

Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING JULY 22, 2011

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## **Jury Charges; Mistake of Fact**

*Duvall v. State, S10G2079 (7/11/2011)*

During a search incident to appellant's arrest, police found three loose tablets of a substance which proved to be Zolpidem Tartrate, a prescription sleeping aid also known by the brand name Ambien™, in appellant's pockets. He was convicted of felony possession of a controlled substance and felony possession of drugs not in their original container.

The Court of Appeals considered whether appellant should have received at trial a jury instruction on mistake of fact. The Court held that the mens rea required for conviction under OCGA § §16-13-30 (a) and 16-13-75 was simply knowledge that one possessed *some* drug. The Court further held that knowledge of whether that drug is listed as a controlled substance is purely a question of law, and that a defendant's ignorance as to whether a particular drug he possesses is categorized as a controlled substance is not a defense to these charges.

On certiorari, the Supreme Court of Georgia considered whether the Court of Appeals erred in construing OCGA § § 16-13-30 (a) and 16-13-75 not to require the defendant to know that the pills he possessed were a controlled substance. The Court found that while the Court of Appeals' characterization of the law was accurate, it had misinterpreted appellant's defense in reaching that holding. According to the Court, the entire basis of appellant's defense at trial was that he knew he possessed the sleeping aids, but that he believed the pills were some form of over-the-counter medication and not Zolpidem Tartrate. The Court of Appeals, on the other hand, understood appellant's argument to be that

he knew the three pills in his possession were Zolpidem Tartrate, but he did not know that Zolpidem Tartrate was a controlled substance.

The Supreme Court explained that the criminal intent required by OCGA § 16-13-30 (a) and 16-13-75 is intent to possess a drug with knowledge of the chemical identity of that drug. Therefore, possessing Zolpidem Tartrate, which one knows or understands to be Zolpidem Tartrate is a violation of OCGA §16-13-30 (a) because Zolpidem Tartrate is a controlled substance. On the other hand, possessing Zolpidem Tartrate, which one believes or understands to be an over-the-counter medication is not a crime because the requisite *mens rea* is not present. It is this latter scenario which appellant asserted to be the case.

Because of the Court of Appeals' apparent misunderstanding of appellant's defense, the Court held that the jury should have been instructed to consider the defense of mistake of fact. Accordingly, the Court granted appellant a new trial.

### **Miranda; Right to Counsel** *Wheeler v. State, S10G2071 (7/11/2011)*

Appellant was arrested and charged with aggravated sexual battery, cruelty to children, and four counts of child molestation. After the arrest, two police officers interviewed him, asking him if he was ready to talk. He replied, "Well, I mean I will to a certain extent, but I, you know, I can't incriminate myself or anything. I mean not until I talk to an attorney, you know, first." One officer then stated that she was going to read appellant his *Miranda* rights, and he responded, "You know, I—I'm—I'm not trying to be hard to get along with—but the seriousness of my charges—and everything, I need to discuss it with a lawyer before I, you know, talk to you. I—I'm not really trying to be hard to get along with."

When the officer then asked appellant if he was going to talk to the officers or not, appellant stated, "You can ask me some questions, and if I feel like I can answer them, I will, and if I feel I can't, then I won't." After being informed of his rights under *Miranda*, appellant waived those rights and affirmed his understanding that if he wanted an attorney, he did not have to make any statement. Appellant confirmed that he was ready to talk to the officers and stated, "[L]ike I said, you know, if there is any kind of questions that's

going to incriminate me, you know, I'll have to exercise my rights." After discussing the victim's behavior with him and making some incriminating statements, appellant denied ever touching her and ended the interview.

The trial court admitted the tape of that custodial interrogation at trial, and appellant was convicted of all charges. The Court of Appeals affirmed, rejecting appellant's contention that the interview was improperly admitted into evidence because the officers failed to cease the interrogation after he invoked his right to counsel. The Court of Appeals found that appellant's references to counsel were equivocal and conditional.

The Supreme Court granted certiorari. The Court found that although appellant's first statement referencing an attorney constituted only a limited request for an attorney, his second statement that based upon the seriousness of the charges, he needed to discuss his case with a lawyer before talking with the officers, was an unequivocal invocation of his right to counsel. Therefore, the officers should have ceased the interrogation at the time appellant made the second statement. Therefore, the Court held, the subsequent discussion was inadmissible, and because its erroneous admission at trial was not harmless, the Court of Appeals' judgment was reversed.

### **Evidence Tampering; False Statement**

*Haley v. State, S11A0606 (7/8/2011)*

Appellant, under the user name "catchmekiller," made and posted two videos on YouTube. The videos were part of an online murder mystery "game" for participants who could find clues to learn the identity of the "catchmekiller." Appellant was convicted of violating OCGA § 16-10-94 by tampering with evidence with intent to prevent the apprehension and obstructing the prosecution of another person and violating OCGA § 16-10-20 by making a false statement in a matter within the jurisdiction of the Georgia Bureau of Investigation (GBI).

Appellant argued that OCGA § 16-10-20 on its face and as applied to his case, violated the freedom of speech protected by the First Amendment and the Georgia Constitution. Appellant's argument was premised on the assumption that a violation of § 16-10-20, with respect to its false statement component, has

only two elements: (1) the defendant must knowingly and willfully make a false statement, and (2) the false statement must in fact be "in a matter within the jurisdiction" of a state or local department or agency. However, the Court found that appellant's premise was incorrect.

In addition to the two elements that appellant identified, the Court explained, the statute requires a defendant to know and intend, that is, to contemplate or expect, that his false statement will come to the attention of a state or local department or agency with the authority to act on it. That is, the defendant must have the proper *mens rea* imputed by the "knowingly and willfully" language in the statute. The Court found that the *mens rea* requirement provided a proper check on the limitation of free speech and therefore that, when properly construed, the statute is constitutional.

