

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 24, 2009

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THIS WEEK:

- Vehicular Homicide, Due Process
- Jury Charges, Judicial Comment
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- Forfeitures; Final Judgment
- DUI; Probable Cause to Arrest
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- Statute of Limitations; Statements
- Jury Charges; Lesser Included Offenses
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- Similar Transactions; Evidence
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- Search & Seizure; Indictments

Vehicular Homicide, Due Process

Smith v. State, S09A0224

Appellant was convicted of first degree vehicular homicide. The evidence showed that a person was killed during appellant's attempt to elude police officers. He contended that the statute was unconstitutionally vague and therefore denied him due process. The Court held that a criminal statute is sufficiently definite if its terms furnish a test based on normal criteria which men of common intelligence who come in contact with the statute may use with reasonable safety in determining its command. Here, the plain language of OCGA § 40-6-393 (a) makes clear that a person is guilty of homicide by vehicle if he

or she causes the death of another, without malice aforethought, by illegally overtaking a school bus, driving recklessly, driving under the influence, or fleeing or attempting to elude an officer. There was nothing in the statute that would have prevented appellant, or any person of ordinary intelligence, from understanding that actions taken to elude police that result in the death of another person could lead to a prosecution and conviction for first degree homicide by vehicle.

Jury Charges, Judicial Comment

Rector v. State, S09A0020

Appellant was convicted of murder, felony murder, and aggravated assault. The evidence showed that appellant and the victim got into a fight in a bar. The two left and went their separate ways. Appellant went to his apartment, retrieved a gun and went to an apartment where the victim was located. Appellant knocked on the door and when someone opened it, he came in and shot the victim. Appellant contended that the following jury charge was improper and an unlawful judicial comment on his guilt: "A person is not justified in revenge by deliberately seeking out and assaulting the alleged wrongdoer." The Court held that this statement was an accurate statement of the law as adjusted to the evidence and would have in no way confused the jury when placed in the context of the entire jury charge given.

Cross-Examination

Hibbs v. State, A09A0954

Appellant was convicted of aggravated child molestation. Appellant argued that his

conviction should be reversed because the trial court improperly curtailed his cross-examination of the victim. The Court agreed. Prior to trial, the State successfully moved in limine to prevent appellant from cross-examining the victim concerning the fact that at the time he made a videotaped statement, he was in custody on juvenile charges. The Court held that the Confrontation Clause of the Sixth Amendment grants criminal defendants the right to impeach the prosecution's witnesses by cross-examining them with regard to whether they are currently on probation for a juvenile offense or have an open or pending case in juvenile court, or whether they are currently committed to the custody of the Department of Juvenile Justice. The right of a defendant to cross-examine a State witness to show that the witness slanted his testimony in favor of the State in order to obtain more favorable treatment overcomes the State's interest in maintaining the confidentiality of juvenile court proceedings. Moreover, the Sixth Amendment right to confrontation required that appellant be permitted to cross-examine the victim as to juvenile charges that were pending at the time of his interview with police, even though they were no longer pending at the time of trial. Finally, the error was not harmless because the State's case against appellant rested primarily upon the testimony of the victim and of the outcry witnesses to whom he had spoken, as well as the testimony of the interviewing officer and the videotaped interview he conducted with the victim.

Demurrers

State v. Pendergrass, A09A0490

Pendergrass was indicted for involuntary manslaughter and reckless conduct. The charges arose after a firefighter died as a result of Pendergrass' action in leaving a candle burning in a vacant house. The trial court granted his general demurrer to the two counts and the State appealed. The Court reversed.

The involuntary manslaughter count of the indictment stated that Pendergrass "did unlawfully cause the death of Steven Solomon, a firefighter, without any intention to do so by the commission of an unlawful act other than a felony, to wit: reckless conduct." The reckless conduct count charged Pendergrass with causing "bodily harm to [the] firefighter, by consciously disregarding a substantial and unjustifiable risk that his act of leaving

a candle burning in a vacant house would endanger the safety of [the firefighter], and the disregard constitutes a gross deviation from the standard of care which a reasonable person would exercise in the situation." The Court held that the true test of the sufficiency of an indictment that will withstand a general demurrer is as follows: If all the facts which the indictment charges can be admitted, and still the accused be innocent, the indictment is bad; but if, taking the facts alleged as premises, the guilt of the accused follows as a legal conclusion, the indictment is good. Here, Pendergrass could not admit the allegations, which closely track the relevant statutory language of each charge, and remain innocent of involuntary manslaughter and reckless conduct. Although leaving a candle burning in a house may not in and of itself constitute reckless conduct, such action may rise to that level depending on the circumstances.

