

# Prosecuting Attorneys' Council of Georgia

# CaseLaw UPDATE

WEEK ENDING AUGUST 22, 2008

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## THIS WEEK:

- **Jury Charges**
- **Timeliness of Motion to Withdraw Guilty Plea**
- **Search and Seizure**

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### *Jury Charges*

*McKenzie v. State*, A08A0842

Appellant argued the trial court erred in instructing the jurors that they could consider a witness' intelligence in determining his or her credibility. In the Suggested Pattern Jury Instructions, Vol. II: Criminal Cases (4th ed), 1.31.01, "intelligence" of the witness is a factor that the jury may consider when assessing the witness' credibility. Recently in *Brodes v. State*, 279 Ga. 435 (2005), the court disapproved of an instruction allowing jurors to consider a witness' certainty in assessing reliability on an identification. Here, even though Appellant did not present the court with any studies, the court agreed that the "intelligence" factor is problematic. For example, a juror could find that a less intelligent witness may have less means of knowing the facts and therefore be less credible. Also, the charge in the suggested pattern jury instructions does not instruct jurors how to utilize intelligence as a factor in determining witness credibility. Because of this confusion, the court found this charge should not be given. However, the error was harmless so a reversal of the conviction was not required.

Appellant also argued that the court's jury charge to the jury to consider with great care and caution the evidence of any statement made by the defendant was prejudicial because his statement was exculpatory. The court found

that this charge is from Suggested Pattern Jury Instructions, Vol. II: Criminal Cases (4th ed), 1.32.60 and is derived from OCGA §24-3-53 relating to admissions and confessions. Since appellant's statement was exculpatory, a reasonable juror would have interpreted the charge, when taken as a whole, as relating to inculpatory statements only. Nevertheless, although in this instance the appellant was not prejudiced by the instruction as given, to avoid any possibility for confusion, the court stated that the suggested pattern instruction should be modified to refer to incriminatory statements only, i.e., admissions and confessions.

### *Timeliness of Motion to Withdraw Guilty Plea*

*Coleman v. State*, A08A1197

Appellant challenged the trial court's denial of his motion to withdraw his guilty plea. Georgia law is well settled that after a term of court has expired in which the defendant was sentenced pursuant to a guilty plea, the trial court lacks jurisdiction to allow the withdrawal of the plea. *Turner v. State*, 281 Ga. 435 (2006). Once the term of court for which the defendant was sentenced has expired, the only available means for an appellant to withdraw his guilty plea is through habeas corpus proceedings. Since two years passed before Appellant even tried to withdraw his guilty plea, the trial court properly denied Appellant's motion to withdraw his guilty plea.

### *Search and Seizure*

*State v. Hopper*, A08A1223

The State appealed the trial court's decision to suppress evidence seized in a traffic stop.

Defendant was stopped after he was observed driving away from a house suspected of drug activity. Besides seeing him leave that house, the officers did not see anything else about Defendant which would give rise to a particularized suspicion of wrongdoing. A person's mere presence in a high crime area does not give rise to reasonable suspicion of criminal activity. The officers were surveilling the house after using a C. I. to make a controlled buy inside. The officers saw many people drive up to the house, go inside, stay a few minutes, and then leave. According to the officers, defendant's actions of driving to the house suspected of drug activity, going inside, staying a few minutes and then driving away, conformed to this general pattern of behavior which was consistent with drug sale activity. The trial court found, and the Court of Appeals agreed, however, that it was this pattern, rather than a particularized suspicion that the defendant himself was engaged in criminal activity, that gave rise to the stop. Since the stop failed to comply with the Fourth Amendment by having a reasonable, articulable suspicion to justify a second-tier detention, the trial court properly granted Defendant's motion to suppress. The trial court's decision was affirmed.