The Court also found the evidence sufficient to support appellant's conviction. Accordingly, the Court affirmed his false statement conviction.

However, the Court reversed appellant's tampering with evidence conviction because the evidence at trial failed to prove that he made false evidence with the specific intent to prevent the apprehension or obstruct the prosecution of another person.

### **Right to Counsel; Massiah** *Higuera-Hernandez v. State, S11A0851 (7/11/2011)*

Appellant and his co-defendant were jointly tried for two murders and other offenses. Appellant was convicted of malice murder, felony murder during the commission of a conspiracy to commit trafficking in cocaine, the underlying conspiracy offense itself (trafficking in a quantity of cocaine separate and distinct from that involved in the conspiracy count), and two counts of possession of a firearm during the commission of a felony.

Appellant argued that the testimony of his cellmate regarding inculpatory statements allegedly made by appellant violated his Sixth Amendment right to counsel as set forth in *Massiah v. United States*, 377 U.201 (1964). Under that case, the right to counsel is violated by the admission of incriminating statements which a government agent deliberately elicits after indictment and in the absence of counsel. *Massiah v. United States*, supra at 206.

The trial court had denied defense counsel's motion to strike the cellmate's testimony, ruling that, although he had provided information on prior occasions in connection with other investigations, the cellmate was not a professional informant in the sense that he was paid or in any way necessarily engaged by the State. The Court agreed, finding that a thorough review of the testimony of both the lead detective and the cellmate showed that they did not have any agreement and that the cellmate had not been promised any payment, lenient treatment, or other help in return for any evidence that he might produce.

The Court held that in the absence of any express or implied *quid pro quo*, or of any instructions or directions by the State, the cellmate did not act as a State agent. Therefore, appellant's right to counsel was not violated. Lastly, the Court noted that "[A] defendant does not make out a violation of the [Sixth Amendment] right [to counsel] simply by showing that an informant, either through prior arrangement or voluntarily, reported his incriminating statements to the police. Rather, the defendant must demonstrate that the police and their informant took some action, beyond merely listening, that was designed deliberately to elicit incriminating remarks." *Kuhlmann v. Wilson*, 477 U.S. 436, 459 (IV) (A) (1986). Accordingly, the Court found no error.

### **Jury Instructions; Imperfect Self-Defense**

*Brinson v. State*, S11A0827 (7/11/2011)

Appellant was convicted of malice murder in the stabbing death of his wife. He argued that the trial court improperly refused to give his request to charge on involuntary manslaughter under OCGA § 16-5-3 (b) (commission of a lawful act in an unlawful manner). Appellant maintained that the lawful act was his belief in the necessity of using deadly force, but that his belief was unreasonable and resulted in the unlawful stabbing of the victim. In this regard, appellant asked the Court to apply the doctrine of "imperfect self-defense." The Court noted that that doctrine had been adopted in a minority of other states, and is a form of the crime of voluntary manslaughter. However, it did not "fit within the definition of voluntary manslaughter in this State," *Scott v. State*, 261 Ga. 611 (1991), and moreover "has... no application to involuntary manslaughter."

*Lamon v. State*, 260 Ga. 119, 120 n. 2 (1990). Accordingly, the Court affirmed.

### **Party to Crime**

*White v. State*, S11A0492 (7/8/2011)

Appellant was convicted of malice murder, armed robbery, and possession of a firearm during the commission of a crime, in connection with two deaths. He argued that the trial court erred in instructing the jury on the law regarding being a party to a crime because he was indicted alone and no other person was alleged to be a perpetrator. The Court disagreed, "The law is well-settled in Georgia that the State is not required to specify in the indictment that it is charging the defendant as a party to the crime." Moreover, the Court found, beginning with his opening statement to the jury, appellant suggested that it was, in fact, a woman he was with who had shot the victims, rather than him; the evidence was uncontroverted that appellant arranged the woman's interaction with the victims, and the evidence authorized the court to instruct the jury on the law regarding party to a crime. Accordingly, the Court affirmed.

### **Hearsay Evidence; Prior Difficulties with Victim**

*Cawthon v. State*, S11A0319 (7/8/2011)

Appellant was convicted of felony murder. He argued that the trial court should have excluded the testimony of three witnesses regarding prior difficulties between himself and the victim, contending that the testimony was inadmissible hearsay

The Court first noted that prior difficulty evidence may be admitted to show motive, intent, or bent of mine. The testimony of third parties about prior difficulties between the defendant and the victim may be admitted into evidence under the necessity exception to the hearsay rule if the testimony is necessary and trustworthy and when the statement is more probative of the material fact than other evidence that may be produced and offered.

The Court found that appellant had waived review of the first witness's testimony by failing to object to it at trial, but that the testimony was admissible anyway. With regard to the second witness's testimony, the Court held that it was not hearsay because the witness had testified as to his observations, and

did not offer evidence "in order to establish the truth of the matter asserted therein . . . thus resting for its value upon the credibility of the out-of-court asserter." Lastly, the Court found that the third witness's testimony bore indicia of reliability. Accordingly, the Court rejected appellant's arguments and affirmed his convictions.

### **Hindering the Apprehension of a Criminal; Evidence Tampering**

*Hampton v. State*, S11A0585 (7/8/2011)

Appellant was convicted of malice murder, aggravated assault, hindering the apprehension of a criminal, and tampering with evidence. The Court first noted that the offense of hindering the apprehension of a criminal, OCGA § 16-10-50, is the equivalent of the common law crime of being an accessory after the fact and that a party may not be convicted both of being a principal to the crime and an accessory after the fact. See *Stanton v. State*, 274 Ga. 21, 22 (1998); *State v. Freeman*, 272 Ga. 813, 815 (2000); and *Jordan v. State*, 272 Ga. 395, 396-397 (2000). Based on these cases, the Court found that appellant correctly argued that he may not be convicted for both malice murder and hindering the apprehension of a criminal. However, the Court found that appellant incorrectly relied upon the unique circumstances of *Freeman* in arguing that the remedy was to set aside his conviction for malice murder. The Court noted that here, as in *Stanton* and *Jordan*, the jury returned a verdict on all counts at the same time. Therefore, it was the conviction for hindering that had to be set aside. Accordingly, the Court vacated appellant's hindering conviction but affirmed his conviction for malice murder.

