

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MARCH 2, 2007

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THIS WEEK:

- **Lawyer Discipline**
- **Subsequent Difficulties**
- **Jury Charges**
- **Escape – Felony v. Misdemeanor**
- **Discovery – Child Pornography and Sanctions**
- **Search and Seizure – Third-Party Consent**

Lawyer Discipline

In the Matter of Eric Robert Johnson II, S07Y0382

An attorney engaged in unethical practices in two separate cases. In the first, the attorney represented two clients, in separate criminal matters, in the DeKalb Recorders Court while employed as an assistant public defender in DeKalb County, and failed to inform either client that they might be eligible for a court-appointed public defender or inform the judges hearing the matters that he was appearing in a private capacity rather than in his usual role as public defender. The assistant public defender also failed to inform his superiors at the Public Defender's Office of the representations, in violation of that office's policy. In the second case, the attorney admitted that he took no remedial measures after learning that a client had testified falsely. Having reviewed the record, the Supreme Court concurred with the special master's recommendation and ordered that, in the first case, the attorney be suspended

from the practice of law for 30 days, he receive a public reprimand, and that his re-instatement be conditioned upon his providing proof that he refunded the fees received from the affected clients. In the second case, the Court ordered a public reprimand.

Subsequent Difficulties

Bond v. State, A07A0766,

Appellant was convicted of aggravated assault. On appeal, appellant challenged the admission of a subsequent confrontation with the victim. At trial, the evidence showed that the victim was on the porch of a friend's house when he was attacked by three men, two of whom he recognized. Appellant struck the victim on his head with a firearm, and pointed the firearm at him. Then the three men robbed him. The day of the attack the victim provided the first names and descriptions of the men that he recognized to police, which included the appellant. Five days after the incident, appellant again approached the victim, brandished a weapon, and accused the victim of identifying him to the police as one of the robbers. Two weeks after the incident, the victim identified appellant from a photo line-up. At trial, the second incident that occurred several days after the initial assault and robbery was admitted as evidence. In holding that the evidence was properly admitted, the Court of Appeals reasoned that a "subsequent difficulty, like evidence of a prior difficulty, was admissible as evidence of the relationship between the victim and the defendant, and it may show the defendant's motive, intent, and bent of mind in committing the charged act against the victim". Thus, the Court reasoned

that the evidence could show the threatening or violent relationship between the victim and appellant. In addition, the evidence helped to explain appellant's actions in the earlier crime which was at issue in the trial. Therefore, the conviction was affirmed.

Jury Charges

Walls v. State, A06A2050,

Appellant was convicted of aggravated battery and aggravated assault. On appeal, appellant challenges the jury charge on aggravated battery. The evidence at trial showed that appellant accused his wife of cheating on him and threatened to kill her. Appellant then repeatedly struck her head, arms, and legs with a heavy metal bar. Appellant then stabbed her with a paring knife. As a result of the attack, the victim had a broken elbow, multiple stab wounds, and numerous abrasions and bruises. The victim was unable to take care of herself for three months following the attack and had to undergo physical therapy in order to regain the strength in her arm. Although the indictment only alleged that the victim was deprived of the use of a member of her body, the entirety of the aggravated battery statute was charged. Appellant claimed that this allowed the jury to find guilt in a manner not charged in the indictment. In affirming appellant's conviction, the Court of Appeals held that the charge did not require reversal when considered in the context of all of the jury charges. The Court reasoned that the trial court's limiting instruction, to the effect that the State had the burden of proving every material allegation in the indictment and every essential element of the crime charged beyond a reasonable doubt, after having read the indictment to the jury verbatim, adequately limited the jury's consideration of the uncharged portion of the statute.

