

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 14, 2011

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THIS WEEK:

- **Search & Seizure**
- **Aggravated Stalking**

Search & Seizure

Bacallao v. State, A10A1743 (1/6/11)

Appellant was convicted of DUI. She contended that the trial court erred in denying her motion to suppress. The evidence showed that officers had set up a roadblock. Appellant headed toward the checkpoint then made an immediate left into the second entrance of a gas station parking lot that was just south of the checkpoint. An officer approached appellant as she exited her vehicle to question her because he did not know if she was going to the gas station or attempting to avoid the roadblock. The officer advised her that they were conducting a license check and asked to see her license. Appellant gave the officer her license, and as they talked, he detected the odor of alcohol on her breath. Appellant admitted to having consumed alcoholic beverages and agreed to field sobriety tests. Appellant was eventually arrested for DUI.

Appellant contended that the trial court erred when it denied her motion to suppress because the officer's detention of her was illegal. Specifically, she argued that there was neither probable cause nor articulable suspicion to support the stop. The Court noted that appellant's argument presumed that the initial interaction between her and the officer was a second- or third- tier encounter. However, the evidence supported the trial court's determination that it was a first-tier encounter. As such, neither articulable suspicion nor probable cause

was necessary for the interaction between her and the officer. Furthermore, once the officer smelled alcohol on appellant's breath, he had the required articulable suspicion to investigate further. In so holding, the Court distinguished *Jorgensen v. State*, 207 Ga. App. 545 (1993), because unlike in *Jorgensen*, there was no evidence here that appellant was initially detained or was told that she was not free to leave.

Aggravated Stalking

Presley v. State, A10A1698 (1/5/11)

Appellant was convicted of aggravated stalking. He contended that the trial court's jury charge on aggravated stalking was unconstitutionally burden-shifting. Under OCGA § 16-5-91 (a), "A person commits the offense of aggravated stalking when such person, in violation of a . . . temporary protective order . . . , follows, places under surveillance, or contacts another person at or about a place or places without the consent of the other person for the purpose of harassing and intimidating the other person." After instructing the jury in accordance with the language of the statute and defining the "harassing and intimidating" element of aggravated stalking, the trial court charged the jury as follows: "Georgia's aggravated stalking statute requires proof of a court order restricting contact by the defendant with the victim and a violation by the defendant of that order. The existence of a written order is presumptive evidence of notice to the defendant in an aggravated stalking case."

Appellant contended that the second sentence unconstitutionally shifted the burden of proof to him. However, the Court found, he failed to object to this charge or reserve exceptions to the charge and thus waived this claim

for appellate review. Nevertheless, appellant argued the exception to this rule for cases in which there is a substantial error in the charge that is harmful as a matter of law. Under this standard, it must be shown that the allegedly erroneous charge was blatantly apparent and prejudicial to the extent that it raises a question as to whether there has been deprivation, to some extent, of a fair trial. The Court found that appellant failed to make this showing. The record contained an ex parte temporary protective order issued against appellant, which was served on him personally by the sheriff's office, as well as a 12-month protective order issued against him following a hearing. A defendant's receipt of actual notice of the order is not an element of the offense of aggravated stalking, and even if it were, proof of the written order alone is sufficient to prove notice to the defendant based on the presumption of regularity in judicial proceedings. Therefore, the Court held, "[b]ased on the evidence in this case and the applicable law, the court's instruction that 'the existence of a written order is presumptive evidence of notice to the defendant' was not harmful as a matter of law."