

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 18, 2007

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THIS WEEK:

- Evidence – Sufficiency
- Search and Seizure

Evidence – Sufficiency

Gillis v. State, A07A0822 (04/27/07)

Appellant was convicted of possession of cocaine with intent to distribute. On appeal, he alleges that the evidence was insufficient because the State failed to present evidence which connected him to the drugs in question. Appellant was a passenger in a car which was stopped because officers observed the driver and appellant not wearing seatbelts. One officer walked to the passenger side and spoke with appellant. While talking to appellant, the officer observed a “mashed up” brown paper bag under the passenger seat. The appellant stepped out of the vehicle at the officer’s request. The officer retrieved the brown paper bag and found that it contained numerous individually packaged rocks of cocaine.

At trial, the State sought to prove constructive possession through circumstantial evidence. A finding of constructive possession cannot rest upon the person’s spatial proximity to the object. Some other connection between the person and object must be shown, particularly where the object is concealed. Mitchell v. State, 268 Ga. 592 (1997). In this case, there was no evidence presented that: appellant hid the drugs; the officers observed significant movement by the occupants prior to being pulled over; and appellant knew about

the drugs. Under these circumstances, the Court of Appeals found that the jury was not authorized to find appellant in constructive possession of the cocaine. Therefore, appellant’s conviction was reversed.

Evidence - Identification

Clark v. State, A07A0134 (04/27/07)

On appeal, appellant argued that the trial court erred in allowing two witnesses to testify about their level of certainty with regard to their identification of the appellant. The appellant relied on Brodes v. State, 279 Ga. 434 (2005) to support his argument. The Court of Appeals held that the Brodes decision does not prohibit an identification witness from testifying about his or her level of certainty. In addition, the State is not prohibited from inquiring about the witness’ level of certainty. Therefore, the trial court did not err.

Search and Seizure

Young v. State, A07A0210 (05/02/07)

At a bench trial, the appellant was convicted of habitual violator and giving a false name to a police officer. On appeal, the appellant argued that the trial court erred in denying his motion to suppress. According to appellant, the officer did not have reasonable articulable suspicion for the investigatory stop. The record shows that an officer observed the appellant driving a car with a lawn mower in the trunk at 1:30 in the morning. The officer testified that a high number of thefts had been reported in the area and he was worried that the mower may have been stolen. The officer followed the appellant for two blocks and did

not observe the appellant commit any traffic violations. The officer then initiated a stop to investigate whether the mower was stolen. The officer subsequently discovered that the appellant did not have a driver's license and was a habitual violator.

“The act of driving at night, lawfully, on a public road in a high crime area does not justify an investigative stop in the absence of additional circumstances.” Lyttle v. State, 279 Ga. App. 659 (2006). In this case, there was no evidence of any “additional circumstances.” The officer was unable to recall any recent theft reports and was not on the look out for a stolen mower. Further, the officer did not observe the appellant commit a traffic violation. Therefore, the Court of Appeals held that the officer did not have a particularized and objective reason to suspect appellant of criminal activity. Thus, the trial court erred and its judgment was reversed.

Foster v. State, A07A0334 (05/02/07)

After a stipulated bench trial, the trial court convicted appellant of possession of cocaine and possession of less than an ounce of marijuana. On appeal, appellant contends that the trial court erred when it denied his motion to suppress. The records shows that an officer was patrolling a high-drug crime area when he saw the appellant sitting in a parked car some distance from the entrance to a hotel. The officer parked his patrol car and approached the appellant. By the time the officer approached the car, the appellant had already gotten out of the vehicle. The officer greeted the appellant and asked whether he could speak with appellant. The appellant stated that he could. The appellant became nervous and placed his hands inside his pockets despite the officer's requests to remove them from his pockets. The officer asked appellant whether he had any drugs or weapons, and the appellant stated that he did not. The appellant gave the officer consent to search his pockets. The officer found a marijuana blunt inside appellant's right front jacket pocket. The officer arrested appellant. Subsequent to the arrest, officers recovered additional marijuana and crack cocaine from appellant's person and vehicle.

The Court of Appeals found that based on the testimony of the officer the trial court was authorized to conclude that the first-tier encounter was consensual and that appellant's consent to search was voluntarily given. However, the officer testified that the consent by appellant was given to search his pockets for weapons out of concern for officer safety. Therefore, the officer was required to pat down first, and intrude into the pocket only if he came upon something that felt like a weapon. The Court noted that the “plain feel” doctrine permits an officer to seize an item when during a lawful pat-down an officer feels an object whose contours or mass make it easily identifiable as contraband. Here, the officer testified that he knew it was marijuana by looking at the blunt, smelling it and breaking it open. Therefore, the item was not immediately identifiable to the officer as contraband. It was only when the officer removed the object from appellant's pocket did he determine that it was contraband. The Court of Appeals held that the trial erred in denying appellant's motion to suppress and reversed.