

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JUNE 5, 2009

Legal Services Staff Attorneys

David Fowler
Deputy Executive Director

Chuck Olson
General Counsel

Lalaine Briones
Legal Services Director

Joe Burford
Trial Services Director

Laura Murphree
Capital Litigation Director

Fay McCormack
Traffic Safety Coordinator

Gary Bergman
Staff Attorney

Tony Lee Hing
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Brad Rigby
Staff Attorney

THIS WEEK:

- **Jury Charges**
- **Disclosure of Identity of C.I.; Voir Dire**
- **Habitual Violator**
- **Statements; Demonstrative Evidence**
- **Evidence; Sex Offender Registration**
- **Continuance; Evidence**
- **Hearsay**

Jury Charges

Robinson v. State, A09A0557

Appellant was convicted of trafficking and selling cocaine. During jury deliberations, the juror foreperson told the court, "There's really half of everybody wants more evidence, and they can't get over the fact that they have to deal with what's going on in this case and . . . is there any way you could address and let everyone know . . . that they have to deal with what is going on in this case?" The trial court responded: "What is evidence, who has the burden of proof, what does reasonable doubt mean, circumstantial evidence, direct evidence. I sent out the bulk of my charges, and I think, if you would just read them and remember what I said, it answers your questions. All right. But you do have to base your decision on the evidence that's before you, not what you would have liked to have seen. You can't go back and start making up evidence and things on your own. You have to base your decision . . . if you can, on the evidence that's presented." Appellant argued that this instruction prevented the jury from considering the lack of evidence presented as raising a reasonable doubt. The Court dis-

agreed. It held that the trial court thoroughly defined reasonable doubt in its initial charge and explained that it could arise from a lack of evidence. The jury had a copy of those charges to consider during deliberations, and the charges taken in their entirety would not mislead a jury of average intelligence to consider only the evidence presented and not consider appellant's argument that the lack of certain evidence cast doubt upon the detective's credibility.

Disclosure of Identity of C.I.; Voir Dire

Pineda v. State, A09A0108

Appellant was convicted of trafficking in methamphetamine. He argued that the trial court foreclosed his ability to present a lack of knowledge defense by preventing him from challenging the existence of the C. I. The evidence showed that officers sent in a C. I. to meet with appellant. Appellant agreed to sell the C. I. a quantity of methamphetamine. The officers followed appellant back to his apartment and watched him load a cooler in his vehicle and then begin driving back to meet with the C. I. The officers stopped appellant's vehicle for speeding, and after a drug dog alerted on the vehicle, discovered the drugs in the cooler. Prior to trial, the court denied appellant's motion to disclose the identity of the C. I. Appellant was twice prohibited from arguing the existence of the C. I. during opening statements.

The Court held that his contention was meritless. It noted that appellant's indicated key defense was to attack the lead detective's credibility with his lies from a preliminary hearing and show that he fabricated the existence of the C. I. The trial court allowed him

a thorough and sifting cross-examination of this detective. Thus, the trial court's actions in limiting defense counsel's argument were not harmful to his lack of knowledge defense and given the testimony that the officers observed appellant carry a the container in which the drugs were located from his apartment and place it in the back of his vehicle, it was highly unlikely that the jury would have reached a different verdict had the trial court given appellant's trial counsel more leeway to argue that no C. I. existed.

Appellant also argued that the trial court erred by failing to take action to ensure that the voir dire of the venire was translated in its entirety for his benefit. The record showed that two-thirds of the way into voir dire, the trial court determined that the interpreter was not translating the proceedings for appellant and directed the interpreter to begin doing so. A criminal defendant's right to be present during all critical stages of the proceedings is a fundamental right. It is undisputed that appellant was present during voir dire. The Court held that the fact that he may have "missed" some portion of the colloquy between counsel and 24 potential jurors did not compromise his right to be present on a constitutional scale. Once the trial court noticed that the interpreter was not translating the proceedings, he quickly advised the interpreter to commence translating. Therefore, there was no error.

Habitual Violator

Eason v. Dozier, A09A0076

Appellant appealed from an order revoking his license as a habitual violator. The record showed that appellant was convicted of first degree vehicular homicide, DUI, racing, and failure to maintain lane on October 7, 2004. He surrendered his driver's license to the Department of Corrections when he entered prison in January 2005. On August 28, 2007, DDS sent notification to him that as of September 11, 2007, he would be declared a habitual violator, pursuant to OCGA § 40-5-58, and he would not be eligible for reinstatement of his license for five years from the later of September 11, 2007, or the date upon which he surrendered his license to DDS (September 20, 2007). The declaration was based on appellant's 2004 convictions.

