

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 14, 2008

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THIS WEEK:

- **Sentencing – Ex Post Facto Law**
- **Implied Consent**
- **Probation Revocation – Crawford and Sufficiency of Evidence**
- **Restitution**

Sentencing – Ex Post Facto Law

Forde v. State, A08A0602

Appellant was convicted of sexual battery against a child under the age of sixteen years. Prior to June 2, 2003, all violations of O.C.G.A. § 16-6-22.1 relating to sexual battery were punishable as a misdemeanor. In 2003, O.C.G.A. § 16-6-22.1 was amended and provided that the penalty for sexual battery against any child under sixteen years of age would be imprisonment from one to five years. Appellant was convicted of acts which were committed prior to the amendment, and acts committed after the amendment went into effect. The verdict form was general in nature and did not make specific findings as to when the sexual abuse occurred. The trial court sentenced appellant to five years to serve pursuant to the amended version of O.C.G.A. § 16-6-22.

On appeal, appellant argues that absent a specific finding by the jury, it is impossible to determine whether the jury found him guilty based on acts occurring prior to the 2003 amendment. Thus, if the conviction is based on the conduct prior to the amendment the felony sentence violates the Ex Post Facto

Clause and is void as a matter of law. The Court of Appeals opined that a reasonable jury could have convicted appellant *solely* on the acts of sexual battery which occurred prior to the June 2, 2003 amendment to O.C.G.A. § 16-6-22. The trial court should have required a special verdict form that addressed the pre- and post-amendment conduct in order to avoid an ex post facto violation. The Court of Appeals vacated appellant's sentence and remanded the case for re-sentencing.

Implied Consent

State v. Morgan, A07A1873

Appellee's motion to suppress the result of his state-administered blood test was granted and the State appeals the judgment of the trial court. Appellee was involved in a car accident that resulted in the death of two people and the injury of several others. After the accident, a State trooper saw appellee walking around and engaged him in conversation. The trooper was unable to observe any signs that appellee was impaired. Appellee was transported to the hospital due to a head injury. Appellee was released from the hospital a few hours later. As appellee was preparing to leave the hospital, the trooper approached the appellee. The officer asked appellee "if he would mind giving a blood test" without advising him of any of his rights. Appellee agreed and signed a blood/urine sample consent form. The form did not apprise appellee of either his constitutional rights or implied consent. Subsequently, appellee was charged with homicide by vehicle and various other offenses.

The state argued that the implied consent statute was inapplicable because it only applies where the officer has probable cause to believe a suspect was driving under the influence, and

the officer in this case lacked such probable cause. The state further argued that the implied consent statute does not provide the exclusive means by which police may obtain a blood sample; the police can ask a person to voluntarily consent. A suspect's Fourth Amendment right to be free from unreasonable searches and seizures applies to the compelled withdrawal of blood. The implied consent statute provides a suspect the opportunity to refuse to submit to a state-administered test. The right of refusal is reinforced in O.C.G.A. § 40-5-67.1 (d). An officer's failure to advise a suspect renders the results of the test inadmissible. The Court found that the plain language of the statute makes it clear that the legislature intended that drivers be permitted to refuse chemical testing. Therefore, the Court of Appeals held, in all cases in which police officers request a chemical test of a person's blood, urine or other bodily substance in connection with the operation of a motor vehicle for the purpose of determining whether the driver was under the influence of alcohol or drugs, they must give the notice required by the implied consent statute.

Probation Revocation– Crawford and Sufficiency of Evidence

Ware v. State, A07A2220

The appellant's probation was revoked for committing a new offense, aggravated assault. The Court of Appeals granted appellant's application for discretionary appeal. Appellant contends that hearsay evidence was admitted during the revocation hearing in violation of Crawford and that the evidence was insufficient. The record shows that the appellant struck her husband on the face with the "non-business end" of a box cutter causing a small cut to his face and injury to the inside of his mouth. At the hearing, the husband exercised his marital privilege and refused to testify. The responding officer testified to the facts and circumstances surrounding the offense and was the state's only witness. The state argued that Crawford is inapplicable to probation revocation hearings and that the statement was admissible under the necessity exception and *res gestae*. Citing several United States Supreme Court cases the Court recognized that the "full panoply of procedural

safeguards associated with criminal trials" has not been attached to revocation proceedings. The Court of Appeals agreed with the trial court that the Confrontation Clause did not demand the exclusion of the officer's testimony. However, the Court found that the trial court should have gone further by exploring the minimum requirements of due process. According to the Court, the trial court should have also considered the secondary issue of whether there was good cause for not allowing the confrontation and ensured that appellant had been afforded the minimum protections of due process. Rather than remanding the case in order that the trial court might make such a determination, the Court found that the evidence was insufficient, thus obviating the need for remand. The Court opined that the state failed to meet its burden of showing that the box cutter was a deadly weapon. The Court based its conclusion on the manner in which the box cutter was used and the wounds inflicted. Apparently, striking a person with the "non-business end" of a box cutter and causing a minor cut on the face and injury to the interior of a victim's mouth is insufficient under the preponderance of the evidence standard to establish aggravated assault.

Restitution

McCart v. State, (A07A1787)

Appellant appeals the trial court's judgment of restitution. Appellant contends that the trial court failed to provide required written findings. In Garrett v. State, 175 Ga. App. 400 (1985), the Court of Appeals held that before a trial court can order restitution it must hold a hearing, consider the factors provided in O.C.G.A. § 17-14-10 and make written findings regarding the factors. The award of restitution to victims is now governed by the Crime Victims Restitution Act of 2005 which became effective July 1, 2005. The Court of Appeals found that the changes in the relevant law have undermined the reasoning of Garrett. Thus, as of July 1, 2005, the ordering authority is no longer required to make written findings when ordering a defendant to make restitution. However, a hearing on the issue of restitution is still required if the parties cannot agree on an amount prior to sentencing.