

Prosecuting Attorneys' Council of Georgia **CaseLaw** UPDATE

WEEK ENDING APRIL 13, 2007

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THIS WEEK:

• **Cross Examination – Impeachment**

• **Motion to Withdraw Guilty Plea**

Cross Examination – Impeachment

Adams v. State, A06A2124 (03/27/07)

On appeal, appellant argued that the trial court erred when it allowed the State to impeach his credibility with a misdemeanor conviction for theft by receiving stolen property. The trial court ruled that theft by receiving stolen property was a crime involving dishonesty within the meaning of O.C.G.A. § 24-9-84.1 (a) (3). The Court of Appeals held that the trial court erred. The Court was persuaded by the reasoning of the Eleventh Circuit. In reaching its holding, the Court noted that the General Assembly chose to use the language of FRE 609 (a) (2) in enacting the statute and that United States Court of Appeals for the Eleventh Circuit has established that crimes such as theft, robbery, or shoplifting do not involve “dishonesty or false statement” within the meaning of FRE 609 (a) (2). The Court further opined that the legislature did not intend for offenses involving theft to be used for purposes of impeachment under O.C.G.A. § 24-9-84.1 (a) (3) because the legislature did not retain the old language, “moral turpitude.” The Court wrote, “In Georgia, prior to the enactment of O.C.G.A. § 24-9-84.1, a witness could be impeached by proof of general bad character or

by proof that the witness had been convicted of a crime of moral turpitude. Under that rule, theft and shoplifting were considered crimes of moral turpitude. Instead of expressly codifying the existing law, the legislature adopted the language of the federal rule, thus using ‘dishonesty or false statement’ instead of ‘moral turpitude.’ Had the legislature intended for the new law to be applied in the same manner as the existing law, it seems logical that they would have used the same language.” Although the Court of Appeals held that the trial court erred in admitting appellant’s prior conviction for misdemeanor theft by receiving for the purpose of impeachment, in this case the error was harmless and the conviction was affirmed.

This decision was 2-1 and therefore is not binding precedent. However, this case can be cited as persuasive authority. The State should argue that the more reasoned authority is the special concurrence by Judge Smith.

Motion to Withdraw Guilty Plea

Kaiser v. State, A06A1767 (03/28/07)

In this case, the Court of Appeals overruled Jarrett v. State, 217 Ga. App. 627 (458 S.E.2d 414) (1995) and the line of cases which hold that a trial court may not grant a motion for withdrawal filed outside the term of court in which sentence is imposed, where that sentence is void and the motion was filed prior to re-sentencing. The appellant entered a guilty plea and was sentenced on February 24, 2004. The negotiated plea included a condition prohibiting appellant from practicing medicine

in Georgia or any state contiguous to Georgia. At sentencing, the trial court modified the negotiated condition, sua sponte, to prohibit appellant from *ever* practicing medicine in Georgia or the surrounding states. Appellant moved to modify the sentence alleging that the sentence was indeterminate and thus illegal. The trial court denied the motion and appellant appealed. The Court of Appeals agreed with appellant and reversed. The Court vacated the sentence and remanded to the trial court for re-sentencing. The remittitur was dated October 25, 2005. On October 28, 2005, appellant filed a motion to withdraw his guilty plea which the trial court later dismissed on the basis that it did not have jurisdiction because the motion was filed after the term of court in which sentence was imposed. The trial court re-sentenced appellant on February 14, 2006. The Court of Appeals held that the appellant had an absolute right to withdraw his plea and reversed.

In reaching its holding, the Court found the reasoning of Mullins v. State, 134 Ga. App. 243 (214 S.E.2d 1) (1975), to be persuasive. In Mullins, Mullins' sentence was void and he filed a written motion to withdraw his guilty plea. The Court of Appeals held that the trial court erred in denying the motion to withdraw. The Court reasoned that an illegal sentence is null and void. Where a sentence is void, a valid sentence may be imposed by the court, until which time the defendant stands convicted but not sentenced. Georgia law allows a defendant to withdraw a guilty plea at any time before judgment, and judgment in this context means "sentence." Thus, Mullins had an absolute right to withdraw his guilty plea prior to re-sentencing. The Court also noted that the reasoning in Mullins is consistent with other authority indicating that the trial court retains jurisdiction over a case past the term of conviction where no legal sentence has been entered. Davis v. State, 192 Ga. 648 (1941).