Escape-Felony v. Misdemeanor

Green v. State, A06A2179,

Appellant pled guilty to attempted escape and, at sentencing, argued that he should be sentenced for a misdemeanor. The trial court accepted the guilty plea

but sentenced appellant for felony escape. Appellant challenges his sentence, contending that it should have been a misdemeanor sentence. The Court of Appeals agreed and vacated appellant's sentence for felony escape. Appellant had been convicted of two felonies in 2002 and sentenced to serve three years in prison. Appellant was released on parole but was subsequently arrested for violation of the terms of his parole. Appellant attempted to escape from the jail where he was being held prior to the parole revocation hearing. In vacating the sentence, the Court held that appellant was not incarcerated for the felonies for which he was convicted in 2002, but for an alleged parole violation. Therefore, appellant should have been sentenced for misdemeanor attempted escape. O.C.G.A. § 16-10-52 (b) (4). The Court rejected the State's contention that there was a substantive difference between parole and probation for the purposes of escape. Under Smith v. State, 154 Ga. App. 608, 269 S.E.2d 100 (1980), a court must look for the reason that a person is incarcerated at the time of the escape "because authority for the detention is an essential element of the felony offense of escape". Because appellant was in jail pending a determination for an alleged parole violation, he was not being held under his earlier felony convictions. Thus, the offense was a misdemeanor and should have been sentenced accordingly.

Discovery – Child Pornography and Sanctions

State v. Jones, A06A2089

The State appeals the trial court's exclusion of a video and photographs of child pornography as a sanction for the State's failure to comply with a court ordered discovery deadline. Appellee opted into discovery under O.C.G.A. § 17-16-2(a) and demanded production and inspection of physical evidence that the state intended to introduce at trial. The State failed to produce certain computer images by the date of the final plea calendar and the trial court imposed a deadline upon the State in which to comply with discovery, warning that failure to comply with the deadline will cause the exclusion of the images from trial. On the date of the deadline, a

hearing was scheduled in which the State intended to argue that a protective order was necessary in order to produce the images. The appellee did not appear as they were apparently not given notice of the hearing. At a hearing three weeks later, the appellee argued that the images had not been produced and should be excluded. The State argued that turning over sexually explicit images of children would possibly violate O.C.G.A. §§ (b) (5) and (8) regarding the possession and dissemination of prohibited materials. In granting the defense's motion the trial court ruled that the court imposed a deadline that had not been contingent upon the appellee stipulating to the protective order and that the evidence would be excluded because of the failure to comply with the court-ordered deadline. The Court of Appeals pointed out that Alexander Properties Group v. Doe, 280 Ga. 306, 626 S.E. 2d 497 (2006), had resolved the State's contention one day prior to the final hearing of the discovery matter. In that case, the Court had held that O.C.G.A. § 16-12-100 (b)(5) does not prohibit producing sexually explicit material in response to a court order or request for discovery, but that a trial court has discretion to grant a limited protective order if it is deemed necessary. However, the Court found that the trial court had not made the necessary findings that the State acted in bad faith and that prejudice resulted, in order to exclude the evidence as a discovery sanction. Thus, the evidence should not have been excluded and the trial court's judgment was reversed.

Search and Seizure – Third-Party Consent

Rhone v. State, A06A1860,

Appellant was convicted of armed robbery and appeals the trial court's denial of his motion to suppress. Appellant, a 17-year-old, was arrested at his home, where he resided with his father, grandmother, and grandfather. After police arrested appellant, they asked for and received written consent to search the entire premises from both the father and the grandfather. The police discovered incriminating evidence in appellant's bedroom which he subsequently sought to suppress.

At the suppression hearing, the testimony showed that the grandmother and grandfather were the homeowners and that appellant and his father lived there rent-free, although the father would occasionally help pay for food. Appellant's grandfather testified that "it was his house and he could go anywhere he wanted in the house...and that if it was necessary he would plunder through anything that's in that bedroom." Furthermore, appellant's grandmother testified that she would go into the room sometimes to put clothes and linens away, and that "it was her house, and she could enter the bedroom if she wanted to, and that she goes in 'when she gets ready'". In affirming the judgment of the trial court, the Court of Appeals determined that the grandparents exercised authority and control over the entirety of the house, had the right to enter appellant's bedroom, and subsequently could assign that right at will. Appellant had no reasonable expectation of privacy that the grandparents would not enter the bedroom. Thus, their assignment of the right to enter was not a violation of a reasonable expectation of privacy.