

Prosecuting Attorneys' Council of Georgia

CaseLaw UPDATE

WEEK ENDING JULY 27, 2007

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THIS WEEK:

- **Search and Seizure**
- **Evidence: Chemical Testing**
- **Evidence: Cross examination, child hearsay**

Court of Appeals

Search and Seizure

Moorer v. State, A07A0755

Appellant was convicted of armed robbery, burglary, kidnapping, and possession of a firearm during the commission of a felony. The record shows that a man rang the doorbell of the victim's house. The man was holding a red folder and was later identified as the appellant. A second man came out of the bushes with a gun. The two men forced the victim into the house, robbed the victim, and tied him up. The victim later escaped and called police. When police responded, they discovered the red folder. The folder contained an employment application filled out by the appellant and a thumb print from the folder matched the appellant's thumb print. A photographic lineup was compiled which included appellant's photograph. The victim identified appellant as one of the perpetrators.

Police obtained an arrest warrant for the appellant and served it on the appellant that same evening. An officer asked appellant if he and some other officers could come in and talk to appellant about the warrant. The appellant invited the officers in. The officers entered the home and the appellant was told that they needed to look around for other people and the appellant responded, "fine." When the police searched appellant's house to ensure

that no one else was hiding inside, one officer saw a handgun under a bed. This alarmed the officer because the appellant's wife had stated earlier that there were no weapons inside the house. The officers then began a safety search. Appellant's wife became upset and told the officers that they needed a warrant to search the house. Appellant however authorized the officers to search the home. Appellant was permitted to consult with his wife in private and she subsequently consented to the search and signed a consent form.

On appeal, appellant argued that the trial court erred in denying his motion to suppress. Appellant argued that the search was not justified as a protective sweep. The Court of Appeals found that the search was justified as a protective sweep. The officers knew that the two men involved in the robbery had guns when they committed the crime. Having located the appellant, it was reasonable for the police to determine whether the other armed assailant was in the house as well. Moreover, appellant and his wife consented to the protective sweep of the house.

Appellant further argues that his wife's consent was not voluntarily and freely given. Although it is generally true that when "persons have equal use and control of the premises to be searched the consent to conduct a warrantless search of a residence given by one occupant is not valid in the face of the refusal of another occupant who is physically present at the scene to permit a warrantless search." State v. Randolph, 278 Ga. 614 (2004). It is also true however that the Fourth Amendment right against unreasonable search and seizure is a personal right and may not be asserted vicariously. Such right may be enforced only at the instance of the person whose protection

was infringed by the search. Randolph does not vicariously impute the wife's refusal to consent to appellant. Here, appellant, the person whose rights were affected, consented to the search of the house.

Trujillo v. State, A07A0936

After a bench trial, appellant was convicted of trafficking in marijuana. Appellant appeals, claiming that the evidence seized from his truck should have been suppressed. Appellant was stopped while driving an eighteen wheeler on Interstate 95 because the air hoses and brake lines between the tractor and trailer were unsecured in violation of federal law. When the deputy asked for appellant's license, log book and other paperwork he smelled the odor of fresh marijuana on appellant's person. The deputy asked if he could search the cab of the eighteen-wheeler, and received consent. Although the appellant speaks Spanish, the trial court found that the deputy and appellant understood each other at the time of the stop. The deputy found over 50 pounds of marijuana.

On appeal, appellant claims that his consent to search was coerced because it was obtained during a custodial interrogation and without the benefit of Miranda. The Court of Appeals found that the record showed that the deputy received consent to search from appellant during a valid traffic stop and while the deputy was in the process of writing a warning. There was no evidence that the deputy's questioning unduly prolonged the traffic stop resulting in an unauthorized seizure of appellant's person or an equivalent custodial detention requiring Miranda warnings. Therefore, the trial court did not err in denying appellant's motion to suppress.

Ingram v. State, A07A0664

While on patrol an officer received a telephone call from an off-duty captain on his personal phone. The captain informed the officer to be on the look out for a white Ford pick-up truck with dual rear tires which was weaving on the roadway. The captain told the officer that he was driving behind the truck and it was currently traveling on Highway 136 towards Dawsonville. The officer drove to the area described by the captain and encountered

a white Chevrolet pick-up truck with dual rear wheels. The truck was parked in the middle of the intersection of Highway 136 and Old Henry Grady Highway blocking traffic. When the officer pulled behind the truck, the truck began to move forward. The officer activated his blue lights and pulled the truck over. When the officer approached the truck he smelled a strong odor of alcohol on the appellant who was the driver. Appellant staggered out of the truck. The captain, who had reported the weaving truck, arrived on the scene and confirmed that this in fact was the truck he had seen earlier. After administering field sobriety tests to the appellant, the officer concluded that appellant was under the influence to the extent that he was less safe to drive. A subsequent breath test showed a blood alcohol concentration over the legal limit.