State v. Delaby, A09A0457

The trial court granted Delaby's special demurrer to an indictment charging him with intimidating a witness. The State appealed and the Court affirmed. The indictment charged that Delaby "did knowingly use intimidation with the intent to influence the testimony of [D. K.], in an official proceeding . . ." In filing a special demurrer, a defendant contends not that the charge in an indictment is fatally defective and incapable of supporting a conviction (as would be asserted by general demurrer), but rather that the charge is imperfect as to form or that the accused is entitled to more information. The test, therefore, is not whether the indictment could have been clearer, but whether it states the elements of the offense and sufficiently apprises the defendant of what he must be prepared to meet, and, in case any other proceedings are taken against him for a similar offense, whether the record shows with accuracy to what extent he may plead a former acquittal or conviction. The purpose of the indictment is to allow the defendant to prepare his defense intelligently and to protect him from double jeopardy.

The Court held that the indictment did not sufficiently apprise the defendant of what he must be prepared to meet. Here, the indictment tracked the language of the statute and usually, this is sufficient. But when the statutory definition of an offense includes generic

terms, the indictment must state the species of acts charged; it must descend to particulars. The Court held that the term "intimidation" was generic and therefore, the use of the statutory language in the indictment did not adequately inform Delaby of the facts constituting the offense alleged against him.

Merger

Yates v. State, A09A0610

Appellant was convicted of burglary, armed robbery, and aggravated assault. He argued that the trial court erred by failing to merge for purposes of sentencing the aggravated assault and/or the burglary conviction with the armed robbery conviction. Appellant was charged with armed robbery in that he took currency from the victim by use of a firearm. He was charged with aggravated assault in that he made an assault on the victim with intent to rob. He was charged with burglary in that he entered the victim's home with intent to commit a theft and intent to commit the felony of armed robbery.

The Court held that a person may be convicted of more than one crime for "a single act," or "the same act or transaction" if the statutory definition of the charged crimes shows that "each provision requires proof of a fact which the other does not." *Drinkard v. Walker*, 281 Ga. 211 (2006). But where the crimes charged are based on more than one separate act or transaction, no merger is required even for charges of the same crime. With regard to the aggravated assault and armed robbery convictions, the evidence showed that the victim was first threatened with a gun in an attempt to rob him, that, separately, he was pistol-whipped with a gun and struck with a hard object in an attempt to rob him, and that finally, he was shot in an attempt to rob him. Thus, the trial court was authorized to conclude that the physical beating and either incident of gun use were separate completed crimes. Similarly, the burglary occurred when appellant walked into the victim's home with intent to rob him. This event was separated by time from the aggravated assault and armed robbery. Thus, all three crimes were separate completed crimes. Accordingly, merger was not required.

Gonzales v. State, A09A0016

Appellant was convicted of multiple of

fenses arising from his action of pushing the victim, his ex-girlfriend, from a moving car. He argued that his convictions on two separate counts of aggravated battery should have merged. The two counts of aggravated battery charged appellant with (a) disfigurement of the victim's back and buttocks, and (b) rendering useless the victim's legs. The State argued that pursuant to *Drinkard v. Walker*, 281 Ga. 211 (2006), appellant could be sentenced on both aggravated battery counts because each aggravated battery count contained an element not found in the other. The Court, however, held that the "required evidence" test of *Drinkard* was inapplicable because it addressed a context in which a defendant's "conduct clearly established the commission of more than one crime," and it answered the question of whether "the same act or transaction constitutes a violation of two distinct statutory provisions." Here, the single act of pushing the victim out of the car did not violate two distinct statutory provisions but rather, the State prosecuted the same act for two alleged violations of the same statutory provision. "That the aggravated battery statute provides more than one method for committing the offense does not create separate offenses based on a single act toward a single victim. This punishes twice the same conduct against the same victim and is akin to charging a defendant with redundant crimes based on a single attack." Therefore, the trial court erred in sentencing appellant on both aggravated battery counts based on a single unlawful act against the same victim (pushing her out of a moving car). The second aggravated battery conviction was surplusage and the case was remanded for resentencing.

