

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 18, 2008

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

Patricia Hull
Traffic Safety Prosecutor

Gary Bergman
Staff Attorney

Tony Lee Hing
Staff Attorney

Rick Thomas
Staff Attorney

Donna Sims
Staff Attorney

Jill Banks
Staff Attorney

Al Martinez
Staff Attorney

Clara Bucci
Staff Attorney

Brad Rigby
Staff Attorney

THIS WEEK:

- **Search & Seizure**
- **Burglary, Jury Charges, Lesser Included Offense, Criminal Trespass**
- **Right to Counsel**
- **Sentencing**
- **DUI: Evidence**
- **Sentencing: Due Process**

Search & Seizure

Locher v. State; A08A1750

Following a stipulated bench trial, appellant appeals his conviction for trafficking in methamphetamine contending that the trial court erred in denying his motion to suppress. On appeal, appellant contends that (i) the search warrant lacked probable cause given that the affidavit failed to show that the confidential informant or the known citizen was credible; (ii) the information was stale because the affidavit provided no dates when the informant or citizen made their statements; (iii) the evidence obtained from the trash was insufficient to show probable cause; and (iv) some information set forth in the affidavit was false or misleading. The record shows police took bags of trash from appellant's residence after being tipped off by a confidential informant and a citizen's complaint that appellant was selling drugs from his residence. After finding methamphetamine residue, partially-burned marijuana cigarettes, duct-taped packaging often used for transporting drugs, and letters and envelopes addressed to appellant, the police obtained and executed

a search warrant on appellant's residence. At the hearing on the motion to suppress, appellant only argued that the warrant should have been accompanied by the affidavit when it was served and executed.

The Court of Appeals concluded that where an entirely different objection or basis for appeal is argued in the brief which was not presented at trial, the Court will not consider that basis because it is limited to those grounds presented and ruled upon by the trial court. The Court held that because the trial court correctly ruled that the address of appellant's residence sufficiently described its location, there was no error in the trial court's ruling. Judgment affirmed.

Wilson v. State; A08A0401

Following a bench trial, appellant was convicted of trafficking in cocaine, trafficking in MDMA (ecstasy), possession of MDMA with intent to distribute, possession of marijuana with intent to distribute and possession of marijuana. On appeal, appellant contends that the trial court erred in denying his motion to suppress evidence of the contraband found during the search of his vehicle because the officer illegally prolonged the traffic stop. The record shows that appellant's vehicle was stopped for following too closely. The police officer who stopped the vehicle noticed that appellant was very nervous and that his hands were shaking. While writing the ticket, the officer asked appellant for consent to search the vehicle but appellant refused. At that time, the officer stopped writing the ticket, retrieved his drug detention canine from the police cruiser and conducted an open air search around the vehicle. The dog gave a positive alert on the vehicle, and the officer

then searched the vehicle and found what he suspected to be cocaine.

The Court of Appeals concluded that although nervousness alone is not sufficient to establish reasonable suspicion to detain and investigate for illicit drug activity, it is permissible for an officer to conduct an open air search around a vehicle while a traffic stop is still in progress so long as the stop has not been unreasonably prolonged for the purpose of conducting the search. The Court found that any delay due to retrieving the dog and conducting the walk around the vehicle was minimal. Judgment affirmed.

Hayes v. State; A08A0084

Appellant appeals his conviction for trafficking in cocaine and methamphetamine. On appeal, appellant contends that a state trooper did not have probable cause to conduct a traffic stop because he was not traveling more than ten miles per hour over the speed limit. In support of his contention, appellant cites OCGA § 40-14-8 (a) which states that no county, city or campus officer shall be allowed to make a case based on the use of any speed detection device, unless the speed of the vehicle exceeds the posted speed limit by more than ten miles per hour. Appellant next asserts that the trial court erred in refusing to suppress the evidence against him because his consent to search was the product of an impermissibly prolonged detention because the traffic stop ended before the trooper asked for his consent to search, and that absent consent or a reasonable suspicion of further criminal activity, his "continued detention" was prohibited by the Fourth Amendment. The record shows a state trooper stopped appellant after clocking him travel ten miles per hour over the speed limit, by pacing behind him at the same speed, and by using radar. The trooper obtained appellant's consent to search the car thirty seconds after issuing him a warning ticket, whereupon he found cocaine and methamphetamine in a bag in the rear floorboard of the car.

The Court of Appeals concluded that the trooper had probable cause to make the traffic stop based on his observation of a traffic violation, and because he was a member of the Georgia State Patrol, he was not bound to OCGA § 40-14-8 (a) which expressly applies only to "county, city, or campus officers."