Appellant contended that he should have

been declared a habitual violator in October 2004 or alternatively, the court should have considered his license revoked as of the time he entered the correctional facility in January 2005. He argued that he is being penalized for the failure of the court of conviction to timely transmit the record of his convictions to DDS, and he was penalized because he could not surrender his license to DDS during the time he was incarcerated. The Court held that under OCGA §40-5-53 (b), a court of conviction is required to transmit notification of applicable convictions to DDS within ten days of the date of conviction, but a trial court's failure to timely transmit the records, which failure results in delayed revocation of an individual's license, does not affect the validity of the revocation or the calculation of the five-year period. Thus, even if appellant could have been declared a habitual violator as early as October 2004, he was not declared a habitual violator until September 11, 2007. Therefore, under the plain language of the statute, his license could not have been revoked based on his status as a habitual violator until the later date. Moreover, while his license may have been held by the Department of Corrections while he was incarcerated, his five-year revocation period may not be reduced by that time because he had not been declared a habitual violator by DDS.

Statements; Demonstrative Evidence

Baez v. State, A09A0221

Appellant was convicted of armed robbery. He challenged the admission of a statement into evidence and the State's use of two handguns as demonstrative evidence. The evidence showed that appellant attacked the victim in the victim's garage. Using a gun to threaten the victim, appellant stole the victim's car. Appellant was spotted in the car by law enforcement and led them on a high speed chase which resulted in appellant crashing the vehicle and attempting to flee on foot. Appellant was subsequently chased down, arrested and *Mirandized*. He gave a statement to an officer ("First Officer"). Another officer then transported him to the hospital because of his injuries sustained during the crash of the stolen vehicle he was driving. That officer stayed with appellant until he was relieved by another officer ("Second Officer") an hour or

so later. The Second Officer, without reading appellant his *Miranda* rights, then engaged appellant in conversation and appellant gave another incriminating statement. Appellant contended that the trial court erred in admitting his custodial statement to the Second Officer because he failed to re-*Mirandize* him or remind him of his *Miranda* rights. The Court disagreed. If a defendant has been informed of his *Miranda* rights, he should be reminded of those rights prior to each subsequent interrogation. However, where one investigating officer is replaced by another with no significant lapse in time, it is not considered a subsequent interrogation, but a continuation of the original interrogation. Here, only a few hours elapsed between the time the First Officer read appellant his *Miranda* rights and the time appellant gave his statement to the Second Officer. Consequently, the Second Officer was not required to re-appraise him of his *Miranda* rights, as his inquiry was no more than a continuation of the First Officer's questioning.

Appellant also argued that the trial court erred in allowing the State to use two handguns that were unrelated to the crime as demonstrative evidence because he denied possession of a gun. Here, the trial court allowed the State to show the victim two handguns for demonstrative purposes to determine which gun was similar to the one that appellant used to rob him. The Court held that a weapon that was not actually used in the commission of an offense, but which is similar to that which was so used is generally admissible into evidence. Thus, where, as here, the victim of a crime identified a weapon as similar to that used in the commission of the crime, the weapon was admissible whether or not it is the identical weapon.

Evidence; Sex Offender Registration

Hollie v. State, A09A0667

Appellant was convicted of aggravated child molestation, aggravated sexual battery, and four counts of child molestation. He argued that the trial court improperly limited his cross-examination of the victim, and challenged the trial court's requirement that he register as a sex offender. At trial, the appellant tried to impeach the victim with an e-mail she allegedly sent to her cousin. The content of the

message was not revealed because the victim testified that she did not write it nor did she recognize it. When appellant attempted to introduce the document into evidence, the state objected that the proper foundation had not been laid, and the trial court agreed. The Court found no error. A writing will not be admitted into evidence unless the offering party tenders proof of the authenticity or genuineness of the writing. There is no presumption of authenticity, and the burden of proof rests upon the proffering party to establish a prima facie case of genuineness. Appellant did not offer any evidence in an attempt to satisfy his burden of proof to establish a prima facie case of genuineness, other than having the victim testify to her e-mail address. Though the e-mail transmission in question appears to have come from the victim's e-mail address, this alone did not prove its genuineness. Moreover, the victim was never asked if she told anyone that she was lying about appellant or if she was trying to exact revenge for appellant lying to her. Had this testimony been elicited from her, the Court noted, the e-mail transmission may have been admitted for purposes of impeachment.

