

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING FEBRUARY 8, 2008

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THIS WEEK:

- **Hearsay - Necessity**
- **Search and Seizure**
- **Evidence**

Hearsay - Necessity

Navarrete v State, S07A1456

Appellant was convicted of felony murder, aggravated assault, and other crimes resulting from the death of Richard Davis. Appellant appeals for a variety of reasons, and claims that the trial court improperly admitted hearsay testimony under the necessity exception. Over objection, an army medic was allowed to testify about an incident that occurred prior to his unit's redeployment to Iraq. The victim, Richard Davis, approached the medic complaining about a wound to his hand. Davis stated that the wound was inflicted while drinking with the appellant and others. Davis confided that the appellant had hit and choked him, and that he thought that they were going to kill him. Davis was drunk when the remarks were made and he told the medic that he would deny the story if questioned.

The trial court admitted the hearsay under the necessity exception. The Supreme Court held that the testimony did not meet the second prong of the necessity test which requires a particularized guarantee of trustworthiness. The Court concluded that the State failed to show sufficient indicia of trustworthiness for the statements to be admitted. In reaching its judgment, the Court noted that Davis was extremely drunk, and was also arguably drunk when the assault took place. The Court also

considered Davis' statement that he would lie about the injury if questioned, thus showing his lack of veracity. The Court held that the testimony was inadmissible, but that the evidence did not contribute to the verdict.

Search and Seizure

Cornwell v State, S07A1559

Appellant was convicted of DUI (drugs) less safe and other additional charges. On appeal, appellant argues that the trial court erred in denying his motion to suppress. The record shows that appellant was stopped on GA 400 after officers received a BOLO about a black SUV headed north on that same highway. Appellant's car was observed weaving, speeding, and following too closely. The appellant tested negative for alcohol, but after being read implied consent tested positive for cocaine, marijuana, and six prescription drugs. Appellant claims that the implied consent statute is unconstitutional because the statute allowed for the warrantless compelled testing of his bodily fluids based on probable cause but without proof of exigent circumstances. The Court rejected this argument finding that it had no merit. A driver is deemed to have consented to tests of his bodily fluid when probable cause exists to arrest him for a violation of OCGA §40-6-391. The judgment of the trial court was affirmed.

Evidence

Newsome v State, A07A2225

The appellant was convicted of two counts of aggravated assault, aggravated stalking, cruelty to a child, and possession of a firearm during the commission of a felony. The appel-

lant challenges the use of his prior convictions for impeachment purposes. Specifically, the appellant challenges the admission of two prior convictions of aggravated assault and possession of a firearm during the commission of a felony. The convictions were admitted pursuant to OCGA § 24-9-84.1, which was enacted in 2005 to establish guidelines for the use of criminal convictions to impeach witnesses or defendants who testify. The Code section tracks the language of Federal Rules of Evidence (“FRE”) Rule 609 (a) (1), except that the General Assembly added the word “substantially” before the word “outweighs.” FRE Rule 609 (a) (1) allows a defendant’s prior felony conviction to be used for impeachment purposes “if the court determines that the probative value of admitting this evidence outweighs its prejudicial effect to the accused.”

Appellant contends that, by adding the word “substantially” to the balancing test, the General Assembly meant to incorporate the standard for admissibility embodied in FRE Rule 609 (b), which provides:

“Evidence of a conviction . . . is not admissible if a period of more than ten years has elapsed since the date of the conviction . . . , unless the court determines, in the interests of justice, that the probative value of the conviction supported by specific facts and circumstances substantially outweighs its prejudicial effect.”

The Court rejected this argument. They found that this far more rigorous standard has already been adopted by our legislature in OCGA § 24-9-84.1 (b). The Court opined that the legislature did not intend to make it part of OCGA § 24-9-84.1 (a) (2), or it would have done so. The Court further held that the language of OCGA § 24-9-84.1(a) (2) is plain and unambiguous. The appellate court concluded that the decision made by the trial court was not an abuse of discretion and therefore provided no basis for reversal.

Smith v State, A07A2077

The appellant was convicted of one count of trafficking in marijuana and one count of possession of marijuana with intent to distribute. On appeal, appellant urges that his conviction should be reversed on the basis that the State’s expert only tested a single sample of the

green leafy substance from one of the twenty one gallon plastic bags found in the appellant’s possession. This green leafy substance was determined to be marijuana. The Court of Appeals held that where the expert tested only a sample, but testified to visually examining the remaining packages, and determining that each was filled with the same substance as the one he tested, the evidence was sufficient to sustain the conviction.