

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MARCH 30, 2007

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Deputy Executive Director  
for Legal Services

**Tom Hayes**  
Regional Offices Director

**Chuck Olson**  
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Trial Support

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Capital Litigation

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Traffic Safety Coordinator

**Patricia Hull**  
Traffic Safety Prosecutor

**Gary Bergman**  
Staff Attorney

**Tony Lee Hing**  
Staff Attorney

**Rick Thomas**  
Staff Attorney

**Donna Sims**  
Staff Attorney

**Jill Banks**  
Staff Attorney

**Al Martinez**  
Staff Attorney

**Clara Bucci**  
Staff Attorney

**Brad Rigby**  
Staff Attorney

## THIS WEEK:

- **Plea In Bar – Double Jeopardy**
- **Merger**
- **Evidence – Defendant's Interrogation**

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### *Plea In Bar – Double Jeopardy*

*State v. T aylor, S06A2163 (03/19/07)*

Appellee admitted to police that he shot the victim, in self-defense. In addition, appellee showed the police where he had hidden the gun used. At trial, the assistant district attorney, hereinafter the ADA, entered into a stipulation with the defense regarding the chain of custody for the gun and other evidence. The ADA then presented a rifle to the State's firearms expert who testified that it was not the alleged murder weapon. The ADA informed defense counsel that the gun used by appellee was missing. The trial court granted a motion for mistrial made by the defense. Later, the trial court granted a plea in bar based on double jeopardy. The trial court found that staff members of the district attorney's office were aware that the rifle could not be located but failed to bring this fact to the ADA's attention, despite the fact that they were present during trial and knew or should have known about the stipulation and that appellee intended to call a firearms expert of his own. Although the trial court noted that the ADA appeared genuinely surprised at trial that the weapon was not the one used by appellee, the trial court held that the withholding of the information by staff members should be imputed to the ADA.

The trial court further concluded that the State benefited from the mistrial and had caused the case to linger an excessively long period of time thus acting in such a manner as to harass appellee and deprive appellee of his defense. Therefore, the trial court held that the provisions of double jeopardy barred a retrial of the case. The State appealed.

“When a mistrial is granted at the defendant's request due to prosecutorial misconduct, the general rule is that the double jeopardy clause does not bar the State from retrying the case.” *Weems v. State*, 268 Ga. 142 (1997). “Unless the prosecutor is intentionally trying to abort the trial, his conduct will not bar a retrial. It doesn't even matter that he knows he is acting improperly, provided that his aim is to get a conviction.” The only relevant intent is the intent to terminate the trial, not the intent to prevail at trial. *Williams v. State*, 268 Ga. 488 (1997). The rule whereby constructive knowledge is attributed to the prosecutor pursuant to *Brady* is not applicable to the double jeopardy issue of whether there was intentional prosecutorial misconduct designed to produce a mistrial. Here, the trial court did not find that the person in control of the prosecution (ADA) instigated the misconduct either directly or through collusion in order to goad the appellee into moving for a mistrial. The Supreme Court found that there was no evidence to support a finding that the ADA intended to terminate the trial rather than enhance the likelihood of conviction. Without such evidence, the protections of the Double Jeopardy Clause are not invoked. Therefore, the Supreme Court reversed the judgment of the trial court.

## **Merger**

Collum v. State, S06A2000 (03/29/07)

Appellant was convicted of the offenses of malice murder, two counts felony murder and cruelty to children for the beating death of his girlfriend's twenty-month-old child. The trial court sentenced appellant to multiple life terms, failing to merge the felony murder convictions with the malice murder conviction. The appellant appeals the sentence arguing that the offenses should have merged into the malice murder. Because the case involved only one victim, the appellant's felony murder convictions merged with the malice murder conviction as a matter of law and are vacated pursuant to O.C.G.A. § 16-1-7. However, the cruelty to children, which underlies the felony murder counts, is only vacated if it merged as a matter of fact into the malice murder conviction. The victim's age is an element of the offense of cruelty to children that is not an element of malice murder. Therefore, the Supreme Court concluded that the cruelty to children conviction did not merge into the malice murder as a matter of fact.

## **Evidence – Defendant's Interrogation**

Spence v. State, S06A1850 (03/19/07)

This case came before the Supreme Court on interlocutory appeal to determine whether the trial court erred when it ruled that appellant's confession would be admissible in evidence at trial. Appellant argued that the confession was inadmissible because it was given as a result of a false representation by an investigator that the interrogation was confidential. The record shows that appellant was arrested for an unrelated rape; this case involves the murder of Tereon Grant. After appellant's arrest for rape, an investigator questioned him with regard to the murder of Grant. The appellant signed a Miranda form after the warnings were read to him. Appellant said nothing to implicate himself during the first hour of the interview. Appellant then began to cry and asked for his girlfriend. Appellant told the investigator: "I'm just scared when I go to jail, everybody gonna know I

said something." The investigator responded: "Lem, ain't nobody saying nothing, this is confidential." The investigator later reiterated: "This is confidential what we're doing right here. Do you understand that. This is confidential." Appellant then gave a statement incriminating himself in Grant's murder.

The Supreme Court concluded that this case was controlled by the rationale of Hopkins v. Cockrell, 325 F.3d 579 (5<sup>th</sup> Cir. 2003) and Foster v. State, 258 Ga. 736 (1988). The foregoing cases held that an officer cannot advise the defendant of his Miranda warnings and then tell him that despite those warnings, what he tells the officer will be "confidential," then use the resulting confession against him. Telling a defendant that whatever he tells the officers is "confidential" is totally inconsistent with the contents of the Miranda warnings. The Court found that it was reasonable for appellant to believe that the statement would be kept confidential and would not be disclosed to anyone else. Therefore, the Supreme Court held that the trial court erred, and appellant's statement would not be admissible at trial.