Appellant also argued that the trial court erred when it required him to submit to lifetime registration as a sex offender because the trial court exceeded the maximum sentence allowed under OCGA § 16-6-4. The Court held that designation of a person as a sexual offender is neither a sentence nor a punishment but simply a regulatory mechanism and status resulting from the conviction of certain crimes. Consequently, a lifetime registration requirement does not extend the maximum sentence allowed under OCGA § 16-6-4.

Continuance; Evidence

Green v. State, A09A0535

Appellant was indicted with three co-defendants, but tried separately and convicted of attempted trafficking in marijuana and possession of a firearm during the commission of a felony. He contended that the trial court abused its discretion in denying his motion for a continuance so that he could interview a co-defendant, whose name had not appeared on the state's witness list. The witness list rule is designed to prevent a defendant from being surprised at trial by a witness that the defendant has not had an opportunity to interview. But, when a witness' name is contained in the

indictment, a defendant cannot validly contend that he had been surprised or unable to interview the witness in question through lack of knowledge of such witness. Therefore, the Court held, because the witness was named in the indictment as a co-defendant, appellant had notice that the witness might be called as a state's witness and the denial of a continuance was not an abuse of discretion.

Appellant also contended that he was denied his right to confrontation because the trial court allowed the State (a) to continue asking leading questions to the same witness co-defendant after it was clear that he was unwilling to testify and (b) to have the investigator read to the jury portions of the transcript of the witness' testimony at the witness' prior trial and the witness' prior statement to the police. The Court found no error. The main and essential purpose of confrontation is to provide the opportunity for cross-examination. Appellant could have subjected the witness to cross-examination, but expressly declined the opportunity. Hence, no effort was made by defense counsel to ascertain whether the witness would continue his refusal to answer certain questions or would offer testimony in explanation of his prior trial testimony or in exculpation of appellant. Under these circumstances, the Court held, appellant "was not denied the right of confrontation, he simply did not exercise it." Moreover, while the failure to cross-examine may not waive a confrontation clause claim if it is clear from the record that an attempt at cross-examination would have been futile, that was not the case here, because the witness refused to answer some but not all of the questions posed to him by the State.

Finally, appellant contended that the state improperly placed his character in issue when it introduced evidence of his prior arrest record through the case agent. The evidence showed that during cross-examination, defense counsel questioned the case agent about an information sheet filled out when appellant was processed after his arrest. Defense counsel elicited testimony from the case agent that on the information sheet, appellant indicated that he had never been arrested or convicted of a crime. The Court held that since the only conceivable purpose of defense counsel's question was to elicit testimony concerning appellant's character, defense counsel opened the door to the state's rebuttal character evi-

dence on the same specific subject. Thus, the State then was allowed on redirect examination of the case agent to introduce evidence that appellant had two prior arrests.

Hearsay

Boivin v. State, A09A0381

Appellant was convicted of theft by taking a 16-foot utility trailer. He admitted at trial to possessing the trailer but asserted that he had purchased it from another person named Michael Harrington. The evidence showed that appellant parked the trailer on the property of Gibby. Gibby became suspicious when appellant told Gibby the amount of money paid for the trailer. Appellant was subsequently arrested after it was determined that it was stolen from a third party. Over the State's hearsay objection, defense counsel was prohibited from asking Gibby about an encounter he had with a person named "Mike." The evidence would have shown that after law enforcement returned the trailer to its owner, someone Gibby knew as "Mike" came to Gibby's property looking for the trailer and claimed it was his; that Gibby and Mike argued concerning the whereabouts of the trailer; that Gibby noted Mike's tag number; and that Gibby unsuccessfully attempted to notify law enforcement that Mike had made a claim concerning the trailer. The Court held that the testimony should have been admitted. The proposed use of Gibby's testimony concerning the encounter with Mike would not have asked the jury to assume that Mike was telling the truth about owning the trailer. To the contrary, the jury was not asked to make any finding about the actual ownership of the trailer; it was undisputed that the trailer was owned by the person from whom it was stolen. Rather, appellant sought to use Gibby's testimony about the encounter to show, in accord with his explanation for possessing the trailer, that there was a person named Mike claiming to own the trailer and taking actions consistent with his claims. Gibby, who witnessed these claims and actions, should have been able to testify and be cross-examined about them. Thus, the value of the excluded evidence rested upon the veracity of Gibby, not the veracity of Mike. The evidence was not hearsay and it was error to exclude it. Moreover, the error was not harmless and therefore required the conviction to be reversed.