Appellant also argued that the State proved that he tampered with evidence in his own case and not in the case of one of his co-defendants, so that he could be sentenced only for a misdemeanor. The Court noted that under OCGA § 16-10-94 (c), a person may receive only misdemeanor punishment for tampering with evidence in his own case. The indictment, along with the jury charge and the evidence, permitted the jury to find that appellant tampered with the evidence in his case alone (a misdemeanor) or in either or both of his accomplices' cases (a felony). However, the Court pointed out, the verdict form simply

contained a finding of guilty on the tampering count, making it impossible to determine if the jury found appellant guilty of misdemeanor or felony tampering. Because appellant had to be given the benefit of the doubt in construing this ambiguous verdict, the Court vacated his felony tampering sentence and remanded for misdemeanor sentencing.

## Affray

*Singletary v. State, A11A0547 (7/6/2011)*

Appellant was convicted of affray after he and another inmate had an altercation. He argued that the evidence was insufficient to support his conviction beyond a reasonable doubt because the State failed to prove that Hall County jail was a “public place” within the meaning of OCGA §§ 16-1-3 (15) and 16-11-32.

The Court first noted that the offense of “affray” is defined as “fighting by two or more persons in some public place to the disturbance of the public tranquility.” Additionally, OCGA § 16-1-3 (15), which applies to OCGA § 16-11-32 (a), defines “public place” as “any place where the conduct involved may reasonably be expected to be viewed by people other than members of the actor’s family or household.” And under this general definition, the Court had previously held that the determination of what constitutes a “public place” is a question of fact for the jury.

Nevertheless, the Court noted that the general definition of “public place” was narrowed somewhat in 1996, when the General Assembly amended Georgia’s public-indecency statute, OCGA § 16-6-8, to include the following: “*For purposes of this Code section only, ‘public place’ shall include jails and penal and correctional institutions of the state and its political subdivisions.*” According to the Court, this 1996 enactment served to limit the broader, earlier-enacted definition of “public place.”

The Court concluded that if the General Assembly had intended for the definition of “public place” in OCGA § 16-1-3 (15) to include “jails and penal and correctional institutions of the state and its political subdivisions,” it would have been unnecessary to specifically define “public place” as *including* such institutions in the later-enacted public-indecency statute. Moreover, the public-indecency statute *explicitly* provided that jails and penal/correctional institutions are only “public places” for purposes of that particular code section.

Therefore, taking the words of OCGA § 16-1-3 (15) and OCGA § 16-6-8 (d) at their plain meaning, avoiding an interpretation that would result in surplusage, and applying the last-enacted rule, the Court concluded that “public place” included “jails and penal and correctional institutions of the state and its political subdivisions” *only* in the context of the public-indecency statute. Therefore, the Court ruled that as a matter of law, appellant could not be convicted of affray for engaging in a fight in the Hall County Jail, which is not a “public place” and, thus, could not satisfy an essential element of the crime of affray. Accordingly, the Court reversed appellant’s conviction of misdemeanor affray and remanded the case for resentencing.

## Merger

*Daniels v. State, A11A0530 (7/6/2011)*

Appellant was convicted of armed robbery, aggravated assault, and possession of a firearm during the commission of a crime. He argued that the trial court erred in failing to merge the offense of aggravated assault with that of armed robbery for purposes of sentencing. The Court agreed. Although aggravated assault is not included in armed robbery as a matter of law, it may be included as a matter of fact. To determine if the aggravated assault was a lesser included offense of the armed robbery, the Court applied the “required evidence” test set forth in *Drinkard v. Walker*, 281 Ga. 211 (2006). Under that test, the Court examined whether each offense required proof of a fact which the other did not.

Here, appellant was charged with armed robbery by use of a gun. He was also charged with aggravated assault by pointing a gun at the store clerk and repeatedly pulling the gun’s trigger. The Court noted that the Georgia Supreme Court has established that aggravated assault with a deadly weapon does not require proof of a fact that armed robbery does not. According to the Court, the elements of appellant’s armed robbery charge under OCGA § 16-8-41 (a) included an intent to rob, the use of an offensive weapon, and the taking of property from the person or presence of another. The elements of appellant’s aggravated assault charge under OCGA § 10 16-5-21 (a) included an assault upon the victim, an intent to rob, and the use of a deadly weapon. Therefore, the Court noted, both crimes required proof of

an intent to rob. Moreover, the “assault upon the victim” requirement of aggravated assault is the equivalent of the “use of an offensive weapon” requirement of armed robbery, and the “deadly weapon” requirement of that form of aggravated assault was the equivalent of the “offensive weapon” requirement of armed robbery. Thus, the Court found, there was no element of aggravated assault with a deadly weapon that was not contained in armed robbery and appellant’s aggravated assault conviction merged into his armed robbery conviction. Accordingly, the Court vacated the conviction and sentence imposed on the aggravated assault count and remanded the case for resentencing.

*Thomas v. State, A11A0126 (7/1/2011)*

Appellant was convicted by a jury of kidnapping, armed robbery, four counts of aggravated assault and two counts of aggravated battery. He argued, among other things, that certain of his convictions should have been merged for sentencing and that he should not have been sentenced as a recidivist. The record showed that one of the investigating officers received a tip that appellant and his codefendant had asked for help getting out of the state because they claimed the authorities were “after them”. Appellant was then located at his residence and taken into custody. Appellant admitted to being at the scene of the crime, but claimed he left during the assault on the victim. Appellant’s girlfriend gave the police a bag of appellant’s belongings that included a ski mask and pair of gloves that the victim testified one of his assailants was wearing during the assault.

