establish that the victim was not related to him. The trial court denied the motion and he appealed. The grant or denial of a post-conviction motion for the assistance of an expert witness and other investigative services lies within the sound discretion of the trial court, and some special need for the assistance must be demonstrated to the trial court. OCGA § 5-5-41 (c) (1), provides that "a person convicted of a serious violent felony as defined in Code Section 17-10-6.1 may file a written motion before the trial court that entered the judgment of conviction in his or her case, for the performance of forensic deoxyribonucleic acid (DNA) testing." Here, appellant is barred from requesting DNA testing under this statute because his conviction for the crime of incest is not defined as a serious violent felony under OCGA § 17-10-6.1 (a). Since he failed to meet even the initial statutory requirement for filing such a motion, the trial court did not abuse its discretion in denying his post-conviction motion for DNA testing.

## New Trial; Newly Discovered Evidence

*Jackson v. State, A08A1222*

Appellant was convicted of armed robbery and other crimes. The evidence showed that

he and two co-defendants committed armed robbery of an asst. store manager as she was taking a store deposit to the bank. The victim was the girlfriend of appellant. She was not complicit in the crime and not charged. All three co-defendants were tried separately. After appellant was convicted, the victim testified in one of his co-defendants' trial. In response to a defense question as to how much she received from appellant in connection with the incident, she answered, "I got about five hundred." Appellant contended that this was newly discovered evidence entitling him to a new trial. The Court disagreed. There are six requirements for granting a new trial based on newly discovered evidence: (1) that the evidence has come to the defendant's knowledge since the trial; (2) that it was not owing to the want of due diligence that he did not acquire it sooner; (3) that it is so material that it would probably produce a different verdict; (4) that it is not cumulative only; (5) that the affidavit of the witness himself should be procured or its absence accounted for; and (6) that a new trial will not be granted if the only effect of the evidence will be to impeach the credit of a witness. The Court found that this "new" evidence failed the first prong of the test because if true that the victim got "five hundred" from appellant in connection with the incident, it can be reasonably inferred that appellant would have known about this evidence at the time of his trial. Moreover, appellant's argument that the victim perjured herself during his trial fails to show that she ever recanted her testimony and, in any event, her alleged perjury would not in itself constitute grounds for a new trial.

## Statements

*In the Interest of D. T., A08A2251*

Appellant, a juvenile, was adjudicated a delinquent. He contended on appeal that the statements he gave to the police were involuntary. The evidence showed that a woman was attacked in her driveway and her purse stolen. Within days, appellant approached a school counselor and stated that he knew who committed the attack and robbery. The counselor placed him in contact with a police officer, to whom appellant told that two young men had attacked the woman and stolen her pocketbook. With appellant's mother's consent, a second officer asked appellant to ride with him in a car, telling him and his mother that he would bring him back when he was through with him. During the ride, appellant confessed to the second officer.

Appellant contended that the officer's promise to drive him home rendered his statements involuntary. OCGA § 24-3-50 renders confessions inadmissible unless they are made voluntarily, "without being induced by another by the slightest hope of benefit. . . ." However, the promise of a benefit that will render a confession involuntary under OCGA § 24-3-50 must relate to the charge or sentence facing the suspect. Here, the officer's promise was a collateral benefit, as it did not relate to either the charge or sentence appellant was facing, nor did the officer give appellant a hope of a lighter sentence in return for his testimony. Accordingly, the Court held, OCGA § 24-3-50 is not implicated.

## Witness Statements; Res Gestae; Statute of Limitations

*Parks v. State, A08A1513*

Appellant was convicted of theft by deception relating to the theft of $600. from the victim's bank account through the use of her ATM card and pin number. Appellant argued that the state allegedly withheld a witness's statement. But, the Court found, even if the witness made an oral statement to the State during their investigation, he was not entitled to a mistrial for the State's violation of OCGA § 17-16-7 for withholding an oral statement by the witness, where the statement was not recorded or otherwise committed to writing.

Appellant also argued that the admission of evidence regarding another ATM withdrawal from the victim's account made from an ATM in a neighboring county was improper because he was not properly notified of the "similar transaction." The Court held that the evidence was admissible because the state is entitled to present evidence of the entire res gestae of a crime even though the defendant is not charged with every crime committed during the entire criminal transaction.

