

# Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING APRIL 24, 2009

## Legal Services Staff Attorneys

**David Fowler**  
Deputy Executive Director

**Chuck Olson**  
General Counsel

**Lalaine Briones**  
Legal Services Director

**Joe Burford**  
Trial Services Director

**Laura Murphree**  
Capital Litigation Director

**Fay McCormack**  
Traffic Safety Coordinator

**Gary Bergman**  
Staff Attorney

**Tony Lee Hing**  
Staff Attorney

**Donna Sims**  
Staff Attorney

**Jill Banks**  
Staff Attorney

**Al Martinez**  
Staff Attorney

**Clara Bucci**  
Staff Attorney

**Brad Rigby**  
Staff Attorney

## THIS WEEK:

- **Right to Remain Silent; Continuance**
- **Jury Charges**
- **Indigent Appointment of Counsel**
- **Search & Seizure**
- **Sufficiency of Evidence; Child Hearsay Statute**
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### **Right to Remain Silent; Continuance**

*Gipson v. State, A09A0544*

Appellant was convicted of child molestation. He argued that the trial court erred in (1) denying his motion for mistrial grounded upon a comment on his right to remain silent, and (2) denying his motion for a continuance to obtain out-of-state witnesses and new counsel. Here, the record showed that the State asked its lead investigator what he had done after interviewing the victim's mother. The witness replied that he then attempted to interview appellant who chose to "invoke his Miranda Rights and did not want to speak without an attorney." At a bench conference out of the presence of the jury, defense counsel unsuccessfully moved for a mistrial. The trial court indicated that it would give a curative instruction as a part of its charge to the jury, but later failed to do so. Appellant did not request a charge on the issue. The Court held that not every comment directed toward a defendant's silence will be cause for automatic reversal. Instead, to reverse a conviction, the evidence of a defendant's election to remain silent must

point directly at the substance of defendant's defense or otherwise substantially prejudice the defendant in the eyes of the jury. Here, the comment, by its own terms, did not sound in evidence of appellant's guilt. Nor could it be characterized as calculated to undermine his defense which was simple denial predicated on the incredibility of the victim. Therefore, the trial court did not err because the comment as to appellant's election to remain silent plainly had no direct bearing on his denial defense.

As to the denial of appellant's motion for continuance, the Court also found no error. The record showed that less than five days before jury selection, appellant sought leave of court to obtain new trial counsel because his trial counsel had failed to timely contact a defense witness located in Texas. At the time of jury selection, Gipson raised the need to obtain a second defense witness in Texas. The record showed, however, that neither witness was willing to testify. The denial of continuance may be proper where a defendant negligently fails to employ counsel promptly or where it appears that he is using the tactic for delay. Here, the trial court was authorized to conclude that the continuance was sought for delay because the defendant sought a continuance for the purpose of obtaining unavailable witnesses.

### **Jury Charges**

*Johnson v. State, A09A0281*

Appellant was convicted of burglary and forgery in the first degree. He argued that the trial court erred in charging the jury on recent possession of stolen property as an inference of guilt. The record showed that the charge the trial court gave was a pattern jury charge taken from 2 Ga. Jury Instructions —Criminal § 2.62.30 and was a correct statement of the

law. Appellant first argued that the facts did not fit the charge because he was in possession of only a single stolen item, the victim's check. The Court held that there was no merit in his contention since the inference of guilt arises from the possession of some, as well as all, of the stolen property. Appellant also argued that the charge was not warranted because he explained his possession of the check and offered some corroborating evidence. However, the Court held, the jury was still entitled to draw an inference of his guilt from his possession of stolen property if it disbelieved him. Under Georgia law, once it is shown that goods were stolen in a burglary, absence of or unsatisfactory explanation of the possession of the goods will support a conviction for burglary based upon recent possession of the stolen goods. Whether a defendant's explanation of possession is satisfactory is a question for the jury.