Appellant contended that his convictions should have been merged for sentencing, arguing that the aggravated assault and aggravated battery charges should have merged with each other and then with his convictions for armed robbery and kidnapping, because these charges “are faceted expressions of a singular event, the attack upon the [victim], who during the course of this one assault, was robbed.” The Court found that the counts of the indictment requiring the State to prove that appellant slashed the victim’s neck with a sharp-edged instrument, hit him with a hammer and wrapped a cord around his neck with the intent to murder, were based on different conduct and merger of those convictions is

not required. However, the Court held that a different result obtains with respect to Counts 3 and 7, both of which allege that appellant committed aggravated assault by slashing the victim's neck. It found that those counts were clearly based on a single act since the razor or knife used in that assault broke while it was pressed against the victim's neck, and therefore the Court agreed with appellant that Count 3 and Count 7 should be merged for sentencing. The Court also found that the aggravated battery charged in Count 6 and the aggravated assault charged in Count 4 were based on the same conduct of hitting the victim with a hammer, resulting in serious bodily injury to his hand (Count 4) and one of his fingers being rendered useless (Count 6) when he placed his hands up in an attempt to protect his head. It found that in this case, the aggravated assault as charged required proof of a less serious injury than the aggravated battery as charged. The Court held that, premitting whether these two offenses meet the 'required evidence' test pursuant to OCGA § 16-1-6 (1), merger of these convictions was required on this basis also. The trial court's judgment was affirmed in part and reversed in part, sentence vacated and case remanded with direction for resentencing.

### **Right to Self-Representation** *Cain v. State, A11A0461 (7/1/2011)*

Appellant was convicted of two counts of child molestation and was sentenced to two consecutive life sentences. He argued that the trial court erred by denying his motion for a continuance to obtain counsel to replace his fourth appointed counsel on the first day of trial, thereby forcing him to represent himself during voir dire with inadequate warning about the dangers of self-representation.

The Court first noted that the trial judge has the discretion to determine whether the accused has intelligently waived his right to counsel. Although no magic words or particular questions are required to affect a valid waiver, the record must reflect that the accused was made aware of the dangers of self-representation and nevertheless made a knowing and intelligent waiver. Here, the record showed that at the beginning of trial, appellant, speaking for himself, asked the court for a continuance so that his family could obtain private counsel for him. However, the trial court, noting that appellant

had already dismissed three attorneys who had been appointed to represent him, denied appellant's motion for a continuance because it concluded that appellant was engaging in dilatory practices. The Court found that under the circumstances the trial court was authorized to make that conclusion.

The Court also found that the trial court had emphasized the importance of counsel, warned appellant that jurors may make "adverse conclusions or inferences from [appellant] choosing to defend himself," as well as the possibility that appellant would commit "non-lawyer blunders." Furthermore, the trial court expressed "anxiety when it comes to prose litigants" and informed appellant that he was facing up to life in prison for each child molestation and that his prior convictions could be used at sentencing and to impeach him in front of the jury.

In addition, the trial court kept appellant's fourth assigned lawyer as standby counsel to assist appellant as needed. During voir dire, appellant conducted the individual questioning for the defense, and the standby attorney acted as counsel in various instances, such as during bench conferences and striking jurors. Thereafter, during the trial, appellant was fully represented by his appointed counsel. Therefore, the Court found that appellant's claim of error was without merit.

### **Jury Charges; Indictment** *Smith v. State, A11A0212 (7/1/2011)*

Appellant was charged with child molestation and statutory rape. He was convicted of child molestation but not of statutory rape. Appellant argued that the trial court's jury charges and subsequent response to jury questions violated his due process rights because they allowed him to be convicted of child molestation in a manner not alleged in the indictment. The Court agreed.

The Court first explained that the indictment alleged that appellant committed child molestation by "unlawfully perform[ing] an immoral and indecent act upon the person of [A. S.], a child under the age of sixteen (16) years, by placing his penis in her vagina with intent to arouse and satisfy the sexual desires of said child and said accused. . . ." However, the jury instructions stated: "[a] person commits the offense of child molestation when that person does an immoral and indecent act to a

child less than 16 years of age with the intent to arouse and satisfy the sexual desires of the person and the child." During deliberations, the jury sent a note to the trial court asking, "Can a sexual conversation alone constitute an indecent act?" and "What is the State's standard definition of immoral and indecent act?" The trial court instructed the jurors: "You'll have to refer to the charge as a whole and the indictment and the evidence."

Appellant maintained that the jury charge and the trial court's response to the jury's question led the jury to believe that they could convict him of child molestation based on a conversation alone, without concluding that he had sexual intercourse with the victim as alleged in the indictment.

The Court held that when the jury expressed its confusion by asking whether sexual conversations could constitute an immoral or indecent act, the trial court should have instructed the jury to limit its consideration to determining whether appellant was guilty of committing child molestation *in the specific manner alleged in the indictment only*. Instead, the trial court aggravated the confusion by simply referring the jury to the charge and the indictment, with no limiting or remedial instruction.

Therefore, the Court concluded, under the circumstances of this case, including the fact that the jury found appellant not guilty of statutory rape, there was a reasonable possibility that the jury convicted the defendant of the commission of a crime in a manner not charged in the indictment. Accordingly, the Court granted appellant a new trial on the child molestation charge.

### **Forfeiture; Innocent Ownership** *State of Ga. v. Centers, A11A0153 (7/1/2011)*

The State appealed from an order denying its in rem forfeiture action and adjudicating Wilburn Centers an innocent owner of a vehicle seized by the State when his wife Tracy was arrested for possessing methamphetamine and other crimes.

The Court found that although Wilburn was the original owner of the vehicle, he had transferred title to Tracy the day before her arrest and seizure of the vehicle. Although Tracy subsequently transferred title back to Wilburn, that transfer was not effective because the vehicle had already been seized.