Moreover, the Court held that if a driver is questioned and gives consent while he is being lawfully detained during a traffic stop, there is no Fourth Amendment violation. The Court concluded that the trooper's virtually contemporaneous request to search did not unreasonably prolong appellant's detention. Judgment affirmed.

Johnson v. State; A08A0473

Following a bench trial, appellant was found guilty of possessing more than one ounce of marijuana. In his sole enumeration of error, appellant contends that the trial court erred in denying his motion to suppress marijuana discovered during the search of his motel room because the search was unlawful given that the officers did not have authority to enter the motel room because they did not have a search warrant, consent to enter, or exigent circumstances that justified their warrantless intrusion. The record shows that appellant rented a motel room. The motel manager called police due to complaints about possible illegal activity in appellant's room, and to request that police patrol the motel. As the officer and the motel employee approached the room to evict appellant, the officer smelled burnt marijuana. When there was no answer at the door, the motel employee unlocked the door and for her own safety, asked the officer to enter and ensure that no one was inside. From outside the room, the officer saw two pipes used to smoke marijuana. The officer then checked the room, as requested by the clerk and saw a large bag containing marijuana in the bathroom in "plain sight." The officer also found additional marijuana in a jacket pocket and underneath the bed.

The Court of Appeals held that because the officer entered the motel room at the explicit request of the motel employee, who was concerned for her safety and because the officers were called to investigate suspicious activity, their conduct was a normal and lawful aspect of police work. The Court also held that the plain view doctrine authorizes seizure of illegal or evidentiary items visible to a police officer if the officer's access to the object itself has some prior Fourth Amendment justification. Here, the entry of the police into the room was lawful, and the seizure of the contraband in plain view was also lawful. However, the Court found that the marijuana found in

the jacket pocket and under the bed was not in plain view was therefore, the product of a search, seized illegally and should have been suppressed. Judgment reversed and remanded for a new trial.

Burglary, Jury Charges, Lesser Included Offense, Criminal Trespass

Williams v. State; A08A0854

After a jury trial, appellant was convicted of burglary. On appeal, appellant contends that the trial court erred in refusing to give a requested jury charge on criminal trespass as a lesser included offense of burglary; that: "A person commits the offense of criminal trespass when that person intentionally damages any property of another person without that person's consent, and the damage to it is \$500 or less." The record shows the victim was asleep in his apartment when he was awakened by someone call his name, followed by the sound of someone trying to get through his sliding glass door. The intruder then smashed his fist through the victim's bedroom window and stuck his head in through the window. At that point, the victim recognized appellant who had previously worked on his landscaping crew.

The Court of Appeals found that criminal trespass may, under certain circumstances, be a lesser included offense of burglary. However, in the instant case there was no evidence concerning the amount of damage done to the window and whether it was more or less than \$500. Without such evidence, appellant could not have been convicted of criminal trespass; thus the trial court did not err in rejecting the requested charge on that offense. Judgment affirmed.

Right to Counsel

Waddell v. State; A08A1489

Following a jury trial, appellant was convicted of armed robbery, aggravated assault, and kidnapping. On appeal, appellant contends that the trial court abused its discretion in denying his pretrial request to be appointed different counsel to represent him at trial. The record shows that nearly four months before trial, appellant, who is indigent, complained to the trial court that his assigned public defender had not performed adequately.

The trial court found that appellant's assigned attorney was performing adequately. The trial court explained that appellant could proceed pro se, or he could hire an attorney, or he could proceed with appointed counsel; the judge then set the case on a trial calendar. On the Friday before trial, the trial judge denied appellant's request for a continuance to prepare to represent himself or for him to be appointed new trial counsel.

The Court of Appeals, quoting the Georgia Supreme Court, held that "an indigent defendant has no right to compel the trial court to appoint a particular attorney of his own choosing. The choice of appointed counsel is a matter governed by the trial court's sound discretion and will not be disturbed on appeal unless that discretion is disturbed." *Chapel v. State*, 264 Ga. 267, 268 (2); 443 S.E.2d 271 (1994). In determining whether the trial court has abused its discretion in appointing counsel for an indigent defendant the following test is employed: When a defendant's choice of counsel is supported by objective considerations favoring the appointment of preferred counsel, and there is no countervailing considerations of comparable weight, it is an abuse of discretion to deny the defendant's request to appoint the counsel of his preference. The Court found that because the trial court had given appellant four months to cooperate with his appointed counsel, who was familiar with the case, preformed adequately, invested time in investigating the case and preparing a defense, or to hire new counsel, the trial court did not abuse its discretion. Judgment affirmed.

