

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING MAY 23, 2008

Legal Services Staff Attorneys

David Fowler
Deputy Executive Director
for Legal Services

Chuck Olson
General Counsel

Joe Burford
Trial Services Director

Lalaine Briones
Trial Support

Laura Murphree
Capital Litigation

Fay McCormack
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:

- Sentencing
- Fatal Variance and Jury Charge
- Search & Seizure and Hearsay
- Search & Seizure
- Criminal Practice: Search & Seizure
- Sentencing, Recidivist
- Sex Offender Registry and Ex Post Facto Law
- Theft by Deception, Accusation
- Evidence – Bad Character

Sentencing

Henry v. State; A08A0264

Appellant was indicted on one count of vehicular homicide in the first degree and two counts of felony hit-and-run. Following a bench trial, appellant was convicted on each count of the indictment. After merging Count 2 with Count 1, appellant was sentenced to fifteen years confinement as to Count 1 and five years probation as to Count 3. Upon his initial appeal, appellant's conviction for vehicular homicide was reversed and the case was remanded to the trial court for sentencing on the lesser included offense of felony-hit-and-run. On resentencing, the trial court sentenced appellant to five years confinement on Count 2 and five years confinement on Count 3. On appeal, appellant contends that the trial court erred in resentencing him as to Count 3 for lack of jurisdiction.

The Court of Appeals found that the trial court lacked jurisdiction to resentence appellant to Count 3 because the trial court was

directed to sentence appellant only to Count 2. Because the trial court was not authorized to resentence appellant as to Count 3, the judgment of the trial court was affirmed in part and reversed in part.

Fatal Variance and Jury Charge

Quiroz v. State; A08A0648

On appeal from his conviction for aggravated assault, appellant contends that a fatal variance existed between the allegations of the indictment and the proof. The record shows appellant hailed a cab, opened a pocketknife, pointed it at the driver and demanded money. The indictment alleged that appellant made an assault upon the driver with a deadly weapon, by holding a knife to the neck of the driver. The driver testified that appellant never held the knife to his neck. During deliberations, the jury inquired whether the State had to prove what it stated in the actual charge or does it need only meet the definition of the offense. The trial court answered, "Whether you think what's put in that indictment is an essential element of the charge, reading it in conjunction with all the other charges I gave you, is up to you."

The Court of Appeals found that because the indictment informed appellant of the aggravated assault charge, and because he could not be prosecuted again for that offense, the variance between the allegation and proof was not fatal. The Court further held that the trial court's recharge forced the jury to answer its own question of law concerning what the state was required to prove, and was so erroneous that it rendered the entire charge defective and denied appellant a fair trial. Judgment reversed.

Search & Seizure and Hearsay

Bell v. State; A08A0548

Following a jury trial, appellant was convicted of driving under the influence, driving with a suspended or revoked license, and failing to maintain his lane. On appeal, appellant contends that the trial court erred in denying his motion to suppress and that the traffic stop was not supported by probable cause. The evidence shows that a police officer noticed appellant make a wide sweeping turn into the middle of the highway, drift in and out of lanes, crossing the center line several times. The officer who conducted the traffic stop testified at trial but not at the suppression hearing. At the suppression hearing, the court allowed a second officer to testify to what the first officer told him about the reasons for stopping appellant. Appellant contends that the second officer's testimony constituted inadmissible hearsay and thus there was no evidence of probable cause to initiate the traffic stop.

The Court of Appeals found that in reviewing the denial of the motion to suppress the Court must consider all the evidence of the record, including evidence introduced at trial. Because the officer testified at trial that he observed appellant drift into the adjacent lane more than seven times constitutes probable cause sufficient to justify the traffic stop. The judgment of the trial court was affirmed.

Search & Seizure

Oldfield v. State; A08A0053

After a bench trial, appellant was convicted of possessing cocaine and a drug related object. On appeal, appellant contends that the trial court erred in denying his motion to suppress all evidence seized by the police, arguing that the officer improperly searched his truck. The record shows that a police officer observed appellant and a female standing with an open beer bottle on the truck bumper. The officer then looked through the truck window and observed another open bottle of beer; the officer entered the truck to remove the beer. While inside, he saw a marijuana pipe as well as a rolled-up \$20 bill and a plastic frisbee containing white powder on the floorboard.

The Court of Appeals found that the officer was lawfully standing outside the truck

when he observed an open, partially filled beer bottle inside the vehicle. Because the officer reasonably believed that the open beer bottle was contraband, the Court concluded that such belief gave the officer probable cause and authority to enter the vehicle, and once inside the vehicle, the officer was permitted to confiscate other suspected contraband that he saw in plain view. Thus, the trial court properly denied appellant's motion to suppress. Judgment affirmed.

