

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 13, 2007

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THIS WEEK:

- **Discovery**
- **Jurisdiction**
- **Double Jeopardy**
- **Search and Seizure**
- **Theft by Deception**

Supreme Court of Georgia-

Discovery

Muhammad v. State, S07A0065

Petitioner was indicted for malice murder, felony murder, aggravated battery, aggravated assault, and first degree arson. The State filed notice to seek the death penalty. Petitioner participated in discovery. After the decision to participate, the Criminal Procedure Discovery Act OCGA §17-16-1 was amended. The trial court ruled that the amended act applied to petitioner's case. Petitioner contends that the amendments are either unconstitutional or inapplicable to her case. Many of the arguments raised by petitioner were decided adversely to her by the Georgia Supreme Court in Stinski v. State, 281 Ga. 783 (2007).

The questions presented to the Court for consideration were: 1) whether the amendments to the Act violate petitioner's right to effective assistance of counsel; and 2) whether the amendment's requirement that the defendant disclose any mitigating evidence she intends to introduce in the pre-sentence hearing violates the privilege against self-incrimination.

Petitioner claimed that the amendments violate her ability to receive effective assistance of counsel because defense counsel cannot investigate mitigating evidence for the sentencing phase of trial while simultaneously being concerned with the possibility that such efforts will result in the discovery of evidence that is both harmful to the defendant and discoverable by the State. The Court noted two key points in rejecting petitioner's argument. First, a defense attorney does not have to produce the evidence until the close of evidence in the guilt/innocence phase of the trial. Second, no part of the Act requires that the defense provide the prosecution with evidence from witnesses that the defendant does not call at the pre-sentence hearing. The Court has held that reciprocal discovery provisions do not violate a defendant's right to effective assistance.

Petitioner also claimed that the Act's requirement that she disclose mitigating evidence violates the privilege against self-incrimination. In order for the self-incrimination clause to apply all four factors from Schmerber v. California, 384 U.S. 757, 761 (1966) must be present. The Court made three findings under this argument. First, producing the items in OCGA §17-16-4(b)(3)(A) and (B) is not compelled self-incrimination. Second, statements of witnesses that the defendant intends to call to testify are not personal to the defendant. Therefore, these statements are made by 'third parties' and are not within the privilege. United States v. Nobles, 422 U.S. 225, 234 (1975). Finally, the Court addressed the requirement that the defendant disclose a list of witnesses the defendant intends to call in the pre-sentence hearing. Because

a helpful sentencing phase witness could be harmful in the guilt-innocence phase, the Court concluded that a trial court can exercise discretion as to the time, place, and manner of the discovery. The trial court may hold a hearing and if it determines that the disclosure of intended witnesses would violate her constitutional rights than the court may grant a protective order or a continuance.

Georgia Court of Appeals–

Jurisdiction

State v. McClendon, A07A0545

Appellee was charged with possession of methamphetamine. The trial court granted appellee's motion to suppress. The State appealed, but failed to file enumerations of error as required by O.C.G.A. § 5-6-40 and Court of Appeals Rules 22, 23, and 25. Because the State did not enumerate errors, the Court did not have jurisdiction and dismissed the case.

Double Jeopardy

Barlowe v. State, A07A0769

Appellant appeals from the denial of his plea in bar, claiming the denial violates the prohibition against successive prosecutions under OCGA § 16-1-7(b). Appellant was charged with possession of alcohol by a minor after being at a movie theater. As he, his sister, and two other girls left, one of the girls complained to her parents that appellant touched her inappropriately during the movie. Appellant was charged with child molestation and sexual battery. Appellant's counsel asked the ADA to move all of the charges to superior court so they could be tried together. However, no action was taken. Appellant pleaded guilty to the possession of alcohol charge in January of 2006. On April 12, 2006, appellant was indicted in superior court for felony child molestation and sexual battery. Appellant then sought to bar his prosecution on these charges, claiming that they should have been prosecuted with the alcohol charge. The superior court denied the plea in bar. For OCGA 16-1-7 to apply, the prosecutor must actually know of the crimes. The burden lies on the defendant to show this. Here, the knowledge of the

prosecutor in state court is the person who matters. When a defendant first pleads guilty to a misdemeanor in state court and is later prosecuted in superior court for felony charges arising out of the same conduct, we look to the knowledge of the state court solicitor to determine if the state court proceedings bar the subsequent superior court proceedings. Since appellant did not show that the solicitor knew of the superior court charges, the trial court properly denied the plea in bar.

Search and Seizure

State v. Holloway, A07A0624

Appellee was indicted for possessing more than one ounce of marijuana. Appellee moved to suppress the marijuana seized during a traffic stop. The Court of Appeals affirmed the trial court's granting of the motion.

Sgt. Holloway of the Jones County Sheriff's department received information from a source that the appellee would be buying marijuana at a certain place and was given information about appellee's van. Sgt. Holloway's source did not state where he had received the information, from whom or how. Lt. Black went to the apartment complex, saw appellee's van and ordered the van stopped. The officers identified the appellee, smelled burnt marijuana, and saw a bulge in his jacket which contained a bag of marijuana. The trial court stated that the source's tip to Sgt. Holloway was not reliable and the stop unjustified. The Court of Appeals agreed. The Court opined that just because a concerned citizen is reliable, the hearsay from an overheard conversation is not made reliable. There was no evidence as to the manner in which the information was acquired or the reliability of the parties. The Court concluded that articulable suspicion may not be grounded in an anonymous tip alone. The Court of Appeals held that the tip to police did not provide enough information to support an investigatory stop.

Theft by Deception

Campbell v. State, A07A0442

Appellant appeals arguing that the evidence against her was not sufficient to warrant

a conviction. The Court agreed. Appellant was convicted of theft by deception based on a promise to provide brokerage services. Valerie Price responded to a newspaper advertisement to discuss the lease/purchase of a house with a woman who called herself Corenthia Davis. Davis said she was a real estate agent acting on behalf of Laura Campbell. After receiving over 1,000 dollars from Price, Davis signed Laura Campbell on a document reflecting the rent payment and the monthly rent for the house. Price drove by the house two days later and saw a foreclosure sign in the yard. Price called Davis but the number was disconnected. The Georgia Board of Realtor determined that there was no Corenthia Davis. However, there was a 'Laura Campbell' licensed with Rita Bagley. Price contacted the Douglas County police. In fact, the person licensed with Bagley was Lori Campbell. Much of the trial evidence concerned whether Laura and Lori Campbell were the same person. The trial judge found Lori Campbell guilty of theft by deception.

The State based its case on the promise of brokerage services. They were required to show that there was a contract between Price and Campbell for brokerage services. There is no evidence in the record of consideration between the parties for the services Campbell was to provide. The money given to Campbell was rent and not consideration for the services. The State offered no evidence of commission or any other payment to Campbell. With no consideration there is no contract, with no contract there can be no theft by deception. Therefore, the Court of Appeals reversed appellant's conviction.