

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING APRIL 10, 2009

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## THIS WEEK:

- **Statements; Juveniles**
- **Search & Seizure**
- **Speedy Trial**
- **Miranda**
- **Discovery**
- **Identification**
- **Jury Charges; Judicial Comment**
- **Judicial Comment**

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### **Statements; Juveniles**

*Killings v. State, A08A2289*

Appellant was convicted of armed robbery. At the time of the crime, he was aged 16, nine months old. He contended that the trial court erred in admitting his statements to the police. The admissibility of statements by juveniles depends upon whether, under the totality of the circumstances, there was a knowing and intelligent waiver of constitutional rights. Factors to be considered include: (1) age of the accused; (2) education of the accused; (3) knowledge of the accused as to both the substance of the charge and the nature of his rights to consult with an attorney and remain silent; (4) whether the accused is held incommunicado or allowed to consult with relatives, friends or an attorney; (5) whether the accused was interrogated before or after formal charges had been filed; (6) methods used in interrogations; (7) length of interrogations; (8) whether the accused refused to voluntarily give statements on prior occasions; and (9) whether the accused has repudiated an extra judicial statement at a later date. Here, the Court held

that the trial court did not err. Appellant's age and other factors, such as his level of education (9th grade) and his knowledge of his right to consult with an attorney, the right to remain silent, and the seriousness of his situation, were consistent with his statement having been voluntarily made following a knowing and intelligent waiver of his rights. The fact that he was interviewed outside the presence of his mother, although a factor to be considered by the trial court, did not preclude the admission of his statement.

### **Search & Seizure**

*Gray v. State, A08A1604*

Appellant was convicted of armed robbery, burglary, aggravated assault, and possession of a firearm during the commission of a felony. He contended that the trial court erred by denying his motion to suppress. The evidence showed that appellant committed a violent home invasion of his next door neighbor's residence. When the police investigated, they followed a trail of footprints back to the back door of appellant's home. The officers knocked on appellant's door. His mother answered and allowed the officers to enter the home. Upon entering the living room, the officers observed appellant lying on the couch, looking at them. The officers him off of the couch, and he complied. As soon as he stood up, he was placed in handcuffs, while at the same time a different officer checked for weapons by looking underneath the cushions of the couch where he had been lying. The officer found \$218 cash underneath one of the cushions. Gray claimed the money to be his and stated that his mother had given it to him; however, his mother stated that she had given him only \$30 for a haircut.

Appellant first argued that the officers made a de facto arrest and the search was not supported by probable cause. The Court held that because an officer must make quick decisions as to how to protect himself and others from possible danger, he is not required to risk his life in order to effectuate an investigatory detention. Thus, in sufficiently dangerous circumstances, officers may handcuff a suspect as part of an investigatory detention without transforming the detention into a de facto arrest. Here, the officers had articulable suspicion that appellant had committed the armed robbery earlier that morning because fresh footprints led from the victim's home directly to appellant's residence and appellant met the victim's physical description of the suspect in terms of race and gender. Furthermore, the armed robbery had been an extremely violent one in which the victim had been threatened and beaten badly with a firearm. Under these circumstances, the means of the detention employed by the officers were reasonable and did not transform the investigatory detention into an arrest.

Appellant also asserted that if he was not arrested, then the search of the couch was illegal. However, the Court held that an officer may search the area in the immediate presence of a detainee for weapons, if the officer has a reasonable and articulable suspicion that the detainee is dangerous and may gain immediate control of a weapon.

*State v. Felton, A08A1817*

The State appealed from the grant of appellee's motion to suppress. The State contended that the trial court erred in granting appellee's motion upon finding that the officer impermissibly expanded the scope of the traffic stop even after being given consent to search. The evidence showed that officer's stopped the vehicle in which appellee was a passenger for a seat belt violation. The officer noticed that the driver and appellee were extremely nervous. After completing a citation for a seatbelt violation, the officer returned to the car, asked the driver to exit the car, gave him a copy of the seatbelt violation, and asked him for consent to search the car. The driver gave consent, as did appellee, and drugs were subsequently found.

The Court held that if an officer continues to detain a subject after the conclusion of a

traffic stop and interrogates him or seeks consent to search without reasonable suspicion of criminal activity, the officer exceeds the scope of a permissible investigation of the initial traffic stop. Here, there was no evidence that at any point in this encounter did the encounter become consensual. It was evident that even after the traffic stop ended the men were not free to go because the officer had the driver exit the car before giving him the citation, and at that point asked him for consent to search. Since appellee's consent was not within the scope of the original traffic stop, nor consensual, the consent to search the vehicle was the product of an illegal detention, and the evidence obtained as a result of the illegal search was rightfully suppressed.

### **Speedy Trial**

*Williams v. State, A08A2437*

Appellant was convicted of aggravated sodomy, aggravated child molestation, and child molestation. He contended that the trial court erred in denying his motion for discharge and acquittal on the ground that, after the trial court granted him a new trial, he was not timely tried in accordance with his demand for speedy trial. The record showed that appellant filed a speedy trial demand and the prosecution tried and convicted him in a timely manner. Thereafter, the trial court granted him a new trial but appellant did not re-file a speedy trial demand. The Court held in 2003, OCGA § 17-7-170 (c) was amended to provide that "[a]ny demand filed pursuant to this Code section shall expire at the conclusion of the trial . . ." Thus, appellant's demand for speedy trial, filed prior to his original trial, expired once that trial was concluded. Since no demand for speedy trial remained in force and effect at the time appellant was granted a new trial, and appellant failed to file a new demand for speedy trial after his motion for new trial was granted, the trial court did not err in denying his motion for discharge and acquittal.