Appellant further argued that the court erred in failing to grant his motion for a directed verdict of acquittal based on the expiration of the statute of limitations. Specifically, he contended, the accusation did not specify the amount stolen, and therefore, it only charged him with a misdemeanor subject to a two-year statute of limitation. It was thus untimely because the accusation was filed approximately three years after the crime. However, appellant did not file a special plea in bar as he should have, but instead waited until all the evidence was presented at trial before moving for a directed verdict based on the statute of limitation. Thus, the Court held, the only question for it to decide was whether the felony sentence was authorized by the evidence. Because the evidence reflected that appellant took an amount in excess of $500 within four years of the time the prosecution began, the trial court did not err in denying his directed verdict motion.

## Lay Witness Testimony

*Jones v. State, A08A1370*

Appellant was convicted of aggravated assault and numerous other crimes. He contended that the trial court erred in allowing the victim to testify about her injuries. Specifically, he argued that the victim's testimony regarding her injuries was inadmissible as hearsay because a lay witness is not competent to give a medical opinion relative to her injuries. Here, the victim was allowed to testify that appellant broke her right jawbone during his assault of her. A lay witness is not competent to give what amounts to a medical opinion relative to her injuries or the effect thereof. This proscription includes the diagnosis and potential continuance of a disease, which must be established by physicians as expert witnesses and not by lay persons. However, the Court found, it could find no authority for the proposition that victims of crimes cannot testify as to the injuries they suffered during an assault. The trial court therefore did not err in permitting the victim to testify that her jaw was broken during the assault.

## Continuance; Child Hearsay

*Sullivan v. State, A08A1397*

Appellant was convicted of numerous counts of child molestation involving three children. He first contended that the trial court erred in not granting a continuance after his attorney had to withdraw and he was appointed new counsel only a month before trial. The Court found no error. Although the present

case involved multiple counts, the alleged sexual crimes occurred on a single day over the course of a few hours in the same location. The state did not rely upon scientific evidence, such as DNA testing or hair analysis, to prove its case. Rather, the state's case was predicated on the testimony and prior statements of the three child victims. The case, therefore, was not overly complicated or convoluted. Consequently, appellant's contention that a month for his newly appointed counsel to prepare for trial was inadequate as a matter of law was without merit.

Appellant also argued that the trial court erred in admitting certain testimony that he claimed was inadmissible double hearsay. At trial, one victim's mother testified that her daughter, the victim, told her that the appellant made her daughter's best friend, the other female victim, have sex with him. Appellant contended that because the alleged sexual contact between him and the other victim occurred outside of the daughter's presence, the statement to her mother about that contact was hearsay and not admissible under the Child Hearsay Statute. The Court agreed that the statement to the mother was inadmissible double hearsay. Statements made by a victim to a witness about sexual contact between the defendant and another child are not admissible under the Child Hearsay Statute, where, as here, the victim at issue did not witness the sexual contact. The admission of the statement, however, was not reversible error because the erroneous admission of hearsay was harmless because legally admissible evidence of the same fact was introduced.

## Jurors

*Sullivan v. State, A08A1397*

Appellant was convicted of numerous counts of child molestation involving three children. Appellant contended that the trial court erred in denying his motion for a mistrial. During the jury's deliberation, the parties learned that the jury foreperson had now accepted a job as a secretary with the district attorney's office, but had not yet started the job. They also learned that the foreperson was currently employed (although she had given her two weeks notice) as a secretary for the private attorney who briefly represented appellant at the time of his arraignment. Appellant contended a mistrial should have been granted because the foreperson could have tainted the jury by disclosing to them confidential information communicated to the private attorney by appellant during the representation. The trial court denied the motion but removed the juror and replaced her with an alternate.

The Court found no error. When irregular juror conduct is shown, there is a presumption of prejudice to the defendant, and the prosecution carries the burden of establishing beyond a reasonable doubt that no harm occurred. However, in order for juror misconduct to upset a jury verdict, it must have been so prejudicial that the verdict is deemed inherently lacking in due process. Here, the foreperson testified at the motion for new trial that she was unaware that the attorney for whom she worked had ever represented appellant. Thus, if the foreperson was not even aware that appellant had been a client of her employer, she clearly had not been privy to, and was not in a position to convey to other members of the jury, any of appellant's confidential client information. Under these circumstances, the presumption of prejudice was overcome by the state, and it was sufficient for the trial court to remove the foreperson and replace her with an alternate without going further and granting a mistrial.