Search & Seizure

Johnson v. State, A09A0746

Appellant was convicted of DUI. She argued that the trial court erred in denying her motion to suppress. The evidence showed that appellant was the owner of a daycare center. A violent domestic disturbance occurred at the center, but appellant did not call 911. Instead, the father of the victim called. When appellant was told that a call was made, she "left real quick." While a responding officer investigated, appellant drove up in a van full of children. The officer wanted to talk to her about her failure to call 911, but appellant insisted she be allowed to go inside with the children

and then she would return to speak with the officer. When after 5 minutes, appellant did not return, the officer motioned to her through a window and she came out. Subsequently, the officer smelled alcohol on her breath and she was eventually charged with DUI.

Appellant argued that the officer's insistence that she return outside after she was permitted to enter into the daycare facility amounted to an unlawful detention without an articulable suspicion of criminal activity. However, the Court held that at the time the officer detained appellant, he was aware that she had failed to call 911 when a violent domestic disturbance had occurred on her premises that potentially placed the children at risk, and that she had "left real quick" upon learning that the police had been summoned. The officer had also been informed appellant may have been drinking. Finally, when appellant returned driving a van full of young children, the officer observed that she had glossy eyes and was in an "over-emotional state." Moreover, the fact that a violent domestic disturbance had erupted in the presence of children under appellant's care and control and she failed to summon the police supported a reasonable suspicion that she may also have been guilty of reckless conduct. The fact that the officer testified that when he signaled appellant to come outside, he did not suspect her of criminal wrongdoing, but intended only to discuss with her the importance of calling 911 for assistance when children are exposed to potentially dangerous circumstances, was irrelevant because when analyzing whether a person has been unconstitutionally seized, the Court is not bound by the detaining officer's subjective belief. Rather, the touchstone of any Fourth Amendment analysis is a determination of whether an officer's conduct is reasonable based upon all of the objective facts. The circumstances presented here illustrated that the officer's conduct was neither arbitrary nor harassing, but was reasonable in light of the objective facts available to him.

Forfeitures; Final Judgment

Weaver v. State of Ga., A09A0822

The State obtained an order of forfeiture under O.C.G.A. §16-13-49 (n) based on an untimely filed claim. Appellant did not appeal from that judgment. Instead, he waited until

after an order of distribution was made a few months later to file his appeal. The State contended that the appeal should have been dismissed as untimely and appellant contended that the trial court erred in finding that his claim filed under (n)(3) was untimely.

The Court held that the appeal was timely filed. In its order of forfeiture, the trial court directed the district attorney to dispose of the property in accordance with O.C.G.A. §16-13-49, and the order of distribution recited that the district attorney filed an application for such an order. An appealable final judgment leaves no issues remaining to be resolved, constitutes the court's final ruling on the merits of the action, and leaves the parties with no further recourse in the trial court. The Court therefore concluded that the action remained pending in the trial court until the district attorney complied with the trial court's judgment. Since appellant's notice of appeal was timely filed within 30 days following the entry of the order of distribution, the State's motion to dismiss the appeal was denied.

Nevertheless, the Court held that the trial court was correct in dismissing appellant's claim as untimely. The record showed that Notice of Seizure was posted in the courthouse on October 10, 2007. Also, on that date, the district attorney mailed a copy of the notice of seizure to appellant by certified mail. A copy of the notice was published in the newspaper for three consecutive weeks: October 12, October 19, and October 26, 2007. Appellant did not file a claim until November 20. The Court held that the trial court erred in determining that the claim was untimely as measured from the date that the Notice was mailed to appellant. But under the "right for any reason" rule, the order of dismissal was affirmed. The Court held that the proper beginning of the 30 days in which to file a claim was the second publication date of the Notice. Since that date was Oct. 19 and the claim was not received until Nov. 20, it was untimely.