The Court explained that Wilburn could not show that he “did not hold the property jointly, in common, or in community with a person [i.e. Tracy] whose conduct gave rise to its forfeiture” (OCGA § 16-13-49 (e) (1) (C)). The subsequent transfer of title back to Wilburn did not change that fact because Wilburn could not show that “[a]t the time [that] interest was acquired, [he] was reasonably without cause to believe that the property was subject to forfeiture or likely to become subject to forfeiture.” Wilburn witnessed the seizure of the vehicle, and he and Tracy attempted the transfer specifically because of the questionable status of the vehicle.

Therefore, the Court found, the State had established a prima facie case supporting the forfeiture, and Wilburn had failed to meet his statutory burden to establish by a preponderance of the evidence that he was an innocent owner. The Court also emphasized that the trial court admittedly based its decision on what it believed was “right,” rather than on the relevant statute. In light of the undisputed evidence showing that Wilburn lacked title to the vehicle and that any other interest he might have had was in community with Tracy, the Court concluded that the trial court had erred by finding him an innocent owner. Therefore, the Court reversed.

## Restitution

*Williams v. State, A11A0129 (7/6/2011)*

Appellant pled to one count of criminal damage to property in the second degree. She argued that the trial court unlawfully increased her sentence by conducting a restitution hearing more than 60 days after the entry of judgment of conviction and sentencing, despite language in the sentencing order directing the hearing to be held within 60 days; and further that the trial court erred in proceeding with the restitution hearing in her absence. The record showed that on March 30, 2010, appellant pleaded guilty after she intentionally scratched the paint on numerous surfaces of the victim’s vehicle. The trial court sentenced appellant as a first offender to a four-year probated sentence, and directed her to pay restitution in an amount “determined at a special set hearing within 60 days.” Thereafter, the State filed a rule nisi, which it served on appellant’s counsel, setting the restitution hearing for June 29, 2010. Although appellant did not

appear at the restitution hearing, her counsel did so on her behalf, and the State presented evidence related to the costs expended by the victim and her insurance company to repair the damage to the victim’s automobile. Consistent with the evidence presented, the trial court ordered appellant to pay restitution in the amount of \$689 directly to the victim, and \$3,744.06 to the victim’s insurance company.

Appellant argued that because the trial court failed to hold the restitution hearing within the 60-day window set forth in the sentencing order, the later-ordered restitution unlawfully expanded her sentence. The Court found that appellant’s original probated sentence required her to pay restitution as a condition of her probation, and appellant expressly acknowledged this requirement in the plea form she signed at the time of the plea. Therefore, it held that the later-determined restitution amount did not unlawfully enhance her sentence, but rather clarified that provision of her sentence, as authorized by OCGA § 17-14-7 (b). And while the trial court did direct that a restitution hearing take place within 60 days of sentencing, the Court declined to hold—in the absence of a statutorily imposed time limit—that the trial court created a substantive right for appellant to have the restitution hearing held within that time. Appellant also argued that the trial court erred in holding the restitution hearing in her absence. The Court held that the trial court was entitled to presume that appellant voluntarily chose not to attend the hearing, thus waiving her confrontation rights. The judgment was affirmed.

## Speedy Trial; Barker v. Wingo

*Weems v. State, A11A0739 (7/6/2011)*

Appellant was arrested for child molestation and aggravated sexual battery. After 38 months had passed, appellant filed a plea in bar and motion to dismiss the indictment based on a violation of his constitutional right to a speedy trial. Appellant argued that the trial court erred in ruling that his right to a speedy trial had not been violated by the State. The facts showed that appellant was arrested on July 28, 2007 on charges of child molestation and aggravated sexual assault for the molestation of his 4-year-old granddaughter. He was released on bond on August 30, 2007 and was indicted for aggravated sexual battery and child molesta-

tion on October 6, 2009. Appellant waived his arraignment on November 2, 2009, and discovery was served and provided to him on July 20, 2010. On October 5, 2010, the morning of the calendar call for his trial, appellant filed a plea in bar and motion to dismiss, contending that his constitutional right to a speedy trial had been violated. One of the State’s prosecutors testified regarding the State’s backlog of cases and identified this as the cause for the delay in bringing appellant’s case to trial.

The Court examined appellant’s argument that he was denied a speedy trial by applying the test set forth in *Barker v. Wingo* and clarified further in *Doggett v. United States*. The *Barker-Doggett* test consists of a two-stage analysis. In the first stage of the analysis, “the court must determine whether the pretrial delay is sufficiently long to be considered presumptively prejudicial.” The pretrial delay is measured from the arrest of the accused or initial formal accusation brought against the accused to the beginning of the trial. And if the trial court finds that the delay has passed the point of presumptive prejudice, it must then engage in the second stage of the analysis, which requires the court to carefully balance four factors: “(i) whether [the] delay before trial was uncommonly long, (ii) whether the government or the criminal defendant is more to blame for that delay, (iii) whether, in due course, the defendant asserted the right to a speedy trial, and (iv) whether he or she suffered prejudice as the delay’s result.”

The Court found that the trial court correctly found, and the State conceded, that the 40-month delay in appellant’s case raised a threshold presumption of prejudice. In continuing on to balance the other *Barker-Doggett* factors, the Court found that the delay was not purposeful and was properly weighed only lightly against the State, that appellant’s failure to assert his right to a trial in a timely manner was properly weighed heavily against appellant, and that appellant failed to present evidence of any significant anxiety or concern that would prove that he suffered any prejudice as a result of the delay. The trial court’s judgment was affirmed.

