

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING MAY 30, 2008

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## THIS WEEK:

- Evidence - Discovery of Chemical Testing Source Codes
- Fatal Variance Rule
- Defendant's Statement and Miranda
- Defendant's Statement

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### *Evidence - Discovery of Chemical Testing Source Codes*

Hills v. State, A08A0726

Appellant filed a motion for discovery seeking to obtain the source codes of the Intoxilyzer 5000. When the trial court denied the motion, appellant requested interlocutory review of the decision. The court granted the motion because the admission of Intoxilyzer 5000 source codes has not previously been addressed by the appellate court. Premitting whether the Intoxilyzer 5000 source code is a "scientific report" as defined by OCGA §17-16-23, before discovery will be ordered, the defendant must make a prima facie showing that the requested evidence is within the possession, custody or control of the State. The State is only required to produce "written scientific reports in the possession of the prosecution." Appellant offered no evidence that the Intoxilyzer 5000 software was created by the State or that the State owned the codes or that the State was in possession or control of the codes. Because appellant failed to make a prima facie showing, the Court held that the Intoxilyzer 5000 source codes are not discoverable.

### *Fatal Variance Rule*

Council v. State, A08A0736

Appellant claims that a fatal variance existed between the conduct alleged in the accusation and the conduct offered as proof at trial. However, in Delacruz v. State, 280 Ga. 392 at 396 (2006), the Supreme Court of Georgia held that: "our courts no longer employ an overly technical application of the fatal variance rule, focusing instead on materiality. The true inquiry is not whether there has been a variance in proof, but whether there has been a variance as to affect the substantial rights of the accused. The underlying reasons for the rule must be served: (1) the allegation must definitely inform the accused as to the charges against him so as to enable him to present his defense and not to be taken by surprise, and (2) the allegations must be adequate to protect the accused against another prosecution for the same offense. Only if the allegations fail to meet these tests is the variance fatal." Appellant argued that the accusation read that he failed to remain in his vehicle; but, at trial the State only proved he failed to return to his vehicle. Nevertheless, the record showed that the police officer instructed appellant to remain in his vehicle and that he failed to comply. The Court of Appeals held that no fatal variance existed.

### *Defendant's Statement and Miranda*

Smith v. State, A08A0135

Appellant signed a waiver of his Miranda rights. On appeal, appellant claims he did not understand what was being read to him. The officer that took appellant's statement

testified that he informed appellant of his right to an attorney but that appellant never asked for an attorney. The officer also testified that appellant never indicated that he did not understand his rights. Appellant argues that his inability to read and his confusion as to whether he could have an attorney at the time he made his statement to the police should have rendered his statement inadmissible at trial. The trial court found that appellant was informed of his rights and that his statement was voluntary. Though the education of a defendant is one factor to consider when deciding the voluntariness of a defendant's statement, the court must consider the totality of the circumstances. The trial court's conclusions regarding the facts and the credibility of witnesses will not be disturbed unless it is clearly erroneous. Therefore, the Court of Appeals affirmed the judgment of the trial court.

feigned an interest in appellant's wife, the trial court was authorized to find that appellant's statement was voluntary and admissible. The Court of Appeals affirmed the judgment of the trial court.

## ***Defendant's Statement***

Smith v. State, A08A0016

During an interview with appellant, the investigator told appellant that his wife was a target of the investigation. Appellant argues that his statement made to the police during this interview was involuntary because it was induced by a threat that his wife was being "targeted for an arrest." At the conclusion of a Jackson-Denno hearing, the trial court ruled that appellant's statement was voluntary. While there may be circumstances during an interrogation when an officer's suggestion that a suspect's family member is the target of an investigation could create a fear of inquiry that invalidates a confession, the facts in this case do not require this conclusion. Here, the investigator made the suggestion in order to deflect appellant's attention away from his wife's involvement in the case because she was in fact the tipster who provided the information which led to appellant's subsequent arrest. Furthermore, appellant never tried to "save" his wife. To the contrary, appellant implicated his wife in several illegal activities once he was notified of the investigator's intent to target her. An indication by the police that they are considering charging a defendant's girlfriend or wife with a crime does not necessarily render a confession involuntary. Under these circumstances, even if the investigator had