

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JANUARY 2, 2009

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THIS WEEK:

- **Speedy Trial**
- **Motion to Withdraw Guilty Plea**
- **Search & Seizure**
- **Expert Testimony**

Speedy Trial

Green v. State, A08A2026

Appellant was arrested in August, 2005 for possession with intent to distribute. He was indicted in January, 2008. He filed a motion to dismiss on constitutional speedy trial grounds in May, 2008. The motion was denied and he appealed.

The Court affirmed. Under the authority of *Doggett v. United States* and *Barker v. Wingo*, the Court first held that the delay was presumptively prejudicial because it is "well-established that any delay over a year is presumptively prejudicial." However, in applying the four factor balancing test, the trial court found (a) the delay was uncommonly long; (b) the state was more to blame for the delay but because it was unintentional the factor was not to be weighed too heavily against the state; (c) appellant's 3 year delay in asserting his rights weighed heavily against him; and (d) appellant did not show any particularized prejudice from the delay. In reviewing these findings, the Court found no abuse of discretion.

Motion to Withdraw Guilty Plea

Brown v. State, A08A1636

Appellant entered a guilty plea to sexual assault against a person in custody. Within the

same term of court, he moved to withdraw his plea on the grounds that his court appointed attorney was ineffective and his plea was not knowingly and voluntarily made. The same attorney who represented him at his plea hearing filed the motion to withdraw and represented him at the hearing. The trial court denied the motion and the Court of Appeals reversed. A plea withdrawal proceeding is a critical stage of the criminal prosecution and absent a waiver, a defendant is entitled to counsel to assist him in seeking to withdraw his guilty pleas. Thus, a trial court has an obligation to inform a defendant of his right to counsel or to obtain a constitutionally valid waiver of counsel. Although appellant was represented by trial counsel, "an attorney cannot reasonably be expected to assert or argue his or her own ineffectiveness," and thus new counsel was required when that claim is raised. Here, the trial court failed to inform appellant that he was entitled to representation by someone other than trial counsel when pursuing a claim of ineffective assistance of trial counsel during the plea hearing. Moreover, because appellant asserted that his plea was not knowingly and voluntarily entered, the error could not be considered harmless.

Search & Seizure

Durrence v. State, A08A1640

The state appealed from the grant of the defendant's motion to suppress. The evidence showed that a sheriff's deputy responded to a disorderly conduct complaint at Durrence's residence. When the deputy arrived, Durrence was outside the house. According to the deputy, he was initially unable to ascertain who had made the disorderly complaint upon arrival due to Durrence's intoxication, but Durrence

eventually indicated that the offender had left the premises. The deputy secured the scene and made sure no one entered or exited the residence. Another deputy arrived 15 minutes later and heard an occupant inside the residence screaming that Durrence had marijuana in the house and was growing marijuana. Without the permission of Durrence, this deputy entered the house to speak with the occupant inside. The deputy then left the house to question Durrence about the allegations and obtained Durrence's verbal and written consent to search the residence. The deputy did not read the written consent form to Durrence and did not advise Durrence that he had the right to refuse to give consent or that he could withdraw his consent. In addition, the deputy testified that during this time, Durrence was not free to leave the premises.

The Court held that premitting whether Durrence was illegally detained or arrested without probable cause prior to giving his consent to search, the evidence supported the trial court's determination that the consent was involuntary. The appropriate inquiry is whether a reasonable person would feel free to decline the officer's request to search or otherwise terminate the encounter. Here, the evidence specifically showed that there were a number of police officers at the scene, Durrence was not free to leave, the officer requesting permission to search did not advise Durrence that he could refuse consent to search, and at least one officer testified that Durrence was intoxicated. The trial court found as fact that this intoxication contributed to the invalidity of the search. Because there was evidence in the record to support the findings of the trial court, the Court affirmed the grant of the motion to suppress.

Expert Testimony

Perry v. State, A08A1913

Appellant was convicted of aggravated assault. At trial, he presented a justification defense asserting that the victim was choking him and he pulled a knife out and stabbed the victim in self defense. He contended on appeal that the trial court erred in granting the state's motion in limine to exclude the testimony of his expert witness. An expert witness is anyone who, through training, education, skill, or experience, has particular knowledge that the average juror would not possess concerning

questions of science, skill, trade, or the like. Expert testimony is admissible where the conclusion of the expert is one which jurors would not ordinarily be able to draw for themselves; i.e., the conclusion is beyond the ken of the average layman.

Under OCGA § 16-3-21 (a), a person is justified in using lethal force if he reasonably believes such force is necessary to prevent death or great bodily injury to himself or others. The justification defense "is based on a 'reasonable man' standard of behavior. Appellant's expert, a specialist in combat and defense training, who identified his expertise as "the justified use of deadly force" and the "dynamics of the confrontation," would have testified at trial about "ability, opportunity, and jeopardy, the three things that you have to have to justify the use of deadly force." Explaining these concepts, the expert asserted that before a person can legally use lethal force against an aggressor, the aggressor must have the ability, opportunity, and intent to cause death or great bodily injury. He further stated that the average lay person does not understand the factors underlying a potentially lethal confrontation or what combatants "go through in a battle." However, the trial court excluded the testimony after determining that the expert's opinions about an aggressor's ability, opportunity, and harmful intent involved "matters that have an official sounding label to them, but . . . are common sense concepts . . . the jury could handle" without expert testimony. The Court of Appeals agreed. Appellant failed to show that "these concepts implicated complex or mysterious areas of human response and behavior that required expert testimony."