Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 27, 2008

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THIS WEEK:

• Jury Selection
• Chain of Custody
• Search & Seizure

Jury Selection

Cox v. State, A08A0066 (06/11/08)

On appeal, appellant argues that the trial court erred and violated O.C.G.A. § 15-12-166, when it permitted the State to strike a juror after the panel had been selected. According to appellant, the trial court should have granted his motion for new trial based on that error. O.C.G.A. § 15-12-166 provides: "a juror, after acceptance by both the State and defense, shall be sworn and that after the defense has accepted a juror, the State cannot then change its mind and excuse the juror." Sakobie v. State, 115 Ga. App. 460 (154 S.E.2d 830) (1967). After fourteen jurors were named and seated in the jury box, the prosecutor immediately realized that he had mistakenly failed to write down one of his strikes and notified the court. The State had only used three of its strikes. The trial court announced that a mistake had been made and excused the juror in question. Thus, the trial was conducted with one alternate rather than two.

The Court of Appeals held that the trial court did not err in denying appellant's motion for new trial. The Court noted that the State mistakenly failed to record its intention to strike a juror. The State immediately notified the trial court, who permitted the State to exercise a remaining strike to excuse the juror. The trial court's action in correcting the mistake was intended to preserve the strikes allowed to the State and not to circumvent O.C.G.A. § 15-12-166. See Thompkins v. State, 181 Ga. App. 158 (351 S.E.2d 475) (1986). A defendant has no vested right to a particular juror. Here, appellant does not assert that any of the remaining jurors were unacceptable. Furthermore, appellant did not assert that the trial court's procedure forced him to use a peremptory strike improperly. Thus, appellant failed to show that any harm resulted. Harm, as well as error, must be shown to authorize a reversal.

Chain of Custody

Ray v. State, A08A0714 (06/12/08)

Appellant was convicted of possession of cocaine with intent to distribute. On appeal, appellant alleges that the trial court erred in admitting into evidence the crack cocaine found on his person on the basis that the State failed to establish chain of custody. The arresting officer took custody of the drugs, sealed and packaged the contraband, completed an evidence card and placed it in a locked evidence room. The GBI lab in Macon received the evidence for testing. As a result of staff shortages, the evidence was transferred to the GBI office in Columbus where it was tested by Matthew Simon. At the motion to suppress hearing, Simon testified that the crack cocaine was sealed in the evidence bag when he received it for testing. Appellant asserts that the trial court should have excluded the evidence because the State failed to present testimony regarding who transported the drugs from Macon to Columbus. The Court of Appeals found no merit in appellant's argument. Here, appellant failed to demonstrate any evidence of tampering. Mere speculation of tampering

does not require that evidence be excluded. "Absent affirmative evidence of tampering, a crime lab and all its branch offices and employees are considered as a single link in the chain of custody."

Search & Seizure

State v. Melanson, A08A0035 (06/06/08)

The State appealed the trial court's judgment granting appellee's motion to suppress. The record shows that a police officer received a report from dispatch regarding suspicious persons at a McDonald's. The officer went to the restaurant and spoke to the McDonald's employee who had made the 911 call. The employee stated that two men in a blue Cadillac pulled up to the drive-through window, banged on it and were cursing. After the employee identified the car, the officer followed the car out of the McDonald's parking lot and stopped it less than a block away. During the stop, appellee, who was the driver admitted to being at the restaurant but denied any wrongdoing. The officer smelled the odor of alcohol on appellee's breath. After an investigation, appellee was cited for DUI. At the motion to suppress, appellee argued that evidence of his DUI was obtained during an illegal traffic stop. The trial court granted the motion. The trial court found that there was no allegation that a crime had occurred or was suspected of having occurred. The trial court further found that the officer did not have authority to stop the car after it had left the McDonald's parking lot.

The Court of Appeals concluded that the trial court's judgment represented a misapplication of the relevant law. The Court opined that the information provided by the employee demonstrated that occupants of the car had engaged in a possible crime - disorderly conduct. The facts provided by the employee gave the officer grounds for conducting a brief traffic stop. Therefore, the trial court committed clear error when it concluded that the officer lacked reasonable, articulable suspicion to stop appellee's car. The Court of Appeals further held that the trial court erred when it ruled that the officer did not have authority to investigate the reported incident after the car had left the McDonald's parking lot. The judgment of the trial court was reversed.

Wolf v. State, A08A0620 (06/12/08)

While working an off-duty security job during a concert, a POST-certified police officer found a wallet lying on the ground. The officer picked up the wallet and looked inside. The officer found a driver's license belonging to the appellant; at this point the officer did not see any contraband in the wallet. The officer and others working security then looked for the wallet's owner. While holding the wallet, the officer felt "something granular crunching around inside the wallet." The officer opened the wallet a second time and located methamphetamine. Next, the officer searched the wallet a third time looking for an automobile insurance card in an attempt to help locate the owner's car. Appellant was subsequently located and arrested. Appellant's motion to suppress was denied and now he appeals the judgment of the trial court.

The Court of Appeals held that the second search by the officer into the wallet violated appellant's Fourth Amendment rights. The Court of Appeals found that the trial court's conclusion that because appellant had lost his wallet, he had lost all expectation of privacy in the property was erroneous. The Court of Appeals noted that there was a distinction between losing a wallet and "abandoning" it. The law is well settled that when a defendant "voluntarily abandons" property he has no standing to complain of a search or seizure of that property. Whether a defendant has abandoned his personal property hinges on his intent. Here, the Court of Appeals found no evidence that the loss of appellant's wallet was either voluntary or knowing. The Court likened appellant's wallet to a brief case or other closed container, which are traditionally repositories for items of a private nature. Thus, one does have an expectation of privacy in a wallet. The Court of Appeals then addressed the question of whether an owner of lost but not abandoned property retains an expectation of privacy in that item. The Court looked to other jurisdictions in order to resolve this question. Other jurisdictions have concluded that "a person's privacy interest in a wallet or other personal item does not disappear because the item has been lost or mislaid. However, the privacy interest is diminished to the extent that the police may examine the item as necessary to determine the identity of the rightful owner." The Court found that this reasoning comports with its previous holding in Berger v. State, 150 Ga. App. 166 (257 S.E.2d 8) (1979). In Berger, an officer searched a lost briefcase looking for identification. During the course of that search marijuana was found, and was later properly admitted into evidence at trial. Here, the Court found that the second search which revealed the contraband was not undertaken to identify the owner. Therefore, the second search of appellant's wallet was invalid.