## Rape Shield; Jurors

*Smith v. State, A08A1398*

Appellant was found guilty of kidnapping and aggravated sodomy. He argued that the trial court erred in disallowing impeachment evidence. To discredit the victim's claim that she did not know and had never seen appellant before the incident, appellant sought to show that he and victim had enjoyed a personal relationship prior to that date by testifying that she had confided in him that she had suffered a miscarriage. The prosecutor objected at trial under the rape shield statute and attributed appellant's knowledge to the defense having had pretrial access to the state's file, which contained the victim's medical records documenting the miscarriage. The Court held that the rape shield statute bars "evidence relating to the past sexual behavior of the complaining witness." "Past sexual behavior" includes the complaining witness's "general reputation for promiscuity, nonchastity, or sexual mores contrary to the community standards." The trial court therefore did not abuse its discretion by excluding the evidence.

Appellant argued that the jurors were improperly tainted by the fact that on two occasions during trial the jury had seen him arrive in a police car, dressed in street clothes, but handcuffed. The Court held that although a defendant has the right to be free of the atmosphere of partiality created by the use of excessive guards or shackles in the courtroom, the mere fact of seeing an indicted accused in custody—not in the courtroom, as here, is not grounds for an automatic mistrial, but is addressed to the sound discretion of the trial court. Here, defense counsel asked the trial court to allow appellant to wait five or 10 minutes to give a reasonable time for the jurors to leave. The court agreed to this request and there was no evidence presented that this was not done. Therefore, no abuse of discretion by the trial court was found by the Court.

## Jury Charges

*Smith v. State, A08A1398*

Appellant was found guilty of kidnapping and aggravated sodomy. He argued that the trial court erred in defining aggravated sodomy to the jury, asserting that the court's definition deviated from the indictment and permitted the jury to find him guilty of that crime in a manner not alleged. The court defined, "[A] person commits the offense of aggravated sodomy when that person performs or submits to a sexual act of one involving the sexual organs of one in the mouth and/or anus of another with force and against the will of the victim." The aggravated sodomy count of the indictment charged appellant with "forcing [the victim] to place her mouth upon the penis of said accused, said act being done with force and against the will of [the victim]" Appellant argued that, given the DNA evidence identified from a rectal swab of the victim, a reasonable probability existed that the jury convicted him of aggravated sodomy for participating in a sexual act involving his sex organs and the victim's anus.

The Court held that giving a jury instruction that deviates from the indictment violates due process where there is evidence to support a conviction on the unalleged manner of committing the crime and the jury is not instructed

to limit its consideration to the manner specified in the indictment. At the start of its final charge, the trial court read to the jury each count of the indictment. It informed the jury that the state had the burden of proving beyond a reasonable doubt "every material allegation of the indictment." After the final charge, the court sent the indictment out with the jury for its use during deliberations. Under these circumstances, there was no reasonable probability that the jury could have convicted appellant of aggravated sodomy in a manner not alleged in the indictment.

## Right to Remain Silent

*Crawford v. State, A08A1431*

Appellant was convicted of aggravated assault and battery. He contended that the trial court erred by not sua sponte giving cautionary instructions or granting a mistrial when a law enforcement officer commented on his right to remain silent. In response to a question about gunpowder residue tests on appellant, the officer testified: "When I first started the initial interview, I read [appellant] his Miranda warnings by our department-issued sheet we have. And he refused to make any statements." The Court held that evidence regarding a defendant's decision to remain silent is objectionable and should be excluded, but improper reference to a defendant's silence does not automatically require reversal. Here, the Court found that this was a single gratuitous reference to appellant's silence. Therefore, given the strong evidence of guilt, any error was harmless.

## Judicial Comments

*Klausen v. State, A08A1119*

Appellant was found guilty of child molestation. The evidence showed that the appellant was found masturbating in the presence of the victim. He argued that the trial court improperly interrupted his attorney's closing argument and in so doing, expressed his opinion about the evidence in the case. Defense counsel, in his closing arguments stated as follows: "There should have to be some sort of connection between the act and the child and not just an in-the-presence-of standard where neither party even knows about it. It cannot be what we are here about. The law cannot intend, the Legislature does not intend that you would bring back a conviction…" At which point the trial court judge interrupted and stated "That is what he is charged with, an immoral and indecent act in the presence of. That is the law." The Court found no error. The trial court judge simply interjected to instruct the jury on the applicable law as charged in the indictment, but did not comment on the evidence or the guilt of appellant. Moreover, the judge later charged the jury that "[b]y no ruling or comment which the Court has made during the progress of the trial of this case has the Court intended to express any opinion upon the facts of this case, upon the credibility of the witnesses, upon the evidence or upon the guilt or innocence of the accused."