## Venue; Merger

*Aldridge v. State, A11A1072 (7/5/2011)*

After his conviction for aggravated assault, robbery, and kidnapping, appellant argued that the trial court erred in failing to merge

the robbery and kidnapping convictions, and that the court's charge on venue was burden-shifting. The record showed that the trial court charged the jury as follows: "In a prosecution in any case in which it cannot be determined what county the crime was committed in, venue is proper and may be proved in any county in which the evidence shows beyond a reasonable doubt that it might have been committed." The Court held that such a charge is not erroneous. "Where the charge taken as a whole plainly informs the jury that venue is a material allegation as to each crime charged and that, as such, the State bears the burden to prove venue as to each crime beyond a reasonable doubt." Therefore, the Court found, there was no error in the trial court's finding that the charge was not burden-shifting.

Appellant also argued that his convictions for kidnapping and robbery by intimidation should have merged as a matter of law and fact. The Court looked to the "required evidence" test set out in *Drinkard v. Walker*, 281 Ga. 211, 215 (2006): "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." Examining the facts, the Court found that even assuming that the kidnapping was complete at the time appellant grabbed the victim's car keys on the road rather than when he abducted the victim at a gas station, the later moment occurred well before the victim was forced out of the car at a park, at which time appellant specifically refused to return most of the victim's personal belongings, including her purse, to her. The Court held that it follows that the two crimes did not merge as a matter of law or fact pursuant to OCGA § 16-5-40 (which defines kidnapping as abducting "another person without lawful authority") and OCGA § 16-8-40 (which defines robbery by intimidation as "tak[ing] property of another . . . [b]y intimidation, by the use of threat or coercion, or by placing such person in fear of immediate serious bodily injury"). The trial court's judgment was affirmed.

### **Special Purpose Grand Jury**

*Kenerly v. State*, A11A0758 (7/6/2011)

This case presented an issue of first impression, and the Court was called upon to determine whether a special purpose grand jury is

authorized to return a criminal indictment. The record showed that the District Attorney petitioned the judges of the Superior Court to impanel a special purpose grand jury, pursuant to OCGA § 15-12-100, for the purpose of investigating the acquisition of real property by the Board of Commissioners. The petition was granted, and an order was issued impaneling the special purpose grand jury. After the special purpose grand jury conducted its investigation for more than a year, the State contended that it served appellant, a Gwinnett County commissioner, with a notice of the State's intent to present a criminal indictment with evidence. On October 7, 2010, appellant filed an objection to the special purpose grand jury, and, on October 8, presented his objection and refused to be present during the presentation of evidence. The parties agreed that on this same day, the special purpose grand jury returned an indictment against appellant, and charged him with one count of bribery and two counts of failing to disclose financial interest.

The Court cited OCGA § 15-12-100, which provides only that a special purpose grand jury may be impaneled "for the purpose of investigating any alleged violation of the laws of this state or any other matter subject to investigation by grand juries as provided by law." OCGA § 15-12-100 (a). It held that there is no language under this section giving a special purpose grand jury the power to return a criminal indictment. The State argued that a special purpose grand jury has all the power and privileges of a grand jury as enumerated in OCGA § 15-12-71, but the Court found no statutory or case law demanding such a conclusion. Instead, the Court found, the rules of statutory interpretation suggested otherwise. The Court agreed with appellant's argument that the trial court erred in holding that the special purpose grand jury was authorized to return the criminal indictment, and it reversed the judgment.

### **Sentencing**

*Smith v. State*, A11A0746 (7/6/2011)

Appellant was convicted of driving without insurance, failure to register a vehicle, and two counts of obstruction of a law enforcement officer. The judge sentenced appellant to 12 months confinement for each conviction, to run concurrently and to be served on probation following 60 days of confinement; \$1,500 in

finer; 100 hours of community service; and a mental health evaluation. Appellant argued, among other things, that the trial judge's sentence was disproportionate to the gravity of the misdemeanor offenses she committed and that the trial court violated her Fourteenth Amendment rights.

The Court stated that the Eighth Amendment protects against cruel and unusual punishment, a concept which prohibits, among other things, arbitrary and disproportionate sentences. Unless a sentence is so overly severe or excessive in proportion to the offense as to shock the conscience, a legislatively authorized punishment does not ordinarily exceed the constitutional bound. Nevertheless, an Eighth Amendment violation could occur if the court abused its discretion in imposing a sentence which is excessive and disproportionate in a specific case. The Court found that here, appellant's sentence was within the statutory limits set by OCGA §§ 16-10-24 (b), 40-6-10 (b), and 40-2-20 (c), and it was not so disproportionate as to shock the conscience. Therefore, it found no merit in appellant's claim of error.

Appellant also asserted that the trial court violated her Fourteenth Amendment rights by purposely omitting from the trial transcript testimony, objections, evidence, voir dire, opening statements, closing arguments, and the charge conference "in an attempt to deny Appellant a fair trial and ultimately, a fair appeal." The Court found that appellant made no attempt to demonstrate any harm or prejudice resulting from the alleged failures to record. "Where the transcript or record does not fully disclose what transpired at trial, the burden is on the complaining party to have the record completed in the trial court under the provisions of OCGA § 5-6-41 (f). When this is not done, there is nothing for [this court] to review." Therefore, the trial court's judgment was affirmed.

### **Search & Seizure**

*Grizzle v. State*, A11A0670 (7/6/2011)

A jury convicted appellant on one count each of possession of methamphetamine with intent to distribute, possession of MDMA ("ecstasy"), possession of a firearm during the commission of a felony, misdemeanor and felony fleeing or attempting to elude a police officer, and numerous traffic offenses. Appellant argued that the trial court erred when it (1) found that the impoundment and

subsequent inventory of his motorcycle was reasonably necessary; and (2) ruled that the opening of a bag, which was found during the vehicle inventory search, was lawful. The facts showed that Georgia State Patrol officers set up a roadblock to check motorists for compliance with licensing, insurance, registration, seat belt, and DUI laws. A short time after the officers began checking vehicles, a motorcyclist (appellant) slowly approached the roadblock but then sped through, ignoring the officers' orders to stop. A high-speed chase ensued, and then ended a few minutes later when the officers forced appellant's motorcycle off the road. After finding over \$4,000 in his pocket, appellant was placed in the backseat of a patrol vehicle. The officers determined that appellant's license was expired, his motorcycle was uninsured, and his displayed license tag was registered to a different vehicle. The officers determined that the motorcycle could not be driven by anyone and called a wrecker service to have it impounded. An officer conducted an inventory search of the motorcycle pursuant to GSP policy and found a zippered, red bag containing two bags of methamphetamine, a bag of MDMA (ecstasy), and a loaded pistol.