DUI; Probable Cause to Arrest

State v. Goode, A09A0362

The State appealed from an order of the trial court finding that the officer did not have probable cause to arrest Goode for DUI. The evidence showed that Goode was pulled over because of a suspended registration. The officer

noticed a strong odor of alcohol emanating from her, her glassy and watery eyes, she admitted to drinking some wine, and she gave a positive reading on two alco-sensor tests. The Court noted that “these facts can be sufficient to support an inference by the trial court that the defendant was an impaired driver and thus to support the denial of a motion to suppress.” However, the evidence also supported an inference that Goode was not an impaired driver, namely, her proper operation of her vehicle, her successful completion of the field sobriety tests, her coherent interaction with the officer, and her steadiness on her feet after exiting the vehicle. The officer also admitted that Goode’s glassy and watery eyes were not bloodshot and could have been caused by any number of alternative factors. Finally, when the trial court viewed the videotape of the traffic stop, the court had the opportunity to observe Goode’s speech, balance, and dexterity prior to her arrest. Since there was evidence to support the trial court’s finding that Goode was not an impaired driver, the Court affirmed the trial court’s order.

Justification; Kidnapping

Brower v. State, A09A0755

Appellant was convicted of four counts of kidnapping, two counts of possession of a hoax device, two counts of terroristic threats, and one count of possession of a knife during the commission of a crime. He contended the trial court erred by refusing to charge the jury on the principles of the defense of justification and that the State failed to prove asportation, an essential element of the crime of kidnapping. The evidence showed that appellant believed that a defense attorney was responsible for appellant spending 11 years in custody. Appellant entered the law offices of the victim attorney and his staff and took them all prisoner. After a while, he let the three staff members go, but held on to the attorney. At one point, the attorney attempted an escape, but was caught by appellant. The hostage situation lasted through the night. At one point, appellant was attempted to surrender, but got spooked, and did not. Eventually, appellant surrendered. Prior to trial, the State successfully moved in limine to prevent appellant from raising the affirmative defense of justification.

Appellant argued that he was entitled at trial to assert a defense of justification. Specifi-

cally, that he was entitled to claim the defense under subsections (5) and (6) of OCGA § 16-3-20, i.e., “conduct is justified for any other reason under the laws of this state” and “instances which stand upon the same footing of reason and justice as those enumerated in this article.” The Court first held that because appellant had not identified in either his response to the State’s motion in limine, his requested jury charges, his motion for a new trial, or his amendment to that motion “any other reason under the laws of this state” that would justify his conduct, a defense under OCGA § 16-3-20 (5) was not authorized, and the trial court did not err by finding that a charge based upon that subsection was not warranted.

Thus, if a justification defense was proper, it must have been possible under subsection (6). This subsection applies when the otherwise criminal conduct at issue cannot be justified under the criteria set out in the other enumerated subsections of OCGA § 16-3-20, but a rational basis exists to assert that such conduct is justified because it stands “upon the same footing of reason and justice as those enumerated in this article.” A premise underlying all the defenses specified in OCGA § 16-3-20 is that the defendant faced circumstances created by external events that demanded prompt, if not immediate, action. The evidence did not support a justification defense under these circumstances here. Therefore, the trial court did not err.

Appellant also argued that his conviction on four counts of kidnapping was based on insufficient evidence because the State failed to prove, under *Garza*, the element of asportation. However, the Court found otherwise. As to the three female staffers, the evidence that they were physically forced from the front of the office near the front door to a room at the rear of the building in a more isolated area showed that their movement was not incidental to any other crime, and it placed them in additional danger by enhancing the appellant’s control over them. Further, their movement served to substantially isolate them from protection or rescue. Since this was not merely a “criminologically insignificant circumstance” attendant to some other crime, the element of asportation was established and the trial court did not err in sentencing appellant on the kidnapping convictions.

As to the victim defense attorney, the movement of the attorney to and from various

locations within and around his office, and particularly the attorney’s movement when he attempted to escape and was captured and, when after the unsuccessful surrender, appellant grabbed the attorney around the neck and forced him back in the building, was sufficient to prove the asportation requirement of kidnapping. The attorney was moved about for hours, there was no separate offense which the movement was a part of, and the various movements presented a significant danger to the attorney by substantially isolating him from rescue, and indeed, prevented his rescue or escape.