Teal v. State; A08A0664

Following a bench trial, appellant was convicted of possession of cocaine with intent to distribute and possession of marijuana with the intent to distribute. On appeal, appellant contends that the trial court erred in denying his motion to suppress evidence seized during an allegedly unlawful search. The record shows that police officers stopped a car in which appellant was a passenger so that they could serve an active warrant on the driver. One of the officers asked appellant to exit the vehicle and turn around so that he could conduct a Terry pat-down search. A search of appellant's pockets produced baggies containing a total of 4.24 grams of crack cocaine and 17.5 grams of marijuana.

The Court of Appeals found that an officer must provide evidence to show that an act alleged to be performed for his safety or the safety of others was actually performed for that purpose in conformance with the requisite standards of Terry. Because the evidence in this case did not show that the officer had a reasonable basis for concluding that appellant was armed and dangerous prior to performing his automatic and habitual pat-down, the pat-down was constitutionally improper. Judgment reversed.

Criminal Practice: Search & Seizure

State v. Sawyer; A08A0638

The State appeals from the trial court's order granting defendant's motion to suppress evidence of methamphetamine found by the police during a burglary investigation. The State contends that the trial court erred in granting defendant's motion upon finding her consent to search invalid based upon an

impermissibly expanded investigative stop. The evidence shows that during a burglary investigation the officer did a record check on the defendant. While the record check was in progress, the officer asked the defendant for consent to search her pockets. The defendant consented and methamphetamine was found. The trial court concluded that defendant's consent to search was invalid because the officer impermissibly expanded his investigative stop for lack of evidence of other criminal activity.

The Court of Appeals found that because the officer asked for defendant's consent to search before the record check had been completed the purpose of the officer's investigative stop had not been fulfilled at the time the officer asked his question. Questioning unrelated to the purpose of an initial stop is proper so long as it does not prolong the duration of the same. Judgment reversed.

Sentencing, Recidivist

Woodall v. State; A08A0321

A jury convicted appellant of one count of criminal intent to possess oxycodone with intent to distribute and was sentenced as a recidivist to thirty years confinement, to serve twenty in confinement and the remainder probated. On appeal, appellant contends that the trial court erred in sentencing him as a recidivist based on his 1982 and 1983 convictions for burglary upon guilty pleas. The record shows and the State concedes, that neither record of prior conviction shows that appellant was represented by counsel or that he waived representation.

The Court of Appeals affirmed the judgments of conviction as to the instant charged offenses but found clear error with respect to sentencing because the State failed to show that appellant's prior convictions were adjudged upon the evidence of counsel or following the waiver thereof. Judgment affirmed in part and case remanded in part with direction.

Sex Offender Registry and Ex Post Facto Law

Miller v. State; A08A0173

Appellant appeals from the trial court's order denying his petition for release from the requirement that he register as a sexual

offender for life. Appellant argues that he is entitled to release because the State failed to meet its burden of showing that he poses a substantial risk of re-offending in opposition to his prima facie case to the contrary. Alternatively, appellant contends that the duty to register is unconstitutional as an ex post facto law. The record shows that appellant pled guilty to three counts of child molestation involving inappropriate touching and an act of fellatio on his three daughters. In support of his petition, appellant presented testimony that he was a man of good character and that since his release from prison he had proceeded with his life without complaint of any impropriety, sexual or otherwise. In other testimony, appellant acknowledged that an open Department of Family and Children Services case existed as to one of his daughters and grandchildren.

The Court of Appeals found that given the foregoing, the trial court could reasonably have concluded that appellant failed to present prima facie evidence demonstrating that he no longer posed a substantial risk of reoffending entitling him to release from the registration requirement. Furthermore, the Court held that appellant's failure to abide by the requirement to register as a sexual offender would result in a new crime based in part on his status as a child molester, and thus the statute is not retrospective and therefore not an ex post facto law. Judgment affirmed.

Theft by Deception, Accusation

Bruster v. State; A08A0716

Following a bench trial, appellant was convicted of one count of theft by deception. On appeal, pro se, appellant contends that the trial court erred in denying his motion to dismiss upon the claim that the warrant for his arrest was invalid. The record shows that appellant entered a grocery store, selected a slip cover and asked for a sticker that would permit him to return it, gave the slipcover to his accomplice who returned it and received a gift card as a refund.

The Court of Appeals found that the trial court did not err in denying appellant's motion to dismiss for any infirmity in the arrest warrant because appellant did not identify any evidence obtained as a result of his arrest and there is no requirement that a misdemeanor

accusation be based on an arrest warrant. Judgment affirmed.

Evidence – Bad Character

Finnan v. State; A08A0613

Following a jury trial, appellant was convicted of two counts of aggravated child molestation, four counts of child molestation, two counts of aggravated sexual battery, one count of enticing a child for indecent purposes, and one count of giving a false name to a law enforcement officer. On appeal, appellant claims the trial court erred in allowing the State to introduce evidence of his general bad character. The record shows that appellant licked and kissed the feet of a thirteen-year-old girl against her will and forcibly rubbed her feet on his genitals. The trial court allowed the State to introduce evidence that appellant changed his name because he had people looking for him and that appellant had a foot fetish. The Court of Appeals found that the testimony was relevant to support the charges against appellant. Judgment affirmed.