Sentencing

McSears v. State; A08A1617

Following a jury trial, appellant was convicted on one count of violating the Georgia Controlled Substances Act for selling cocaine, and was sentenced as a recidivist based on three prior felony convictions. On appeal, appellant contends that the trial court erred in sentencing him as a recidivist under OCGA § 17-10-7(c), which applies to defendants having three or more prior felony convictions. The record shows that during the sentencing hearing, the State introduced evidence of appellant's three guilty pleas, including evidence that he pled guilty to two most recent burglaries on the same day and received concurrent sentences for those two convictions. Appellant asserts that

because he pled guilty to the latter two burglaries on the same day before the same judge, the convictions were consolidated pursuant to OCGA § 17-10-7(d).

The Court of Appeals held there was no evidence that the two convictions were consolidated. Here, the two convictions at issue concerned separate burglaries, which occurred on separate dates and which resulted in separate indictments. The Court concluded that the fact that the sentences were entered on the same day and that the sentences ran concurrent did not require the conclusion that the two prior convictions had been consolidated for trial within the meaning of OCGA § 17-10-7(d). Judgment affirmed.

DUI: Evidence

Hann v. State; A08A0011

Appellant appeals his conviction for driving under the influence and driving with a suspended driver's license. Appellant contends that his conviction should be reversed because (i) the deputy who stopped him had no articulable suspicion to authorize the traffic stop; (ii) evidence of the results of his breath test should have been excluded because he was denied full information regarding the results (iii) the horizontal gase nystagmus test should not have been admitted because the uncontradicted testimony showed that the officer did not perform the test as he was trained; and (iv) the trial court erroneously admitted a certified copy of his suspended license packet which was hearsay and irrelevant, and the contents of his driving record went to the jury, which was prejudicial. The record shows that a deputy stopped appellant's vehicle after he observed it swerve over toward his lane, swerve back, and then pass him. The incident was recorded on the officer's video camera which was played for the jury.

The Court of Appeals found (i) the deputy had reasonable grounds to conduct an investigatory inquiry and that appellant was not stopped because of mere inclination, caprice, or harassment; (ii) appellant failed to object to the test results of the breath test, thus, he did not preserve the issue for the Court's consideration; (iii) the evidence showed that the deputy substantially performed the test in accordance with the guidelines and appellant showed six clues of impairment; (iv) the trial court did not error in allowing the State to

introduce a certified copy of appellant's notice of suspension prepared in connection with an earlier DUI conviction and a computer printout establishing the date of the suspension because to prove the offense of driving with a suspended license the State must prove appellant was driving with a suspended license, and that he received actual or legal notice of the suspension. Further, before the printout was submitted to the jury, the trial court required that the prejudicial information be redacted. Judgment affirmed.

Sentencing: Due Process

Williams v. State; A08A1508

Following a jury trial, appellant was convicted of burglary, aggravated stalking, terroristic threats, criminal damage to property, and possession of a knife while making terroristic threats. On appeal, appellant contends that the trial court erred in (i) not merging the burglary and aggravated stalking crimes because under the actual evidence test, the same factual evidence was used to prove both crimes; and (ii) relying on hearsay evidence during resentencing; and (iii) failing to consider probation during resentencing. Appellant also contends that he was denied due process by an eight-year delay in the court's conducting a hearing on his motion for new trial because his trial counsel could not be found to testify at the hearing. The record shows that appellant broke into his ex-girlfriend's home and caused damage during a rage regarding the ex-girlfriend having a new boyfriend. A judge denied appellant's motion for a new trial but granted his request for resentencing. At the resentencing hearing, rather than have the distraught victim, who was present, testify, the prosecutor informed the Court what the victim told him, namely that the original 45-year sentence was appropriate.

The Court of Appeals found that the actual evidence test was eschewed in favor of the required evidence test in 2006 by the Georgia Supreme Court in *Drinkard v. Walker*, 281 Ga. 211, 214-217; 636 S.E.2d 530 (2006). Under the required evidence test, the applicable rule is that where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of a fact which the other does not. The Court concluded

that based on this test, no merger occurred; the burglary statute required that the State show entry into the residence, which was not required by the aggravated stalking statute; and the aggravated stalking statute required that the State prove that appellant actually contacted the victim, which was not required by the burglary statute that only required that appellant have the intent of contacting the victim when he entered the residence. The Court further held that because the law presumes that during sentencing a trial judge will consider only legal evidence and because the court expressly stated that nothing the victim had said impacted the sentence, the Court presumed that the trial judge ignored the hearsay evidence. Additionally, the Court concluded that appellant's contention that the court refused to consider probation was without merit because at no point during resentencing did the court indicate that it did not consider probation as a possible punishment. Lastly, the Court concluded that because appellant could not show that he was prejudiced by the eight year delay his claim of due process violations fail. Judgment affirmed.