Statute of Limitations; Statements

Flournoy v. State, A09A0263

Appellant was convicted of rape. He argued that the trial court erred in denying his plea in bar based on the running of the statute of limitations. The record showed that appellant was indicted on January 7, 2008, on two counts of rape. The first count arose from acts alleged to have occurred between January 1, 1992 and December 31, 1993 and the second from acts alleged to have occurred between January 1, 1994 and July 15, 1995. It is undisputed that these incidents were first reported to the police as early as December 13, 1995, when the victim was eight years old. Appellant argued that the applicable statute of limitations should have been the 7 years under OCGA § 17-3-11 as it existed prior to 1996.

The Court disagreed. The statute of limitations for rape was amended to 15 years in 1996. OCGA § 17-3-1. The legislature also provided a tolling provision set forth in OCGA § 17-3-2.1: The limitations period within which a prosecution of the rape of a victim under 16 years of age must be commenced “shall not begin to run until the victim has reached the age of 16 or the violation is reported to a law enforcement agency . . . whichever occurs earlier.” The Court held that a penal statute enacted after expiration of a previously applicable limitations period violates the Ex Post Facto Clause when it is applied to revive a previously time-barred prosecution. Here, the limitation period for appellant’s crime runs 15 years from December 13, 1995. Thus, because the State had until December 13, 2010 to indict him, the January 7, 2008 indictment was timely.

Appellant also argued that the 1996 amendment is inapplicable because he was not

charged with “forcible rape” as contemplated by OCGA § 17-3-1 (b). He asserted, instead, that he was indicted under the language of OCGA § 16-1-1 (a) (2), which does not require proof of force to establish rape against a child under ten years of age. He contended, therefore, that the 15-year limitation period did not apply to his alleged crimes. But, the Court held, even assuming that the 15-year limitation period applies only to charges of forcible rape as defined under 16-6-1 (a) (1), it applies to the charges here because at the time the offenses were committed, the element of force was a required element to establish rape, even where the victim was a child under ten years of age. Thus, the indictment alleges that appellant “unlawfully” had carnal knowledge of the victim between 1992 and 1995. The only carnal knowledge that was unlawful at that time was carnal knowledge forcibly and against the victim’s will. Therefore, the indictment asserted a charge of forcible rape within the meaning of OCGA § 17-3-1, and the trial court properly applied the 15-year limitation period in this case.

Appellant also argued that the trial court erred in denying his motion to suppress an audio recording of a statement he made to the victim. Although the statement was noncustodial in nature, it was not admissible unless it was made voluntarily, considering the totality of the circumstances. The evidence showed that in 2007, the victim purchased a digital recorder, concealed it on her person and confronted appellant about the incidents in this case. The conversation occurred in the yard at her aunt’s house. The victim testified that appellant spoke to her willingly, that she did not promise him anything to make the statement, and she did not threaten him into making it. She discussed with a police officer the idea of confronting appellant with a hidden tape recorder and the officer testified that he discussed the recording with her and the legal requirements of proving rape before she confronted appellant. The Court held that under the provisions of OCGA § 24-3-50, to make a confession admissible, it must have been made voluntarily, without being induced by another by the slightest hope of benefit or remotest fear of injury. The trial court concluded, considering the totality of the circumstances, appellant’s statement was voluntary and thus admissible. The Court held that because evidence in the record supported the trial court’s conclusion, it must affirm.

Jury Charges; Lesser Included Offenses

Herbert v. State, A09A0171

Appellant was convicted of burglary. He contended that the trial court erred in not giving his request to charge on criminal trespass. The evidence showed that appellant was seen walking around the outside of the victim’s house. Appellant started to walk around the back of the house. The victim and his roommate, who were inside the house, went and got their guns. The two then heard the handle to the door of the basement office “jiggling.” The roommate saw someone lift the blinds and start coming through the window, which had been closed and covered by a screen. He told the person to stop, and when he did not do so, the roommate fired his gun three times at the intruder and then called 911. Appellant was later found at a local hospital suffering from bullet wounds. At trial, appellant contended that the trial should have charged on intentional property damage to address the damage done to the window screen. Pursuant to OCGA § 16-7-21 (a), criminal trespass can be committed by intentionally damaging “any property of another without consent of that other person and the damage thereto is \$500.00 or less...” The Court held that although appellant argued that the charge was warranted because the evidence showed that the window screen was damaged, no evidence was proven concerning the amount of damage done to the screen and whether it was more or less than \$500. Without such evidence, appellant could not have been convicted of criminal trespass in this manner and the trial court did not err in rejecting his requested charge on the offense. Moreover, appellant, who testified in his own defense, denied any intent to damage the screen and implied that it may have been damaged when he landed on it after he was shot.