### **Indigent Appointment of Counsel**

*Thomas v. State, A09A0577*

Appellant, who was 19 years of age, was convicted of misdemeanor criminal trespass. He argued that the trial court should have provided him with court-appointed counsel because the trial court, in determining that he was not indigent, should not have considered the income of his mother and stepfather, with whom he resided. He relied on the definition of an "indigent defendant" in the statute establishing the Georgia Public Defendant Standards Council, which provides, in relevant part: "Indigent person" or "indigent defendant" means: A person charged with a misdemeanor, violation of probation, or a municipal or county offense punishable by imprisonment who earns less than 100 percent of the federal poverty guidelines unless there is evidence that the person has other resources that might reasonably be used to employ a lawyer without undue hardship on the person or his or her dependents." Here, the record showed that appellant was earning approximately \$428 a month, but his stepfather had a monthly income of \$4000. The Court first held that the determination of whether a defendant is indigent lies solely within the discretion of the trial court, and this determination is not subject to review. Nevertheless, where as here, a 19 year-old defendant is still residing with his parents and lists the parents' income on an affidavit of indigency,

the trial court would not be precluded from taking such income into account.

### **Search & Seizure**

*Davis v. State, A09A0657*

Appellant was convicted of trafficking in marijuana. He contended that the trial court erred in denying his motion to suppress. The evidence showed that appellant was a passenger in a vehicle that was stopped for following too closely. The officer asked the driver whether he had any explosives or weapons, large amounts of money, or drugs in the car, including marijuana. The driver said no. The officer testified that he then asked for consent to search, and the driver initially refused but then consented to the search. The marijuana was subsequently located in the trunk of the vehicle. Appellant argued that the driver said only that the officer could "look inside" the car and that therefore, searching the trunk was an unlawful extension of any valid consent given. The Court held that although the evidence was in conflict, the trial court did not err in denying the motion to suppress. Here, the officer told the driver about the problems with contraband and other illegal items being transported on state highways before making inquiry about large sums of currency or drugs. Given that the officer had placed the driver on notice that he was looking for contraband, the officer did not exceed the scope of the consent by searching the trunk of the car. Moreover, the driver did not revoke or withdraw his consent at any time.

### **Sufficiency of Evidence; Child Hearsay Statute**

*Metts v. State, A09A0202*

Appellant was convicted of aggravated child molestation, child molestation, and false imprisonment. At trial, a police investigator testified that the young victim told him that on one occasion, appellant "had locked the house, would not let her out, called her into the bedroom, and forced her to perform oral sex on him." The victim did not herself testify that appellant ever locked her in the house. Appellant contended that this testimony was inadmissible hearsay because the victim's statement that she was locked in the house was not a statement "describing any act of sexual contact or physical abuse performed with or on the child," as required by the Child Hearsay

Statute, OCGA § 24-3-16. As such, he argued, there was no competent evidence establishing the crime of false imprisonment. The Court held that while the victim's statement that appellant locked her in the house and would not let her leave did not in itself describe an act of sexual contact or physical abuse, it cannot be considered in a vacuum. A child's statement is admissible under the Child Hearsay Statute if it is an inextricable part of the child's description of the act of sexual abuse at issue. Thus, when read in context rather than in isolation, the victim's statement clearly was part of the victim's description of an act of sexual abuse, namely, appellant's act of forcing her to perform oral sex on him. The investigator's testimony concerning the victim's statement was admissible, therefore, as substantive evidence under the Child Hearsay Statute and was sufficient, standing alone, to support the false imprisonment conviction.

### **Child Hearsay Statute**

*Stegall v. State, A09A0913*

Appellant was convicted of cruelty to children. She argued that the trial court erred in admitting the victim's testimony under the Child Hearsay Statute, OCGA § 24-3-16. At trial, the victim's foster mother testified as to statements the victim had made to her concerning the abuse. The State also presented the victim as a witness, but she refused to answer questions from either the prosecutor or from defense counsel. Defense counsel thereafter moved for a mistrial or, in the alternative, to have the foster mother's testimony regarding the hearsay statements of the victim stricken from the record. She argued that the victim's refusal to answer questions at trial meant the child was unavailable to testify within the meaning of the statute. The Court disagreed. The thrust of the statute is to allow the jury, which must be convinced of guilt beyond a reasonable doubt, to judge the credibility of a child's accusations. If a child, who has reported abuse to an adult permitted to testify to the out-of-court statement at trial, is incapable of reiterating the accusation at trial or is unresponsive or evasive during cross-examination, the jury must decide the child's credibility, taking into consideration the child's maturity and ability to withstand the pressure and intimidation of the courtroom environment. The manner in which the witness responds to cross-examina-

tion is itself evidence as to credibility. The trial court therefore did not err because the victim was available to appear at trial and in fact, took the witness stand.