Appellant first contended that the trial court erred in denying his motion to suppress, arguing that the impoundment and subsequent inventory search of his motorcycle was not reasonably necessary. The Court found that because appellant was arrested for attempting to elude police and for several traffic offenses, including driving with an expired license, he was not going to be allowed to drive his motorcycle under any circumstances. Therefore, even if appellant had requested that officers allow someone of his choosing to take possession of his motorcycle, such a request could not be honored because his motorcycle was uninsured and displayed a license tag that was actually registered to a different vehicle. Thus, the trial court properly found that the impoundment of appellant's motorcycle was reasonably necessary under the circumstances.

Appellant also argued that the trial court erred in finding that the officers' opening of the zippered, red bag, which was found during the inventory search of his motorcycle, was lawful. The Court found that the officer who conducted the inventory of appellant's motorcycle specifically testified that he did so pursuant to GSP policy and, in doing so, completed a standard inventory form that required listing

all items of value found in the vehicle. Based on this testimony, there is evidence to support the trial court's finding that the officers' search of the zippered, red bag did not exceed the permissible scope of the inventory search of appellant's motorcycle. Accordingly, the trial court did not err in denying appellant's motion to suppress, and the judgment was affirmed.

## **VGCSA; Witness Tampering**

*DeLong v. State, A11A0155 (7/6/2011)*

Appellant was convicted of one count of child molestation, two counts of violating Georgia's Controlled Substances Act by distributing a Schedule IV drug, and two counts of influencing witnesses.

Appellant argued that the State failed to prove that he violated the Controlled Substances Act because while Zolpidem is listed as a controlled substance, Ambien™ is not, and there was no testimony or physical evidence presented by the State at trial linking Ambien™ to Zolpidem. Despite appellant's own admission that he distributed Ambien™ to the two victims, the Court agreed that the State failed to meet its burden of proof on these two counts. Here, appellant was charged with two counts of violating the Controlled Substances Act by distributing "[Z]olpidem, a controlled substance commonly known as Ambien™[.]" to the victims. The Court noted that while the Georgia Controlled Substances Act lists Zolpidem as a controlled substance, and although the trial court and prosecutor both informed the jury that they would refer to Zolpidem by its trade name Ambien™, the State failed to present evidence linking Ambien™ to Zolpidem. Thus, the Court found that while the State presented evidence that appellant distributed Ambien to both victims and elicited expert testimony that "Ambien™" is a Schedule IV controlled substance, the State failed to explicitly identify "Ambien™" as a trade name for Zolpidem through admissible evidence, as required by Georgia case law. Therefore, the Court reversed appellant's convictions for violating the Controlled Substances Act.

Appellant also argued that the State failed to prove that he was guilty of influencing witnesses because threatening to file a lawsuit does not fall within the ambit of this statutory offense. The Court agreed, finding that while it is unlawful to communicate, either directly

or indirectly, "any threat of injury or damage to the person, property, or employment" of a witness "with the intent to deter a witness from testifying freely, fully, and truthfully," it could not say that threatening to (ostensibly) exercise one's legitimate right to file a lawsuit was encompassed by that statute. Here, appellant had threatened to file a lawsuit seeking \$25,000 in damages against one of the victim's parents. The Court held that because the mere threat of potential monetary damage and public humiliation did not constitute either a per se threat to person or to property, it was constrained to reverse appellant's convictions on the counts for influencing witnesses.

## **Theft by Receiving**

*Fields v. State, A11A0620 (7/1/2011)*

Appellant was convicted of misdemeanor theft by receiving stolen property, misdemeanor theft by deception, and two counts of felony theft by receiving stolen property. He first argued that the evidence was insufficient to support the guilty verdict as to the theft by receiving counts because the evidence showed that he was the principal thief of the laptops, not that he received them after they were stolen. The Court agreed. "The offense of theft by receiving is intended to catch the person who buys or receives stolen goods, as distinct from the principal thief. An essential element of the crime of theft by receiving is that the goods had been stolen by some person other than the accused." *Thomas v. State*, 261 Ga. 854, 855 (1992). The Court also stated that where "direct and uncontested evidence identifies the defendant as the original thief, the defendant cannot be convicted of theft by receiving." *Phillips v. State*, 269 Ga. App. 619, 631 (2004). Here, the Court determined, there was overwhelming evidence, including video and still photographs, that appellant was the original thief. Moreover, the State itself argued that appellant was the original thief. Accordingly, the Court reversed appellant's conviction on the theft by receiving counts.

## **Collateral Estoppel, Similar Transaction Evidence, Voir Dire**

*Bell v. State, A11A0118 (7/5/2011)*

Appellant was convicted of rape. He first argued that the trial court erred when it per-

mitted the State to present evidence of a similar transaction from a previous case in which appellant was acquitted. The State argued that the modus operandi was the same in both cases: both victims had been approached at night while they were walking alone and then taken to an abandoned house and raped. The trial court allowed the acquittal into evidence to show course of conduct.