Cross-examination; Impeachment

Miller v. State, A09A0146

Appellant was convicted of manufacturing methamphetamine. He argued that the trial court erred in admitting evidence of his prior conviction of possession of methamphetamine with intent to distribute. The evidence of his prior felony drug conviction

was introduced by the prosecutor to impeach his credibility as a witness pursuant to OCGA § 24-9-84.1 (a) (2). The statute provides, in pertinent part, that

“[e]vidence that the defendant has been convicted of a crime shall be admitted if the crime was punishable by death or imprisonment of one year or more under the law under which the defendant was convicted if the court determines that the probative value of admitting the evidence substantially outweighs its prejudicial effect to the defendant[.]” Here, the trial court failed to make an express ruling on the record as to whether the probative value of the evidence substantially outweighed its prejudicial effect. The Court held that the trial court’s error in failing to make such an express finding was analogous with error in failing to properly conduct a hearing regarding the admissibility of similar transaction evidence. Although subject to a harmless error analysis, the Court held that the failure was not harmless because much of the evidence against appellant was circumstantial. Therefore, the Court remanded the case to the trial court for the entry of express findings on the record as to whether the probative value of appellant’s prior conviction substantially outweighed its prejudicial effect, considering the factors set forth in *Quiroz v. State*, 291 Ga. 423 (2008). If the trial court determines that the prior conviction was inadmissible after engaging in the balancing test required under OCGA § 24-9-84.1 (a) (2), then a new trial would be required. But, if the trial court determines that the prior conviction was admissible, a new trial would not be mandated, subject to appellate review for an abuse of discretion.

Similar Transactions; Evidence

Ector v. State, A09A0580

Appellant was convicted of aggravated assault of a law enforcement officer and fleeing and attempting to elude. He contended that the trial court erred in admitting a similar transaction and in admitting certain evidence. The evidence showed that law enforcement officers attempted make a traffic stop of appellant’s vehicle. Appellant refused to stop, almost ran over an officer and then led the officers on a high-speed chase. Eventually, appellant crashed into a wall. The following day, officers found an “off-white powdery substance” in the vehicle.

Appellant contended that the admission of a similar transaction was error. The similar showed that when appellant was stopped 10 years prior, he ignored officers, became aggressive and attempted to get back into his vehicle. Eventually, he got back into his vehicle, grabbed a bag containing a white powdery substance and then unsuccessfully tried to flee. Appellant contended that the similar transaction evidence was inadmissible to show that during both the prior and present transactions his motive in attempting to flee was to avoid the discovery of illegal drugs because in this case he was not charged with any drug crime and no evidence was presented that the substance found in his car was illegal contraband. The Court, however, held that disregarding the evidence in both the prior and present offenses concerning suspected contraband, evidence that appellant had become physically aggressive and attempted to flee during a previous stop was relevant and admissible to show that he had a pattern of trying to run from police and assaulting them while attempting to do so.

Appellant also argued that the trial court erred in admitting evidence of the “off-white powdery substance” since he was not charged with VGCSA. The Court agreed. Although the trial court referred to the substance as “drugs” and found the evidence was admissible to show why appellant attempted to flee from law enforcement, no evidence was presented that the substance found in appellant’s car was in fact contraband and he was not charged with VGCSA. Thus, the evidence was inadmissible to show that appellant attempted to elude the officers because he was in possession of an illegal substance. Nevertheless, the Court held that the error was harmless given the overwhelming evidence of guilt.

Co-Conspirator Statements

Harrison v. State, A09A1495

Appellant was convicted of burglary. The evidence showed that appellant and two others burglarized a home, were caught by the homeowner who gave chase, and eventually captured by the police. Appellant argued that the trial court erred in admitting into evidence through the testifying police officer the hearsay statements that his co-conspirator gave to the police shortly after his capture, statements implicating the other co-conspirator and ap-

pellant in the burglary. Specifically, he argued, because the conspiracy had ended when the statements were made, the hearsay statements were not admissible against his co-conspirators under OCGA § 24-3-52. The Court held that while appellant’s recitation of the law was correct, the rule cited did not apply given the facts of the case, because where, as here, the co-conspirator testifies at trial and is subject to cross examination, OCGA § 24-3-52 has no application. Thus, because the co-conspirator testified under oath at trial and was subject to cross-examination, the trial court did not err in admitting his statements.