On appeal, appellant argued that the officer did not have sufficient cause to initiate the traffic stop. Appellant urged that his case was similar to Vansant v. State, 264 Ga. 319, in which the Georgia Supreme Court held that an officer did not have the requisite particularized basis for suspecting a driver of criminal activity where he stopped a white van after receiving information that a white van had been involved in a hit and run. In Vansant, the Supreme Court noted that the officer did not: 1) have a particularized description of the van; 2) have knowledge of the van's direction of travel, and 3) observe criminal activity by the driver. In contrast, here the officer was given a particularized description of the truck; the captain personally observed the truck weaving and conveyed that information to the officer; and the officer knew what road the truck was on and what direction the truck was traveling. The trial court did not err in denying appellant's motion to suppress.

Murphy v. State, A07A1418

Appellant was convicted of five counts of burglary and one count of trafficking methamphetamine. A deputy observed the appellant's red jeep leaving a residence, which he knew to be vacant, at 5:30 in the morning with its headlights off. The deputy watched the jeep drive two to three car lengths away before turning on its lights. The deputy knew the family who owned the residence and recognized that

the jeep did not belong to them. In addition, the deputy was aware that the family no longer occupied the property and that the property had been recently burglarized numerous times. The deputy called in the jeep's license plate number to dispatch and drove back to the house to investigate. The deputy saw signs of recent forced entry, which included a newly cut screen, broken window, and a back door which appeared to have been forcibly opened. Two other officers heard the deputy's report of the suspicious jeep and went to appellant's house after hearing dispatch indicate that the jeep was registered to appellant. Ten minutes after the deputy initially reported the suspicious jeep, the officers arrived at appellant's residence. The officers entered the property on foot and saw the jeep being driven by the appellant. The officers arrested appellant and the passenger for suspicion of burglary. During the search incident to arrest, the officers found a bag containing methamphetamine.

On appeal, appellant argued that her motion to suppress should have been granted because she was arrested without probable cause. Appellant claims that no probable cause existed because the deputy was not certain that her vehicle wasn't legitimately at the residence, did not know exactly when the damage to the residence occurred and was unable to identify the occupants of the jeep seen leaving the residence. The Court examined the totality of the circumstances and found that the facts known to the officers were sufficient to support probable cause. Probable cause does not require a certainty, but merely a probability. Therefore, the fact that the deputy was uncertain as to whether the jeep was legitimately on the premises or when the forcible entry took place did not render the arrest unlawful. The Court also dismissed appellant's assertion that probable cause did not exist due to the deputy's inability to identify the occupants of the jeep. The Court pointed out that the appellant was observed driving the jeep seen leaving the burglarized home only 10 minutes later.

Evidence: Chemical Testing

Davis v. State, A07A1356

Appellant was convicted of DUI Person Under 21 years of age. On appeal, appellant contends that the trial court erred in failing

to suppress her Intoxilyzer results. Appellant stipulated that her arrest was with probable cause and that she was read the implied consent warning. Appellant also stipulated that the breath machine was in good working order. Appellant provided a breath sample and blew a .126. Appellant failed to provide a sample of her breath during the second attempt because she was crying. Appellant's third attempt produced a .126. Appellant argues that the trial court should have suppressed the tests because they were not sequential as required by law. The Court of Appeals declined to hold that sequential as used in the statute means without any gaps in the procedure due to the test taker's inability to provide an adequate sample. The Court has previously held that the fact that a defendant failed or refused to provide a second sample does not affect the admissibility of the first sample. The Court affirmed the conviction.

Evidence: Cross Examination, Child Hearsay

Slade v. State, A07A0734

Appellant was convicted of aggravated sodomy, and two counts of child molestation for molesting his wife's grandson. The State introduced similar transaction evidence regarding the molestation of appellant's son nine years before. The State presented testimony from the appellant's son, the son's mother and a child protective services worker concerning the reported abuse. In addition, the State played a video-taped interview with the appellant's son, at 10 years of age, concerning the molestation.

In the case in chief, Billie Slade, the appellant's wife, and the victim's (hereinafter RRF) other grandmother shared custody of RRF and were engaged in a custody dispute over the child at the time the abuse was reported. During the trial, Billie Slade testified that RRF's behavior changed towards everybody, especially when he came back from spending time at his other grandmother's house. When Billie Slade began to testify regarding specific instances of RRF's change in behavior, the State objected and the objection was sustained. On appeal, the appellant contends that he was deprived of a thorough and shifting cross-

examination. Appellant argues that the trial court denied him the opportunity to show that the allegations of abuse were the result of the other grandmother's influence. The Court of Appeals found that the trial court erred in sustaining the objection. Despite the similar transaction evidence from the appellant's own son, the Court of Appeals concluded that they could not say that the error was harmless. The Court concluded that the trial court committed reversible error.