The Court first noted that “evidence of prior criminal misconduct on the part of a defendant which would otherwise be relevant and admissible to prove identity, motive, bent of mind, or course of conduct *is rendered inadmissible* under the doctrine of collateral estoppel *where the defendant has been tried and acquitted* of the alleged prior offense.” The Court also noted that the application of collateral estoppel requires an examination of what facts were in issue and necessarily resolved in the defendant’s favor at the first trial. Specifically, it must be determined whether an issue that *was* in dispute in the previous trial—and resolved in the defendant’s favor—is what the State is now trying to establish in *this* trial, notwithstanding the previous acquittal. At the previous trial, appellant had admitted performing the act but denied that he acted with the intent to rape, instead claiming that the sex was consensual. Thus, his identity and the fact he performed the acts were not in dispute. Instead, the appellant’s intent to rape was in dispute. By contrast, in the case at hand, appellant claimed that he did not know the victim and had not raped her. Thus, identity was the fact in dispute. The Court held that because the State was seeking to introduce the similar transaction evidence to resolve a fact that was not at issue in the first trial, admission of the evidence was proper and not foreclosed by collateral estoppel.

Appellant also argued that the trial court erred in denying his motion for mistrial that he made after a question from a prospective juror. During voir dire, the juror stated that he had heard of a person named James Bell who was accused of a previous sexual assault in another county, and asked if it was the same person because the victim in that assault was his grandmother. The State then asked the juror if his grandmother’s name was the name of the victim in that case. The juror stated that he wondered if it was the same James Bell. The State then responded that “We can’t talk about what happened in the past.” At that time,

defense counsel moved for a mistrial based on the juror’s remarks about the alleged past rape. During the hearing on the motion, appellant argued that the juror’s remarks had tainted the remainder of the panel. The trial court denied defense counsel’s motion.

The Court found that although the prospective juror at issue said he was not sure if the defendant was the same James Bell accused of raping his grandmother, rather than leave the question unanswered, and move on to another juror, the State elicited more information from the juror. Specifically, the State asked if the juror’s grandmother was “[name omitted]” thereby providing the other prospective jurors with the name of another alleged rape victim in a crime for which appellant was not on trial. Moreover, the Court found that the trial court did not undertake any measures to ascertain what, if any, impact the remark had on the panel’s ability to decide the case. Further, the State had chosen not to present evidence of the alleged past rape as a similar transaction, so the jury would not have heard the incriminating evidence during the trial. Therefore, the Court found, the mention of the alleged past rape was *inherently* prejudicial and deprived appellant of his right to begin his trial with a jury free from even a suspicion of prejudice or fixed opinion. Because the trial was tainted from the beginning, the Court held that appellant’s conviction had to be reversed.

### **Rape Shield Statute**

*McIntyre v. State, A11A0571; A11A0572 (7/1/2011)*

Appellants were found guilty of two counts of aggravated sexual battery, one count of child molestation, one count of aggravated child molestation, one count of rape, one count of possessing more than one ounce of marijuana, and one count of contributing to the delinquency of a minor. Appellants argued that the trial court erred by restricting their cross-examination of the victim regarding her past sexual history pursuant to Georgia’s Rape Shield Statute, OCGA § 24-2-3. Specifically, the appellants argued that they should have been allowed to present evidence that the victim fabricated her claims in retaliation for their disclosure to her mother that she was sexually active.

The Court emphasized that it had already considered this issue and decided it adversely to

the appellants’ argument. The Court explained that the Rape Shield Statute bars the admission of evidence relating to the victim’s past sexual behavior unless it directly involves the accused’s participation and supports an inference that the accused could have reasonably believed that the victim consented to the conduct at issue. Therefore, the Court concluded that the trial court did not abuse its discretion by excluding cross-examination and testimony concerning the victim’s alleged past sexual encounters. Accordingly, the Court affirmed.

### **DUI; Intoxilyzer 5000 Source Code**

*Spann v. State, A11A0595 (7/6/2011)*

Appellant was convicted of DUI. She challenged the trial court’s denial of her motion for issuance of an out-of-state subpoena to the CEO of CMI, Inc., the Kentucky corporation that manufactures the Intoxilyzer 5000, so that she could obtain the source code for that machine. The trial court originally granted appellant’s request for the issuance of the out-of-state subpoena, based on a finding that production of the code was both necessary and material for appellant to challenge the accuracy of the results of the State administered breath test. However, citing the Court’s decisions in *Davenport v. State*, 303 Ga. App. 401 (2010) and *Yeary v. State*, 302 Ga. App. 535 (2010), the trial court subsequently vacated that order and denied appellant’s motion, finding that appellant had failed to show that either the witness or the source code were necessary and material to the case.

The Court first noted that the Supreme Court had recently vacated its opinions in *Davenport* and *Yeary*, finding, inter alia, that it had employed an improper standard in cases involving requests for issuance of an out-of-state subpoena by requiring a party to show that the out-of-state witness was both “necessary and material.” Instead, the Supreme Court held that pursuant to OCGA § 24-10-94 (a), the trial court should make the initial finding concerning whether the witness is “material” and “whether the state in which [that] witness is located has laws ‘for commanding persons within its borders to attend and testify in criminal prosecutions . . . , in this state[.] . . .’” *Davenport*, \_\_ Ga. \_\_ (slip op at 4-5). If the trial court finds those criteria are met, “the Georgia trial judge ‘may issue a certificate under seal’

that is then presented to a judge of a court of record in the out-of-state county in which the witness is found.” *Id.* slip op. at 5. The judge of the out-of-state court may then hold a hearing to make certain findings, including whether the out-of-state witness is “material and necessary to the Georgia criminal proceedings[,]” and based on these findings, will then determine whether to issue a summons directing the witness to attend and testify in the Georgia proceedings.

In light of the Supreme Court’s findings, the Court remanded the case to the trial court for reconsideration of its order denying appellant’s motion for the issuance of the out-of-state subpoena. The Court stated that if the trial court determined that the witness for whom the certificate was requested was a “material” witness, it then had to consider whether it ought to have issued a certificate in this case, and if so, whether appellant was entitled to a new trial or a new trial conditioned on the issuance by the appropriate out-of-state court of a subpoena to compel the appearance of the witness in Georgia. On the other hand, if the trial court determined that no new trial was warranted, the judgment of conviction would stand affirmed.