

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JUNE 1, 2007

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## THIS WEEK:

- **Sufficiency of Evidence**
- **Evidence: Res Gestae**
- **Evidence: Search Warrant, Affidavit**

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### *Sufficiency of Evidence*

Bragg v. State, A07A0443 (05/16/07)

Appellant challenges his conviction for aggravated stalking, arguing that it cannot stand because the victim initiated the contact which served as the basis of the charge. Under O.C.G.A. § 16-5-91(a):

“A person commits the offense of aggravated stalking when such person, in violation of a... condition of probation... follows, places under surveillance, or contacts another person at or about a place or places *without the consent* of the other person for the purpose of harassing and intimidating the other person.”

In the present case, the victim testified that she had agreed to meet the appellant. The contact between the appellant and the victim was with her consent. The Court of Appeals held that the evidence was, for these reasons, insufficient to support appellant's conviction for aggravated stalking.

### *Evidence: Res Gestae*

Smith v. State, A07A0780 (05/25/07)

Appellant was convicted of cocaine possession. On February 1, 2006, Officers Thompson and Jordan served two arrest warrants at a residence, including one for the

arrest of appellant. When the two officers approached the residence they saw five men standing outside and ordered them to get on the ground. All of the men obeyed, except for appellant, who instead threw a small metal object to the ground. This object was later identified as a metal pipe used to smoke crack cocaine.

Appellant contends that the trial court erred in allowing Officer Jordan to testify that she was looking for the appellant on February 1, 2006 because she possessed a warrant for his arrest on charges of burglary. The trial court admitted the testimony as part of the res gestae but gave a curative instruction. Appellant contends that the reference to an arrest warrant in an unrelated case was impermissible character evidence and was also inadmissible to explain conduct.

The Court of Appeals disagreed with appellant, reasoning that the reference to the warrant was part of the circumstances surrounding appellant's arrest and all those circumstances are admissible for whatever value the jury desires to place on them. Further, the Court explained that unless clearly erroneous, the Court will not disturb a trial court's determination that res gestae is admissible.

### *Evidence: Search Warrant, Affidavit*

State v. Owens, A07A0328 (05/11/07)

The State appeals the trial court's order granting appellee's motion to suppress contraband found in her home pursuant to a search warrant. The Court of Appeals found that the trial court had correctly determined

that omissions of material fact in the affidavit used to obtain the search warrant erroneously led the issuing magistrate to conclude that probable cause existed for the issuance of the search warrant.

On February 11, 2006, appellee's 8-month-old daughter was taken to the emergency room by a babysitter and was found to have high levels of cocaine in her system. Appellee was not breastfeeding so the cocaine was allegedly ingested. The babysitter had the baby for approximately nine hours before taking the baby to the hospital, but this fact was not revealed to the magistrate. The affidavit instead allowed the assumption that the babysitter took the baby to the hospital as soon as she took the baby to her home and noticed the baby's condition. The affidavit also failed to reveal that the babysitter had previously asked for custody of the baby and still wished to seek custody of the baby. The Court found that these were material facts that would be highly influential in deciding whether probable cause existed to issue the warrant and should not have been excluded.

The affidavit also failed to include the fact that the babysitter and appellee's parents did not indicate that they had seen drugs at appellee's residence. The investigating officer also omitted from the affidavit the fact that he had visited appellee's residence the day before applying for the warrant and spent 15-20 minutes examining the different rooms, failing to find any contraband. This last omission, the Court found, would have been detrimental in determining whether probable cause existed to issue the search warrant.

The Court of Appeals reasoned that the material information which was excluded from the affidavit denied the issuing magistrate the opportunity to accurately assess whether or not probable cause existed to issue a search warrant. The Court of Appeals held that the trial court correctly found that there was no substantial basis to find probable cause to issue a search warrant.