Search & Seizure; Indictments

Leftwich v. State, A09A0736

Appellant was convicted of rape, kidnapping, aggravated assault with intent to rape, and aggravated assault with intent to rob. The evidence showed that the victim was abducted from a mall in 1994, taken to an unknown destination, raped, robbed and then driven back to the mall. On Sept. 26, 2005, appellant, a former inmate, was identified through the Combined DNA Index System database (“CODIS”) from a sample he gave when released from prison on February 18, 2005. Appellant argued that the trial court erred by ruling that the DNA evidence seized from him pursuant to OCGA § 24-4-60 on the day he was released from prison was constitutionally obtained. The evidence showed that on February 11, 2005, a trial court that had sentenced appellant on charges unrelated to this case sent an order to the Department of Corrections explaining that appellant should be placed on probation immediately because his sentence of confinement should have ended on January 2, 2005. Thus, appellant argued, because he should have been released from prison on January 2, 2005, the State’s act of taking a DNA sample from him on February 18, 2005, constituted an unreasonable search and seizure in his case. The Court disagreed. First, it held that the correct calculation of appellant’s remaining sentence after the entry of the February 11, 2005 order was a matter for the Department of Corrections, not the trial court, and the trial court’s order directing his release was not necessarily evidence that appellant’s detention after January 2, 2005, was illegal. Moreover, the DNA sample was

taken from appellant on February 18, 2005, rather than January 2, 2005, simply because he was physically discharged from custody on February 18. Thus, even assuming that appellant’s detention at the time was illegal, the exclusionary rule does not apply to this case because the DNA extraction (and thereby, the CODIS match) was not a *result* of any illegal detention by the State. Furthermore, the threat of exclusion of evidence in this case was not likely to deter future instances of the presumed illegal conduct in this case—holding an inmate beyond the end of his sentence term—because the Department of Corrections employees responsible for calculating prison terms have no stake in the outcome of future criminal prosecutions.

Appellant also argued that the trial court erred in determining that the indictment served to toll the statutes of limitations. The indictment charged appellant with Count 1 (rape), Count 2 (kidnapping), Count 3 (armed robbery), Count 4 (aggravated assault with intent to rape), Count 5 (aggravated assault with intent to rob), and Count 6 (possession of a knife during a commission of a felony). The indictment also added language to each of the counts, which read “[f]urther, as to count one (1) the identity of the accused was not known to the State until the year 2005 (O.C.G.A. § 17-3-2(2)), when . . . (DNA) evidence was used to establish the identity of [appellant] (O.C.G.A. § 17-3-1(c.1)).” Under each count of the remaining counts, instead of stating “as to count two (2),” “as to count three (3),” etc., the language simply repeated “as to count one (1).” Appellant argued that Counts 2, 4, and 5 were defective because the tolling language in those defectively referred back to Count 1, rather than the count in question. The Court held that under OCGA § 17-3-2 (2), the period of limitation is tolled during any period in which “[t]he person committing the crime is unknown . . .” However, where an exception is relied upon to prevent the bar of the statute of limitation, it must be alleged and proved. While an exception to the statute of limitations must be pled in the indictment if the State is relying on one, the statute of limitations is not an element of the crime per se. Thus, although each count must be complete within itself and contain every allegation essential to constitute the crime, this rule applies to the offense rather than the form. Therefore, *one count may incorporate by reference portions of*

another, and the indictment is read as a whole.

The true test of the sufficiency of an indictment is not whether it could be made more certain and definite, but whether it contains the elements of the offense charged, apprises the accused of what he must be prepared to defend against, and protects against double jeopardy. Here, appellant was sufficiently apprised of the all the essential elements of the charges when read as a whole, including the fact that the State intended to prove that the statutes of limitations for the crimes were tolled until 2005 because appellant's identity was unknown until that time. The superfluous language "as to count one (1)" contained in Counts 2 through 6 was not enough to confuse him about the offenses or the applicable exception to the statutes of limitations, which the State intended to prove at trial.