### **Miranda**

*Escobar v. State, A09A0675*

Appellant was convicted of trafficking in methamphetamine. He argued that the trial court erred in admitting his statement in violation of *Miranda* and in admitting inadmissible

hearsay. The evidence showed that law enforcement, using a CI set up a buy from appellant. Appellant drove his vehicle to the arranged meeting spot and carried the drugs with him. Law enforcement told the CI not to go through with the purchase. Appellant thereafter was observed transferring the drugs to a third party. He then drove away. A uniformed traffic officer noticed appellant weaving and initiated a traffic stop. When the officer asked why appellant was so nervous, appellant replied, "I'm not nervous. There's nothing in the car, search it." He argues that this statement was improperly admitted because it was custodial interrogation in violation of *Miranda*. Specifically he argued that because the stop was made for the express purpose of detaining and/or arresting him, he was in custody from the time it began. The Court disagreed. Whether the police have probable cause to arrest and whether the defendant was the focus of the investigation are irrelevant considerations for *Miranda* purposes. The subjective views of the interrogator and suspect are not dispositive of whether a person is in custody for the purposes of *Miranda* warnings. Here, there was no evidence that the patrol officer made any statement or otherwise acted in a way that would cause a reasonable person to believe that he was under arrest and not simply temporarily detained for further investigation pursuant to a routine traffic stop. Thus, appellant was not in custody at the time he made the statement at issue.

### **Discovery**

*Spencer v. State, A09A0453*

Appellant was convicted of aggravated battery and aggravated assault and other offenses. He argued that because the state failed to meet its disclosure obligations under OCGA § 17-16-4, the trial court erred in admitting testimony of a statement he allegedly made while in custody. The evidence showed that he shot the victim in the ear with a small revolver, at close range, but the victim survived. Later, both the victim and he were in custody at the same time. Over objection, the victim testified that during this time, appellant offered him a bribe to say someone else shot him. OCGA § 17-16-4 (a) (1), provides that "[t]he prosecuting attorney shall . . . disclose to the defendant the substance of any . . . relevant written or oral statement made by the defendant while in custody, whether or not in response to inter-

rogation.” The Court held that the State plainly failed to comply with the statute. However, a defendant generally has a duty to request a continuance to cure any prejudice which may have resulted from the failure to comply with the requirements of O. C. G. A. § 17-16-1 et seq. Here, appellant objected, but failed to either request a continuance or move for a mistrial. Moreover, given that the evidence was overwhelming, any error was harmless.

## Identification

*Daniels v. State, A08A2091*

Appellant was convicted of aggravated assault, false imprisonment, possession of a firearm during the commission of a crime, and possession of a firearm by a convicted felon. He argued that the trial court erred in denying his motion to suppress evidence of the victim’s identification of him in a pretrial photographic lineup because the identification procedure was impermissibly suggestive. The Court found that the photographic lineup consisted of photographs of six males of the same race and of similar complexion, age, facial hair, and hairstyle. Appellant nonetheless complained that he was the only person depicted wearing a light-colored shirt. But, the Court held, such lineups are not impermissibly suggestive when the defendant’s clothing differed from the others’ in some respect, if the witnesses had not described the perpetrator as wearing the clothing the defendant wore when he was identified.” The color of appellant’s shirt in the lineup did not match the victim’s prior description of his clothing worn at the time of the incident. Therefore, the difference in appellant’s shirt in the lineup was not significant and did not render the lineup impermissibly suggestive.

## Jury Charges; Judicial Comment

*Rolland v. State, A09A0061*

Appellant was convicted of aggravated assault; kidnapping with bodily injury; kidnapping; and misdemeanor cruelty to children. He argued that the trial court committed reversible error in violation of OCGA § 17-8-57 by giving a jury charge in which the judge expressed an opinion that statements made by a witness for the State were reliable or true. As part of its final charge to the jury at the close of evidence, the trial judge gave an instruction at

the State’s request which substantially tracked the language of OCGA § 24-3-16: “I charge you that a statement made by a child under the age of fourteen years describing any physical abuse performed with or on the child by another or performed with or on another in the presence of the child is admissible in evidence by the testimony of the person or persons to whom made if the child is available to testify and the court finds that the circumstances of the statement provide sufficient indicia of reliability.” The Court agreed with appellant, holding that it had previously held in *Starr v. State*, 269 Ga. App. 466 (2004) that this same jury charge violated OCGA § 17-8-57 and required reversal. Moreover, although the trial court here realized its mistake in giving the charge and then gave a curative instruction, the Court held that it was not sufficient to cure the violation. Appellant’s convictions were therefore reversed.

## Judicial Comment

*Gardner v. State, A08A2087*

Appellant was convicted of three counts of armed robbery. He contended that the trial court violated OCGA § 17-8-57 during an exchange with the prosecutor after the first witness testified. The transcript showed that the trial court asked the prosecutor if venue had been proven. The prosecutor said no and the court then said as follows: “Why don’t we go ahead and do that before we forget it.” The Court held that by aligning himself with the prosecution through the reference to “we,” the judge could have been perceived by the jury as an advocate for the State. Although the defense attorney did not object at the time, the Court held that this comment was plain error and reversed the convictions.